



National Retail Federation  
*The Voice of Retail Worldwide*



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

**COMMENTS OF THE  
NATIONAL RETAIL FEDERATION**  
Responding to the Notice of Proposed Rulemaking on "Primary Purpose"

**CAN-SPAM Act Rulemaking**  
**FTC Project No. R411008**

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The National Retail Federation (“NRF”) is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet and independent stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.4 million U.S. retail establishments, more than 20 million employees - about one in five American workers - and 2003 sales of \$3.8 trillion. As the industry umbrella group, NRF also represents more than 100 state, national and international retail associations.

NRF is pleased to submit these comments on the Federal Trade Commission’s (“Commission”) request for public comment on what constitutes “primary purpose” under the CAN-SPAM Act Rulemaking project. The NRF also submitted comments on April 21, 2004, on the ANPRM for the same project.

Multichannel retailers have spent the past eight years revolutionizing the way Americans shop by giving each and every consumer greater access to a wide variety of goods and services at highly competitive prices. As a result, many multichannel retailers routinely communicate with their customers by e-mail. Whether it is to confirm a transaction, to notify the customer of the delivery status of their product, to send an electronic billing statement, or to distribute news and promotions for the customer’s convenience, retailers send out millions of e-mails each and every day. The sheer breadth and expectations of the online retail customer base virtually necessitates this practice and it has proven to be an effective tool for providing customer service and building customer loyalty.

Unlike spammers, retailers have long understood that keeping their customers happy is the most essential part of building a positive long-term business relationship. A satisfied customer is a repeat customer. That is why NRF was extensively involved in the formulation of the Commission's National Do Not Call list, supported the passage of legislation at the end of the 107th Congress that asked the FCC to do the same, and was actively involved in the formulation and passage of the CAN-SPAM Act. If our customers do not want to be called, e-mailed, or even sent perfume samples in their monthly billing statements, retailers want to accommodate their wishes. Retailers have been at the leading edge of e-mail marketing best practices. In fact, many retailers only communicate with customers who have provided them with their e-mail addresses and, even before the CAN-SPAM Act took effect, routinely included easy opt-outs in their marketing e-mail.

The NRF supported the passage of the CAN-SPAM Act (Pub. L. No. 108-107) during the first session of the 108<sup>th</sup> Congress, and has been active in cooperating with the requests of the Commission during the rulemaking and implementation period. Overall, the NRF and its members have been pleased with the recommendations and actions taken by the Commission, however there are several important issues that NRF and its members would like to address in response to Commission's recent published request for comments under the "primary purpose" NPRM.

**Criteria for determining whether the “primary purpose” of an electronic message is commercial**

In § 316.3(a) of the NPRM published on August 13, 2004, the Commission proposes a regime under which there three different tests are used to determine the “commercial” nature of an e-mail; however none seems to adequately take in to account “pure” or primarily transactional messages. As we wrote in April 2004 comments on the Commission’s ANPRM, NRF strongly believes that the term “primary purpose” should be interpreted to mean that the e-mail’s commercial advertisement or promotion is more important than all the other purposes of the e-mail. Thus, any criteria should take into account whether or not the e-mail is *primarily* a commercial advertisement or, conversely, if it is *primarily* a transactional or relationship message as was intended by Congress.

It remains vitally important that the apparent adoption of the “net impression”<sup>1</sup> or “reasonable consumer” standard not come mean that a retailer cannot include advertising in the body of a transactional message. Customers receive great benefit from being informed of new products or given additional information about a retailer in customarily transactional messages. Further, inclusion of any additional advertising does not alter the fact that a message is primarily transactional in nature, nor does it interfere with the consumer’s ability to opt-out of any future primarily commercial e-mail. In a related context, the fact that a credit card billing statement mailing also contains a perfume sample does not alter the fundamentally transactional nature of the billing communication.

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<sup>1</sup> In our previous comments, dated April 21, 2004, NRF advocated for a highly objective approach for determining “primary purpose” that we believe was intended by the Act. The Commission has settled on the more subjective “net impression” or “reasonable consumer” standard that is more widely used in other consumer protection laws.

Thus, in developing what constitutes “primary purpose” it is important that the Commission take *primarily transactional* messages into separate account and explicitly give them the special status that was envisioned by the bill’s authors – even if they contain secondary or “dual” commercial content. In order to do so, the Commission should consider clarifying the categories of messages that may always be considered transactional. The types of messages that should be deemed transactional under the Act include: e-mail sent at the request of the recipient (including those sent to update a customer on the status of their gift registry or loyalty program), e-mails that contain billing statements, warranty information, transaction confirmations, subscription notifications, or statements of accounts. Each of these categories is particularly important for retailers in managing their transactional relationships with existing customers. Further, a reasonable consumer would not expect to be able to simply opt-out of these types of e-mail without first changing the nature of the underlying transactional relationship.

In the NPRM the Commission explicitly states that an e-mail message may be judged as either commercial or transactional by the mere placement of the commercial content. Proposed § 316.3(a)(2)(ii) states that placement of the commercial content “at or near the beginning” of the body of the message may be determinative in categorizing a dual purpose message, and proposed §316.3(a)(3)(ii) adds that the proportion of the message dedicated to commercial content – and how color, graphics, type size, and style are used to highlight commercial content – may also be considered when categorizing miscellaneous e-mail messages as transactional or commercial. Many retailers are concerned by this approach, particularly those who may use color banner

ads placed lengthwise within the body of transactional e-mails. In some cases a retailer may run a promotional ad down the right side of the screen in color and including splashy graphics, while the important transactional material runs on the left side of the screen in plain black and white (or blue and white) text. Most consumers have seen these types of e-mail, and, in most cases, a majority of the body of the message is dedicated to the transactional material; however, under the Commission's proposed "top and bottom" approach many retailers could be penalized under the act. The NRF urges the Commission to reconsider this approach and look to the primary *content* of the e-mail, not to the specific placement of content.

#### **Further issues that should be addressed by the Commission**

The CAN-SPAM Act requires that the intent of the sender be determinative as to the "primary purpose" of an e-mail. Therefore, it is very important that the Commission simultaneously clarifies instances in which an advertiser can in fact be considered a "sender" at the same time it determines the purpose of such e-mail. NRF highlighted two important areas in comments submitted under the ANPRM in April, 2004. These include instances where there are multiple advertisers and in forward-a-friend programs.

The term "sender" is defined in the Act as "a person who initiates such a message and whose product, service or Internet website is promoted by the message." However, in situations where you have a marketing campaign or promotional piece that is initiated by an unrelated third party marketer who offers ancillary advertising space to a retailer (in the same manner that a newspaper or magazine offers adjacent advertising to retailers), the retailer should not be deemed a "sender." Further, if a

retailer purchases promotional space from a coupon service that e-mails hundreds of coupons and promotions to its own list of coupon customers, the participating retailers should not be considered senders. In both these cases, the retailer did not initiate the contact with the consumer, but participated in an ancillary manner that only served to enhance the product offered by the sender -- whether or not the retailer paid some type of consideration to the sender. Indeed, to be absolutely clear, the Commission should create a specific exemption for advertisers in a newsletter or newspaper that e-mails its content in electronic form to its own subscribers list.

Clearly, if a retailer initiates its own marketing campaign by procuring a third party to send e-mail promotions to the retailer's list of customer (or a list that the retailer purchases from the third party), then the retailer should be considered a sender. This type of relationship is definitely contemplated under the Act. Further, if the retailer procures the participation of other marketers to participate in a joint marketing campaign where the promotion of the retailers' or marketers products and services is the primary purpose of the e-mail, the retailer and its partners should be considered senders under the Act.

The Commission has asked for a great deal of input on how forward-a-friend e-mail campaigns should be treated under the Act, and NRF and its members are hoping to receive guidance on this issue very soon. Forward-a-friend programs are highly successful programs that generate e-mails sent from other customers' e-mail addresses. The companies that use this type of tool offer it, in significant part, as a goodwill benefit to their customers and generally do not capture or collect the e-mail addresses for future solicitations. NRF strongly believes that if a retailer is not offering any

inducement or consideration to customers using this system, then retailer should not be considered a “sender” or “initiator” under the Act. Furthermore, the simple offer of a promotion (5 percent off the book being recommended by the sender/friend) to the end recipient of the e-mail should not be deemed to be an act of procurement by the Commission.

Clearly, the Commission does not want to create a loophole that will allow bad actors to attempt to abuse send-a-friend to create huge e-mail trees constituting millions of e-mailed friends. Retailers would not want that as well. But the Commission has to consider the fact that participant sender/friends in such abusive chains are probably receiving some type of payment or inducement for their services and thus would be covered under the Act. Again, the CAN-SPAM Act was meant to catch spammers, not retailers who are offering popular services to their customers and their customers’ friends.

NRF is hopeful that the Commission will address these important issues in a timely manner. Although NRF understands the mandatory nature of the “primary purpose” rulemaking, it is also important to address other highly substantive and related topics as quickly as possible. Many of our members are also hopeful that the Commission will also further consider lengthening the 10-business-day time limit for processing an opt-out. The less uncertainty that exists in the e-mail marketplace, the more likely it is that good actors will be able to easily comply, and fewer loopholes will exist for true spammers.

Thank you for your consideration of these issues.