Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

Regarding	)	
	)	
The FTC's request for comments	)	**Project No. R411008**
on regulations regarding unsolicited	)	**RIN 3084-AA96**
commercial email, as directed by	)	
the CAN SPAM Act of 2004	)	

COMMENTS OF AeA (THE AMERICAN ELECTRONICS ASSOCIATION) TO THE FEDERAL TRADE COMMISSION REGARDING THE CAN SPAM ACT

AeA (American Electronics Association)[1] submits these comments in response to the Federal Trade Commission's ("the Commission") request for comments regarding this proceeding under Sections 3(2)(C), 3(17)(B), and 5(c)(1) of the CAN SPAM Act, P.L. 108-187 ("the Act"). All AeA member companies utilize email to communicate with employees, business partners, customers, and prospective customers. Our members realize the importance of protecting American consumers from false and deceptive commercial email or "spam," as it costs both consumers and businesses billions of dollars in lost productivity and unnecessary expenditures each year. Because of Congress' efforts to control false and deceptive commercial emails, and the Commission's task to further define the extent of those rules, we express support for the Commission's approach in this NPRM and submit the following answers to the Commission's questions.

[1] AeA is the nation's largest high-tech trade association, representing more than 3,000 companies with 1.8 million employees. These 3000+ companies span the high-technology spectrum, from software, semiconductors, medical devices and computers to Internet technology, advanced electronics and telecommunications systems and services. With 17 regional U.S. councils and offices in Brussels and Beijing, AeA has been the accepted voice of the U.S. technology community since 1943. For more information, please visit us at www.aeanet.org.

<u>The Definition of "Primary Purpose" Needs Clarification</u>

The CAN SPAM Act defines the term "commercial electronic mail message" as any electronic mail message the *primary purpose* of which is the commercial advertisement or promotion of a commercial product or service. The Commission now seeks direction as to the definition of "primary purpose," so as to help draw a clear line between that which is an advertisement, and that which is not. There are two important points that the Commission should consider in defining "primary purpose" – who the sender is and what is in the message.

The identity of the sender is not dispositive of whether the message is commercial or transactional.

The identity of the sender of the message should not be held as conclusive one way or another as to whether the message is commercial in nature (where the sender is seeking to establish a business relationship where there was none before) or transactional (where a pre-existing business relationship already exists). An individual person may send out a purely commercial solicitation, just as an established business would. Likewise, statements, correspondences and transactional messages are routinely sent by businesses to their existing customers, the vast majority of which contain no marketing material. As such, the identity of the sender is dispositive of the intent of the email, and as such, should not be considered as an indicator of whether a message is commercial solicitation for the purposes of the CAN SPAM Act.

Whether the message is commercial or transactional should be based on its net impression.

The appropriate gauge in which the Commission should utilize whether a message is a commercial solicitation is by the contents of the message itself, using a "net impression test." That is, if the "net impression" of the message indicates that it was meant by the sender to be a transactional or relationship message, but includes language that creates awareness of additional products or services relevant to the customer, then it should be adjudged as an exempted transactional or relationship message. Similarly, if the "net impression" of the message is that it is a commercial promotion, then it should be considered commercial in nature.

Determining whether a message is a commercial promotion or not based on pre-set proportions is not a viable alternative, because setting a formula based on how much text is transactional versus how much is promotional would be arbitrary and unreliable. An example would be the sending of a customer's monthly account statement that contained a one paragraph promotional message. If the Commission were to adopt a proportion formula, a customer statement reflecting an extremely active

account would be deemed a transactional message, while a statement reflecting an account with little or no activity on it may be deemed a commercial message. For this reason, AeA respectfully recommends that the Commission avoid a proportionality test, in favor of a "net impression" test, using the sender's intent as the perspective.

The Definition of "Transactional or Relationship Message" Needs Clarification

The CAN SPAM Act primarily defines the term "Transactional or Relationship Message" as an electronic mail message the primary purpose of which is to facilitate, complete or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender. The Act also considers as transaction/relationship oriented:

- Warranty and recall information;
- Statements of account and customer status reports;
- Information directly related to employment status and benefit plans the recipient is enrolled in; and
- Follow-up services, such as updates and upgrades, related to a previously agreed to transaction.

AeA respectfully suggests to the Commission that the definition of "transactional or relationship message" be clarified and expanded, using the following comments as guidance.

Legally required messages should be considered a transactional or relationship message.

Congress, in drafting the Act, made certain to include a number of necessary types of customer communications that are part and parcel to the transaction of business. However, Congress neglected to include legally required notices such as those compelled by the Financial Services Modernization Act of 1999 (also known as the Gramm-Leach-Bliley Act, or GBLA). Since businesses that deal with a consumer's financial information are mandated by Congress to send specific notice and opt-out announcements as required by GLBA annually, we are certain that this is merely an oversight. This is just one type of notice that could be required to be sent; presumably there are other types of notice, required by both federal and state law that should also be clearly permissible under the transactional and relationship message exception. As such, the definition should be amended to include legally required notices.

Responses to consumer initiated sales inquiries should be considered transactional or relationship messages.

Within the ordinary course of business, corporations regularly receive requests for product information and pricing from prospective customers. Whether these customer-initiated sales contacts come in the form of an email, a phone call, an email address submitted on the company website, or even a business card dropped in a fishbowl, these sales leads can be an important part of a business' sales effort. Of importance is that these inquiries are usually targeted to specific individuals or small groups, and generally do not involve the bulk email solicitations that formed the basis of the Act. In following up with a prospective customer, a company may wish to reply by sending marketing material and advertisements via email and clearly the prospective customer has consented to receive additional information. Under the current Act, however, these replies are forced to bear all the marks required of a commercial electronic email message notwithstanding the inherent consent, including identification as an advertisement in the subject line. Because of the identification requirement, and its potential negative impact on consumers, clarification as to whether a reply to a customer initiated sales inquiry is needed.

Since consumers can set their email applications to segregate and delete as spam any email that contains the commercial identification, there is a high likelihood that a response to a consumer inquiry will be treated as if it were unsolicited and unwanted. If not addressed, this problem will lead to increased consumer frustration. For businesses, however, the impact this will have on sales threatens to be substantial for larger market participants, and quite possibly fatal to the smaller ones. While there is a provision under the current Act that exempts the identification requirement if the recipients have given their prior affirmative consent to the receipt of the message, what would qualify as prior affirmative consent remains unclear.

AeA respectfully requests that the Commission include in the definition of transactional or relationship message that any email that is in response to a consumer initiated inquiry will be treated as if prior affirmative consent had been implicitly given.

Extension of the 10 Day Window for Opt-Out Requests

The CAN SPAM Act creates a prohibition against the sending of commercial email messages 10 business days after consumer opt-out of any further messages. The Commission now seeks direction as to whether a different period would be more reasonable, taking into account the purposes of Act, the interests of consumers, and the burdens imposed on the senders of lawful commercial email. AeA respectfully requests that the Commission extend the opt-out window from 10 business days to 30 calendar days.

Under the final and amended Telemarketing Sales Rule ("TSR")(regarding the National Do-Not-Call Registry), the Commission saw fit to require telemarketer compliance within 30 calendar days, as it best balances the needs of the consumer against the burdens placed upon business.[2] Given the organizational complexity of many businesses and the process intricacies inherent in compliance, ten days is proving to be barely adequate, even under the best of situations. Even assuming the most assiduous observance of the Act, a power problem, network outage or other technical anomaly may cause an inadvertent and unintentional violation. Allowing thirty days for opt-out compliance would allow sufficient time for businesses to ensure fulfillment of the requirements, while simultaneously providing the benefit to consumers intended to them by the Act.

For these reasons, AeA respectfully requests that the Commission extend the opt-out window from 10 business days to 30 calendar days.

The Definition of "Sender" Needs Clarification

The CAN SPAM Act defines the "sender" of a commercial electronic email message generally as a person who initiates such a message and whose product, service, or Internet website is advertised or promoted by the message.[3] AeA requests further clarification on the definition of "sender" to contemplate co-branded or joint marketing communications.

It is common practice for businesses to co-brand certain product lines with products offered by other entities that they believe will offer their customers additional convenience, functionality, and savings. Usually a business may include the logo of its co-branding partner in a customer communication. Because the Act is silent on the co-branding issue, a question is created as to who must be in compliance with the Act – the sender of the email, the co-branded business partner, or both. Because this dilemma creates confusion for both the business and the consumer alike, AeA respectfully offers its proposal on this issue.

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[2] It should be noted the final and amended TSR requires telemarketers to update and purge their do-not-call lists every thirty business days. The decision was made pursuant to the Commission's Notice of Proposed Rule Making (69 FR 7329, Feb. 13, 2004) which asked for comments regarding the proposed requirement whether telemarketers be required to scrub their lists every thirty days, or every thirty-one. The scrub period had been reduced to "one month" from every three months in a previous proceeding. Although we are asking the Commission to increase the timeframe for the compliance requirements, the same rationale for selecting a thirty day update/purge requirement is applicable to this proceeding – that of increased flexibility for compliance.

[3] While the Commission's request for comments does not contemplate this issue, nor has Congress given it the power to act on this issue, AeA considers it necessary to include it in this record.

We suggest that in the situation of a co-branded commercial communication, the Commission employ a control test as to who is to be subject to the Act. Elements that would be indicative of who the controlling entity is, and thus amenable to the Act, would include the determination of:

- Which business partner controls the development of the message;
- Which business partner sends the message, or causes it to be sent; and
- Which business partner controls the relationship with the recipient customer.

Determining which business partner is the controlling entity would greatly decrease customer frustration as to who is disseminating the commercial communication. Further, establishing who is in control of the message would additionally allow the consumer to better manage who they receive communications from. Businesses, in turn, would gain greater certainty over their legal responsibilities to their customers, while eliminating the chances that a consumer may inadvertently opt-out of valuable business communications they *want* to get.

For these reasons, AeA respectfully recommends that the definition of "sender" be clarified to include a control test, so as to eliminate any questions of amenability with regard to the Act.

We thank you for considering our views, and would be pleased to answer any questions the Commission may have.

Respectfully submitted,

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/s/ Marc-Anthony Signorino

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April 5, 2004

CERTIFICATE OF SERVICE

I, Marc-Anthony J. Signorino, Counsel for Technology Policy for AeA (The American Electronics Association), hereby certify that a true and correct copy of the foregoing Comments of AeA was sent this 20th day of April, 2004, electronically to the Federal Trade Commission via www.regulations.gov.

/s/ Marc-Anthony Signorino .

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AeA