

April 20, 2004

Via Electronic Filing

Mr. Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: CAN-SPAM Act Rulemaking, Project No. R411008

Dear Secretary Clark:

The signatories to this letter include a wide range of trade associations and business coalitions (hereinafter "Associations"). These Associations collectively represent thousands of companies across a diverse cross-section of industry, all of which benefit from electronic commerce.

These Associations strongly support efforts to combat spam, as well as preserving the health of e-mail as a medium for legitimate commerce and communication. Some of these Associations are submitting comments separately in this proceeding, (69 Fed. Reg. 11776) but all agree on a set of common principles discussed in this letter. The Associations request that in its notice of proposed rulemaking to implement the CAN-SPAM Act, Pub. L. No. 108-187 (the "Act"), the Commission:

- provide objective standards for businesses to use to determine the primary purpose of an e-mail;
- clarify that, in instances of multiple advertisers in an e-mail, each advertiser is not necessarily a "sender" under the Act and, where consistent with the statute, create single sender responsibilities and establish objective criteria that may be used to determine who is the sender in multiple advertiser situations;
- expand the categories of "transactional or relationship" messages to include e-mail sent with consent or at the request of a consumer;
- lengthen the time frame for honoring opt-outs from 10 business days to 31 calendar days;
- establish a duration of no more than three years for individual opt-out requests;

- recommend against “ADV” or other identifier; and
- recommend against a reward system.

These issues are discussed in more detail below.

1. Primary Purpose of a Message

The Act requires that the Commission issue rules to determine what “constitutes” the primary purpose of an e-mail message. The statute contemplates that the sender of the message determines the primary purpose. Often messages have several purposes, some that are “commercial” and others that are not. By referring to “*the* primary purpose” (emphasis added), the statute is clear that a message can have only one primary purpose. Thus, for messages with multiple purposes, the provisions of the statute that apply to them will be determined by which of the purposes is the primary purpose of the message. It is critical that, as the Commission develops its proposed rule on the term “primary purpose,” the result provide a clear standard for senders of e-mail and ISPs that allows for the certainty required for senders and ISPs to manage their e-mail operations.

In defining criteria for the term “primary purpose,” there are specific types of e-mail that the Commission should clarify do not have a primary purpose that is “commercial” in nature. These categories should include:

- e-mail messages that would not have been sent “but for” the transactional or relationship component of the message; for example, an e-mail whose purpose is to transmit billing and account information or improve service that may also include an advertisement or promotion would not be considered “commercial.”
- those messages that provide bona fide editorial content, including newsletters.

There likely are additional categories of messages that should be enumerated in the types of messages that are not commercial in nature.

2. Criteria for Determining Who is a “Sender”

The Associations request that the Commission provide clarity that, in instances where there are multiple advertisers in an e-mail message, each advertiser is not a “sender” under the Act. Potential interpretations of the Act have been considered that could result in treating each advertiser in an e-mail message that contains multiple advertisers as a sender. We do not believe that Congress intended this result. We also

believe that where there may be multiple senders, the consumer would be better served by a single contact.

These difficulties come from the definition in the Act of the term “procure.” A sender of a message includes entities that “procure” messages for another entity. The term “procure” means “intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one’s behalf.” The intent of this definition is to prevent spammers from evading the statutory opt-out requirement by encouraging others to send messages that the spammer would be prohibited from sending to those who have opted out. We agree with this goal. However, Congress did not intend for advertisers and other legitimate actors that are not attempting to avoid the law and who honor consumer opt-outs to become “senders” for any e-mail in which the advertiser’s product or service is advertised or promoted. Treating each advertiser in an e-mail as a “sender” would create significant problems, including:

- **Requiring multiple suppression.** Treating each advertiser as a sender could result in each e-mail recipient having to be scrubbed against the “suppression” list—the list of individuals who have opted out of receiving further messages—of every advertiser. This would be extremely burdensome and costly for business. Additionally, multiple suppression takes a significant amount of time, which would delay the sending of the message. In many instances, suppression would have to be done by independent third parties, further increasing costs and time delays. It also could result in a possible privacy issue if multiple senders had to exchange opt-out lists.
- **Requiring each message to contain multiple opt-outs and physical postal addresses.** Many e-mails would have to contain a long list of opt-out notices and physical address listings. This result would crowd e-mails with unnecessary information and create consumer confusion.
- **Undermining rather than enhancing privacy.** Many companies have indicated in their privacy policies that they would not transfer e-mail addresses to third parties. Transferring addresses for scrubbing purposes would violate such promises and jeopardize the privacy of consumers.

The Commission can avoid any legal uncertainty, unnecessary litigation, and potential interpretations of the Act that would have these unintended consequences by clarifying what initiating a message “on one’s behalf” means. The Commission should set forth criteria that businesses can use to determine when a message is sent on one’s behalf. We suggest that such criteria include the following:

- *“But for” test.* If an e-mail message would have been sent irrespective of the inclusion of a particular advertisement, then the advertiser is not a sender.

Advertisers would not be “senders” in e-mail that is sent regularly that has different advertisers. This is the simplest and easiest test to apply. However, an e-mail that would not have been sent irrespective of an advertisement would not necessarily make the advertiser a sender.

- *Advertiser provision of recipient e-mail addresses.* If the advertiser does not provide the sender with a list of e-mail recipients, then the message is not necessarily sent on behalf of the advertiser. Such a result is consistent with the intent of the Act to prohibit entities from having others “front” for them and send messages to individuals who have opted out of receiving messages directly from the entity. In instances when an advertiser provides the “sender” with the e-mail addresses of recipients for such message, then such list should not include any e-mail address that has opted out of receiving messages directly from the advertiser. Provision of e-mail addresses, would not, by itself, result in an advertiser becoming a sender.
- *Indication of who the message is from.* If it is clear to the recipient who the message is from, then each of the many entities that may provide advertising to a message should not be treated as a “sender.” For example, if the e-mail is an electronic version of a magazine where it is clear that the publisher of the magazine is transmitting the message, then each advertiser that advertises in the magazine should not be subject to the requirements placed on senders.

Using these and other criteria, however, should not result in a scenario where there is no sender. Consumers should always be able to opt out of receiving communications from at least one party.

3. Transactional or Relationship Messages

The Commission has requested comment on whether the categories of messages that are “transactional or relationship” in nature should be expanded or contracted. The Associations collectively believe that this list should not be contracted. Each of the enumerated items in the Act is a critical business practice that should not fall within the scope of commercial e-mail. Rather, these categories should be modified and expanded to ensure that they reflect practices that are clearly “transactional or relationship” in nature. Many of the Associations in their individual comments set forth specific examples of and proposals for how to modify these provisions. The Commission should, as it refines the term “transactional or relationship” messages, evaluate and ensure that these categories reflect the broad scope of messages that fall within the category of “transactional or relationship.”

An example of a category of messages that the Commission should classify as transactional is where the recipient has consented to receive the e-mail. While some

messages where consent exists already fall within one of the categories of “transactional or relationship” in the statute, there are others that may not. If a consumer asks to receive the message, it should not be subject to the requirements of the Act.

Another example of e-mail that should be categorized as “transactional or relationship” is e-mail related to a transaction beyond that involving account information such as e-mail sent prior to a transaction occurring, e.g., an application that must be completed in order to obtain a good or service or a subscription renewal.

4. Amount of Time to Honor Opt-Out Requests

The Act requires that a sender, or any person acting on behalf of the sender, not initiate transmission to recipients who have opted out after 10 business days, and provides the Commission with the authority to alter this time frame for honoring opt-out requests. The Associations believe that this time frame should be lengthened to 31 calendar days. A 31-day time frame is consistent with the Commission’s rules under the Telemarketing Sales Rule as amended by Congress for complying with the do-not-call registry. The experience of the Associations in implementing the Act demonstrates that 10 business days is an insufficient amount of time to honor such requests. In many instances, there are multiple parties involved in sending commercial e-mail; coordinating the opt-outs among these parties takes time. The greater the number of parties, the longer the amount of time necessary to manage the logistics of the opt-outs. The Associations believe that 31 calendar days is a more reasonable time frame to meet this obligation.

5. Duration of Time to Maintain Opt-Out Requests

The Act does not specify the amount of time that an individual’s opt-out request must be honored. The Associations recommend a time frame of no more than three years. Over time, the list of e-mail opt-outs that a company would need to suppress will grow and many of these e-mail addresses will become non-functional, thus requiring the expense of scrubbing the list against non-functional addresses. Limiting the duration to two to three years will reduce this expense. Persons with functional e-mail addresses whose addresses re-enter sender lists periodically can simply renew their opt-out requests as appropriate.

6. “ADV” or Similar Identifier

The Associations believe that the Commission should recommend against the use of “ADV” or a comparable identifier in the subject line in its required report to Congress. Such labeling is unnecessary. The Act already requires that messages include a clear and conspicuous identification that the message is an advertisement or solicitation. An “ADV” identifier would not be followed by those bad actors who are principally responsible for the vast majority of spam. This fact was demonstrated in the

Commission's own survey last year that showed that only 2% of spam included an "ADV" label, even though such a labeling requirement existed in several state laws.

7. Reward System

The Associations also believe that the Commission, in its report to Congress, should recommend against a reward system for those who supply information to it about violations of the Act. Such a system would divert significant resources needed to combat spam to determining who should receive the awards. ISPs and law enforcement are best suited to engage in the sometimes complicated task of identifying and locating spammers.

The Associations appreciate the opportunity to comment on this proceeding and look forward to continuing to discuss these important issues with the Commission. For additional information, please contact Ron Plessler, Piper Rudnick LLP, at 202/861-3900.

Sincerely,

American Advertising Federation
American Association of Advertising Agencies
American Bankers Association
American Business Media
Association of National Advertisers
American Society of Travel Agents, Inc.
-National Tour Association
-Cruise Lines International Association
Consumer Bankers Association
Direct Marketing Association
Electronic Retailing Association
Email Service Provider Coalition
The Financial Services Roundtable
Information Technology Association of America
Interactive Travel Services Association
Internet Alliance
Internet Commerce Coalition
Magazine Publishers of America
National Business Coalition on E-Commerce and Privacy
National Retail Federation
Network Advertising Initiative
Promotion Marketing Association
U.S. Chamber of Commerce