



September 13, 2004

By Hand Delivery

Federal Trade Commission
Office of the Secretary
Room H-159
600 Pennsylvania Avenue, NW
Washington, DC 20580

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

Ladies and Gentlemen:

This comment letter is submitted on behalf of Visa U.S.A. Inc. in response to the notice and request for comment (“Proposal”) by the Federal Trade Commission (“FTC”), published in the Federal Register on August 13, 2004. The Proposal requests comment on the criteria for determining the “primary purpose” of a commercial e-mail message under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act” or “Act”). Visa appreciates the opportunity to comment on this important matter.

The Visa Payment System, of which Visa U.S.A.¹ is a part, is the largest consumer payment system, and the leading consumer e-commerce payment system, in the world, with more volume than all other major payment cards combined. Visa plays a pivotal role in advancing new payment products and technologies, including technology initiatives for protecting personal information and preventing identity theft and other fraud, for the benefit of its member financial institutions and their hundreds of millions of cardholders.

Background

The CAN-SPAM Act applies to any “commercial electronic mail message,” which is defined as “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service.”² The Act requires the FTC to issue regulations establishing the relevant criteria to facilitate the determination of “the primary purpose” of an e-mail message.³ The definition of “primary purpose” is significant because it determines whether a particular e-mail message is subject to the requirements of the CAN-SPAM Act.

¹ Visa U.S.A. is a membership organization comprised of U.S. financial institutions licensed to use the Visa service marks in connection with payment systems.

² 15 U.S.C. § 7702(2)(A) (emphasis added).

³ 15 U.S.C. § 7702(2)(C).

The FTC previously issued an Advance Notice of Proposed Rulemaking (“ANPR”) on certain aspects of the CAN-SPAM Act, including the definition of “primary purpose.”⁴ In the ANPR, the FTC had proposed three different interpretations of primary purpose, which included an importance-based standard—that is, under this proposed interpretation, the primary purpose of an e-mail message would be for a commercial advertisement or promotion if the promotional purpose is “more important than all other purposes combined.” In the ANPR, the FTC also asked whether the relative importance of various purposes in an e-mail message should be determined based on a subjective “net impression” standard.⁵

Notwithstanding the suggested interpretations in the FTC’s ANPR, the FTC’s Proposal suggests three new sets of criteria for determining the primary purpose of an e-mail message. More specifically, the FTC states, in the supplementary information accompanying the Proposal, that “[a]ll three sets of criteria are based on a single fundamental principle: determining ‘the primary purpose’ of an email message must focus on what the message’s recipient would reasonably interpret the primary purpose to be.”⁶ In doing so, the FTC apparently decided not to re-propose an importance-based standard and apparently did not accept recommendations from commenters for an objective standard, such as a “but for” approach. At the same time, however, it appears that the FTC did not consider the possibility, or effectiveness, of a combination of standards; instead, the FTC simply states that “an importance-based standard, without more, probably” is not enough for determining the primary purpose.⁷

Although Visa supports the FTC’s attempt to create multiple sets of criteria for determining the primary purpose to address the variety of ways that e-mail messages are sent, Visa does not support the FTC’s use of a subjective, net impression standard for determining the primary purpose. Because a subjective, net impression standard is based on the impressions of a hypothetical recipient, such a standard creates substantial uncertainty by relying on the interpretation of individual recipients, rather than relying on a more objective determination of why the e-mail was sent. To further complicate the application and effect of such a subjective standard, marketing material presented in electronic form may be different from marketing material presented by other means, such as written material. In particular, electronic marketing material often includes links to certain explanations or graphics that are placed in various parts of an e-mail message. As a result, a subjective standard applied from the standpoint of the recipient is impractical, because it is impossible to predict how individual recipients will interpret an e-mail message since each individual’s reaction and response will depend on the particular perspective and background of that individual and the personal circumstances applicable to that individual at the moment the message is received.

Accordingly, the Proposal, if adopted, essentially would provide no practical guidance for businesses that send legitimate e-mail messages. As a result, the Proposal would negatively impact both businesses and consumers, particularly where customer relationships already exist and the business wishes to send e-mail messages to those existing customers regarding that

⁴ 69 Fed. Reg. 11,776 (Mar. 11, 2004).

⁵ 69 Fed. Reg. at 11,779.

⁶ 69 Fed. Reg. 50,091, 50,094 (Aug. 13, 2004).

⁷ 69 Fed. Reg. at 50,101 (emphasis added).

relationship without the need to separately attempt to qualify every message under the Act's exception for transactional or relationship messages.

Criteria for Determining the Primary Purpose

Under the FTC's first prong of the Proposal, if an e-mail message contains only content that advertises or promotes a product or service ("Commercial Content"), the primary purpose of the e-mail message is commercial. Visa agrees with this part of the criteria. In this regard, it is fair to conclude that the primary purpose of an e-mail message is for the advertisement or promotion of a product or service when, in fact, that message contains only Commercial Content.

Although Visa agrees with the FTC's approach in the first prong of the criteria, we nevertheless urge the FTC to modify the Proposal to establish an objective standard for determining the primary purpose of e-mail messages that include: (1) Commercial Content and transactional or relationship content; and (2) Commercial Content and content that is neither Commercial Content nor transactional or relationship content. Specifically, Visa recommends that the FTC adopt in the final rule the following criteria for e-mail messages that include more than just Commercial Content:

If an e-mail message includes both Commercial Content and transactional or relationship content, or if an e-mail message includes Commercial Content and content that is neither Commercial Content nor transactional or relationship content, the primary purpose is commercial if: (a) the subject line includes Commercial Content; or (b) the Commercial Content is more important than all other purposes combined and, but for the inclusion of the Commercial Content, the e-mail message would not be sent.

Visa recognizes the usefulness of the subject line of e-mail messages and agrees with the FTC's view that the subject line is important because it assists consumers in deciding whether or not to read a particular e-mail message. As a result, "*bona fide* email senders" likely will highlight in the subject line the principal purpose of the e-mail message.⁸ For example, a financial institution might indicate in the subject line of a transactional or relationship e-mail message sent to a customer that the primary purpose of the message relates to the customer's account; for example, such that the subject line might read: "Important information about your credit card account."

In addition, Visa acknowledges that the placement of the transactional or relationship content in an e-mail message may be useful in determining the primary purpose. Similarly, the placement of the Commercial Content could be useful in determining the primary purpose. Nevertheless, it is important that the FTC consider the uniqueness of e-mail messages and the way that graphics are placed, or links are included, in e-mail messages. Accordingly, a factor that underlies our recommended criteria above—the importance-based standard combined with a "but for" approach—is the placement of the text of the Commercial Content, and not the placement of any graphics or links, or the placement of the transactional or relationship content. Thus, if the text of the Commercial Content appears at or near the beginning of the e-mail message and is more important than all other purposes combined (that is, for example, but for the

⁸ 69 Fed. Reg. at 50,095.

inclusion of the Commercial Content, the e-mail would not be sent), then it can reasonably be concluded that the primary purpose is to advertise or promote a product or service.

An Objective Standard Provides Better Guidance

Visa's recommendation that the FTC adopt the "more important than all other purposes" standard, combined with a "but for" requirement for interpreting the primary purpose of an e-mail message, provides businesses with the necessary guidance to operate under the CAN-SPAM Act. Because such a standard does not turn on the subjective interpretation of every individual who receives the e-mail message, the objective standard instead establishes a broader overall test that does not vary from individual to individual. More specifically, the application of the Act's requirements would turn on the primary purpose that the sender has transmitted the e-mail message, and not on the subjective interpretation of every individual receiving that message. As a result, Visa's recommended approach would provide businesses with specific criteria that could be applied to e-mail messages "to determine with confidence"⁹ whether those messages are subject to the Act's requirements. Moreover, a business sending legitimate e-mail messages to its customers for transactional or relationship purposes would have reliable guidance with respect to the use of such messages for communicating with its existing customers without having to guess about the subjective reaction of individual customers receiving those messages merely because the business also includes additional information that is or can be viewed as promotional.

Objective Standard Benefits Both Consumers and Businesses

An objective standard will benefit both consumers and businesses. In this regard, Visa member financial institutions often send e-mails to their existing customers and to others whom they have reason to believe may be interested in a particular product or service being offered, but are not yet customers. While many e-mails sent to prospective customers can fairly be viewed as being transmitted for the purpose of commercial advertisement or promotion, other messages clearly serve another primary purpose, namely providing account information to existing customers. For example, financial institutions often have co-branded card programs with rewards features, which provide existing customers the opportunity to earn rewards for qualifying purchases made with the credit card. Card issuers typically send customers monthly statements either by hard-copy mailings or e-mail, providing information about the existing status of their accounts. Such account statements also include information regarding their accounts, such as their current rewards balances and the goods or services available for rewards points, that could be viewed as promotional material. Notwithstanding the inclusion of that additional material, the primary purpose of the mailing is to communicate with customers about their existing accounts and, clearly, the primary purpose of such communications is for transactional or relationship purposes.¹⁰ It should not matter whether the financial institution communicates with its customers by hard-copy mailings or e-mail messages. Under Visa's recommended standard, if an e-mail message sent to an existing customer happens to include

⁹ 69 Fed. Reg. at 50,101.

¹⁰ 15 U.S.C. § 7702(17)(A). Transactional or relationship functions of e-mail messages include, for example, providing, at regular periodic intervals, account balance information or other type of account statement with respect to an account, and providing notification concerning a change in the terms or features of an account.

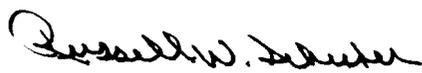
information on the co-branded rewards program, together with the account-related information, the primary purpose of the e-mail message still would not be for commercial purposes. Instead, because the purpose of the e-mail message is to communicate information to an existing customer about that existing account, the primary purpose of that e-mail message can only logically be viewed as being for relationship purposes, not commercial purposes, even if other information is included in that message and even if an individual customer might subjectively interpret the e-mail message as being for promotional purposes because of the inclusion of that other information. Virtually all relationship communications, including e-mail communications, serve dual purposes because in addition to sending account statements and other relationship information to customers, businesses almost always include additional information that could be viewed as promotional. However, such communications clearly are relationship communications by any objective standard, notwithstanding the subjective impressions of some individual customers.

As a result, the establishment of an objective standard enables financial institutions to effectively communicate with their existing customers about important aspects of their account relationships without the uncertainty and compliance risk that a particular e-mail message may be deemed to be commercial, simply because the institution also elects to include information regarding other product or service opportunities—something that is commonly done through inserts in hard-copy monthly statements. In addition, because the services provided by the e-mail messages sent by Visa member financial institutions are still evolving and because e-mail will continue to increase in importance as a means of communicating about all aspects of existing financial relationships, including the prevention of fraud and identity theft, an objective standard for determining the primary purpose of an e-mail message is the most appropriate approach and the only effective approach. Such an objective approach also would limit the potential of the CAN-SPAM Act to interfere with the ability of a financial institution or other business to use the Internet to disseminate information that is so important to its existing customers. In this regard, it is important to recognize that federal law, including the Electronic Signatures in Global and National Commerce Act, encourages the use of electronic communication, and consumers increasingly expect the use of electronic communication. Therefore, the FTC should not discourage the use of electronic technology by establishing standards under the CAN-SPAM Act that operate as an impediment to the use of the Internet by businesses for communicating with their existing customers.

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Visa appreciates the opportunity to comment on this important matter. If you have any questions concerning these comments, or if we may otherwise be of assistance in connection with this matter, please do not hesitate to contact me, at (415) 932-2178.

Sincerely,



Russell W. Schrader
Senior Vice President and
Assistant General Counsel