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Via Electronic Mail

Federal Trade Commission  
Office of the Secretary  
Room H-159  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

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

Ladies and Gentlemen:

These comments are submitted by the American Council of Life Insurers (“ACLI”), a national trade association representing three hundred sixty-eight (368) legal reserve life insurance companies operating in the United States. These 368 companies account for 69 percent of the life insurance premiums, 76 percent of annuity considerations, 53 percent of disability income insurance premiums, and 72 percent of long-term insurance premiums in the United States.

ACLI previously submitted comments on March 31, 2004, in response to the Commission’s Advance Notice of Rulemaking Request for public comment on various aspects of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act” or “Act”) (“Proposed Rule”). ACLI member companies are actively engaged in utilizing electronic commerce for the marketing and delivery of insurance products and annuities to insureds and policyholders. Accordingly, our members have a keen interest in assuring that the electronic marketplace is not adversely affected by the Proposed Rule.

Our comments are directed to the portion of the Proposed Rule that establishes criteria for determining “the primary purpose” of an e-mail message. ACLI does not have specific comments regarding subsection 316.3(a)(1) – e-mail content that only advertises or promotes a product or service; or subsection 316.3(a)(3) – e-mail content that advertises or promotes a product or service as well as other, non-transactional/relationship content as identified in subsection 316.3(b). ACLI, however, is chiefly concerned with subsection 316.3(a)(2) – e-mail content that advertises a product or service as well as transactional/relationship content.

## General Comments

ACLI believes that the Commission should be guided in its rulemaking process by a greater recognition of the fundamental distinction between legitimate business use of e-mail to communicate with existing customers and indiscriminate “spammers.” The Commission acknowledges such a distinction in several places within the commentary accompanying the Proposed Rule,<sup>1</sup> however, the “primary purpose” concept in the Proposed Rule effectively treats all e-mail as equally suspect. ACLI believes this approach will inevitably have a chilling effect upon legitimate uses of electronic commerce. Growth of electronic commerce is dependent upon new technologies and new ways of using these technologies. Legitimate businesses will simply not embrace electronic commerce if there is the specter of liability overhanging even rudimentary activities, such as communicating via e-mail with customers. As a result, the Proposed Rule will stifle the creativity and innovativeness of legitimate users of electronic commerce.

The ACLI urges the Commission to give greater consideration to the likely impact of the Proposed Rule on legitimate or bona fide users of e-mail. This may be a difficult task,<sup>2</sup> but one that is essential to businesses that are attempting to incorporate e-mail into their business models. The fact that businesses of all sizes are in the formative stages of developing and implementing electronic commerce strategies is justification enough for the Commission to tread carefully before it acts. ACLI member companies strongly supported the CAN-SPAM Act because it was viewed as providing important civil and criminal tools that would aid in the battle against pornographers and illegitimate bulk spammers. We urge the Commission to keep its focus directed upon spammers that abuse electronic commerce channels, while taking utmost care to avoid interference with legitimate electronic communications. We do not believe that § 316.3(a)(2) of the Proposed Rule meets this standard.

## Lack of Guidance

The Commission states in its Discussion of Significant Alternatives that the Proposed Rule “should help ease compliance burdens by avoiding interpretive uncertainty and by ensuring that the rule extends no further than reasonably necessary to implement the purpose and intent of the CAN-SPAM Act.” ACLI respectfully disagrees with the Commission’s statement. In fact, the Proposed Rule, by leaving the interpretation subject to the perception of the receiver, has created an enormous obstacle to legitimate e-mail communications. ACLI member companies have without exception indicated that the Proposed Rule, if implemented, will cause them to scale back their anticipated use of e-mail. Companies believe the Proposed Rule offers so little interpretive guidance that they will have no alternative but to reduce their electronic commerce business models.

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<sup>1</sup> For example, in Section II(C)1(a) commentary it states” [B]ona fide e-mail senders likely use the subject line to announce or provide a preview of their message.” The term “bona fide” also appears in questions small L and M in Section 316.3. The term “spammers” is used throughout the proposed rulemaking commentary, presumably in reference to individuals and entities that generate bulk e-mails to consumers with whom the sender has no relationship, and with the sole intent of marketing pornography, get-rich-quick schemes and health products of dubious value.

<sup>2</sup> Under the small business analysis, the Commission cites a survey conducted by web hosting provider Interland that suggests 85 percent of small businesses communicate with existing customers via e-mail. The Commission then goes on to conclude that lack of statistical data makes it impossible to evaluate the potential impact on small businesses. Elsewhere the Commission commentary notes the lack of cites the Proposed Rule will have adverse consequences as evidence that no such consequences will occur. This circular argument conveniently ignores the fact that there is no evidence that negative consequences will not occur. Given the relative infancy of electronic commerce and the variety of its uses and applications, it is not surprising that there is a dearth of empirical evidence relating to the impact, pro or con, of any particular regulatory action. As discussed elsewhere, the newness of electronic commerce is a compelling reason to proceed with particular care in designing and implementing any regulation.

In the realm of financial services many, if not most messages, have multiple purposes. The Commission's insistence that each e-mail have a single "primary purpose" is not reflective of how life insurers and other financial services firms communicate with customers. Transaction or relationship information is routinely intermingled with mandated financial disclosures, market commentary, safety and soundness (security and confidentiality) information, as well as information regarding promotions. In addition, what constitutes an "advertisement" or "promotion" in the context of a financial services-consumer relationship is not always readily apparent.

For example, a life insurer may recommend that a consumer consider changes to his or her account allocations, or the conversion of certain benefits or rights to more accurately reflect the consumer's age and life circumstances. Are such recommendations "commercial"? From a life insurer's perspective these communications are all of a whole; a whole that reflects the ongoing, dynamic relationship of a financial services provider and its customers. But a particular customer may view some or all of the above-described content as "commercial" under the Proposed Rule. The Commission's proposal does not provide sufficient guidance for financial service providers to operate in the on-line world.

#### Deviation from Existing Federal Policy Regarding Electronic Commerce

ACLI and its members have long-supported the federal government's Framework for Global and Economic Commerce. This document has been a guiding force for many legislative and regulatory initiatives over the past seven years.<sup>3</sup> The Framework states in part:

Governments can have a profound effect on the growth of commerce on the Internet. By their actions, they can facilitate electronic trade or inhibit it. Knowing when to act and - - at least as important - - when not to act, will be crucial to the development of electronic commerce.

Though government played a role in financing the initial development of the Internet, its expansion has been driven primarily by the private sector. For electronic commerce to flourish, the private sector must continue to lead. Innovation, expanded services, broader participation, and lower prices will arise in a market-driven arena, not in an environment that operates as a regulated industry.

The genius and explosive success of the Internet can be attributed in part to its decentralized nature and to its tradition of bottom-up governance. These same characteristics pose significant logistical and technological challenges to existing regulatory models, and governments should tailor their policies accordingly.

Wherever governmental involvement is needed its aim should be to support and enforce a predictable, minimalist, consistent and simple legal environment for commerce.

ACLI believes the Commission has strayed widely from these sound principles in its rulemaking process. It is trying to micro-manage an application that does not fit into a traditional regulatory formula. As a result, the Proposed Rule is neither predictable, minimalist, consistent, nor simple.

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<sup>3</sup> These include the Electronic Commerce in Global and National Commerce Act (E-SIGN). The U.S. – EU "safe harbor" agreement governing electronic transfer of personal data pursuant to the European Union Directive on Data Privacy.

## Commercial and Transactional/Relationship Messages

The Commission bases the Proposed Rule on the premise that it (or as is proposed in some circumstances the recipient) must weigh and evaluate whether the “primary purpose” of any e-mail message is properly characterized as commercial. The Proposed Rule treats an e-mail message as a “commercial electronic mail message” if the recipient reasonably interpreting the subject line would likely conclude that the message advertises or promotes a product or service. In addition, the e-mail message will be regarded as a commercial e-mail message if the transaction or relationship function does not appear at or near the beginning of the message.

ACLI suggests that the Commission’s proposed standard is not in accord with the CAN-SPAM Act. Whether an electronic message promotes a product or service is not the sole statutory basis for determining whether an e-mail is an electronic commercial mail message. Indeed, the CAN-SPAM Act itself provides that a commercial e-mail message “does not include a transactional or relationship message.” CAN-SPAM Act § 3(2)(B). Inexplicably, the Proposed Rule does not provide additional guidance as to the definition of the term “transactional or relationship message,” which is defined quite specifically in the CAN-SPAM Act. See § 3(17). ACLI believes that the Commission should elaborate on when an electronic message will be a transactional or relationship message. Because a “commercial electronic mail message” does not include a “transactional or relationship message,” the requirements and prohibitions set forth in Section 5 clearly apply only to “commercial” messages, and not to “transactional or relationship” messages (with the exception of the prohibition on materially false or misleading header information (§ 5(a)(1))). Therefore, if a message is a “transactional or relationship message” it is by definition not “commercial” even if the primary purpose of the message is to advertise or promote a commercial product or service. In our view, the Proposed Rule confuses the distinction between the statutory definitions of a commercial e-mail message and a transactional or relationship message. The result is an unmanageable and unworkable standard that must be applied to every message regardless of its content or primary purpose. This standard is made all the worse by the unnecessary introduction of the concept that the primary purpose of an e-mail will be commercial if the perception of the recipient of the e-mail is that he or she reasonably interprets the subject matter as a message that advertises or promotes a product or service. This standard is not in accord with the language of the CAN-SPAM Act and will thwart the development of legitimate electronic commerce.

The Proposed Rule takes a position that is unfortunate policy and contrary to the intent of the sponsors of the CAN-SPAM Act. Representative Sensenbrenner stated in the House debate during final House action on S. 877 that “policy makers should be wary of any ‘soundbite’ legislative or regulatory approach to this problem that promises to end all spam - - because such an approach would surely have drastic consequences for free speech and legitimate forms of e-mail that consumers want and use.”<sup>4</sup> Members of Congress and other stakeholders who worked for several years on the CAN-SPAM Act wished to slow the proliferation of spam while not creating obstacles for legitimate businesses. The Proposed Rule does not heed these admonitions. ACLI urges the Commission to adhere to Congressional intent in its rulemaking process.

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<sup>4</sup> 149 *Cong. Rec.* H12860 (December 8, 2003 daily ed.)

### A Bright-Line Test for Determining Primary Purpose

We believe that consumers and legitimate businesses would be better served with a bright-line test that allows businesses to communicate with existing and potential customers if the electronic message is a transactional or relationship message. That is, the test should follow the CAN-SPAM Act.

The Commission's final rule should provide that if the primary purpose of the e-mail is to perform the functions specified in § 3(17)(A) of the CAN-SPAM Act, the message is not a commercial e-mail message. The Proposed Rule ignores the fact that whether such a message also contains commercial information is not relevant. This is far preferable to the Proposed Rule's weighing of consumer perceptions, and determining location of transactional versus commercial content within a particular message. This approach is also consistent with the language of the CAN-SPAM Act and the intent of Congress.

Another (although not exclusive) way of setting forth a bright-line test is to examine whether a message would have been sent "but for" its transactional or relationship purpose. The use of the "but for" test was supported by many commenters in response to the Commission's advanced notice of public rulemaking.

### Conclusion

ACLI urges the Commission not to adopt the Proposed Rule as it pertains to combined commercial and transactional/relationships content (Section 316.3(a)(2)). This portion of the Proposed Rule is quite vague and uncertain. If adopted as proposed, it will inevitably stifle product and service innovations, and retard the Internet's growth as a delivery mechanism for insurers and other legitimate businesses.

Thank you for considering the comments of ACLI. If there is any additional information that we can provide to you, please let us know.

Sincerely,

