

COMMENT ON PROPOSED RULE

Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003

16 CFR 316

Definitions, Implementations and Reporting Requirements Under the CAN-SPAM Act

AGENCY: Federal Trade Commission (“FTC” or the “Commission”)

This comment is submitted by the Council of American Survey Research Organizations, Inc. (“CASRO”) in response to the Commission’s Notice of Proposed Rulemaking; Request for Public Comments (the “NPRM”) dated August 13, 2004 with respect to “Definitions, implementations and reporting requirements under the CAN-SPAM Act” (the “Act”).

CASRO is a not-for-profit industry and professional association representing nearly 250 research companies and institutions engaged in survey research regarding a wide variety of public policy, forensic, health, scientific, economic and other public and private areas of inquiry. Its members are responsible for the overwhelming majority of the survey research conducted each year in the United States and a major portion of global survey research.

Survey research contributes significantly to the public interest by providing reliable, verifiable analyses of a wide variety of public policy, sociological, legislative, regulatory, political, forensic, scientific, public health and economic areas of inquiry. Survey research is an invaluable and irreplaceable tool of behavioral science used to measure, track, analyze and predict public attitudes, opinions, awareness and preferences. Survey research is virtually the only source of statistically reliable and verifiable information of this type, on which government, business and private interests rely to formulate their actions and decisions.

Among the principal missions of CASRO is the establishment, maintenance and enforcement of professional and ethical standards in survey research and the protection of the

privacy interests of those who participate in survey research. These principles reflect the social utility of survey research and the need to protect and respect the industry's most valuable resource -- its survey respondents.

As one of the leading representatives of the U.S. survey research industry, CASRO has an interest in articulating the compelling public, governmental and business need for protecting not only survey research, but also the rights and concerns of the public and survey respondents. We believe that privacy is one of these important concerns. Accordingly, CASRO supports the CAN-SPAM Act and the regulation of commercial email as important tools in protecting that right.

The Act regulates "commercial electronic mail messages," a description that encompasses "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service." In the NPRM, the Commission invites comment on whether the proposed Rule provisions "strike the appropriate balance, maximizing protections for email recipients while avoiding the imposition of unnecessary compliance burdens on legitimate industry." As an organization that is intensely interested in both of those concerns, CASRO hereby responds to that portion of the NPRM.

Generally, CASRO recommends that the Commission promulgate rules that are consistent with the Act's legislative intent and the policy of the FTC and other federal agencies in administering national privacy regulations; i.e., that such regulations should be carefully applied so that they continue to protect the privacy interests of consumers, but still allow the survey researchers that comprise CASRO's membership to obtain critical survey information from businesses and individuals.

The survey research industry supports the CAN-SPAM Act in its efforts to bring an end to the practice of emailers concealing their true commercial purpose by posing as survey

researchers. This practice, known as “sugging” or “selling under the guise of research” involves marketers masking their solicitations or advertisements as invitations to participate in surveys. This practice has dissuaded potential survey respondents from participating in surveys for fear that they will become the targets of email marketing or telemarketing, and is already prohibited by the Commission as a deceptive trade practice. The Commission’s primary purpose criteria will help to effectively curtail this cynical and abusive activity, while continuing to exclude bona fide survey research from the coverage of the Act.

CASRO also supports the Commission’s decision not to adopt specific exemptions from the regulations for certain types of unsolicited email messages. We believe that the determination of whether an email is covered by the regulations should be, as mandated by Congress, whether the primary purpose of the message is commercial, based on carefully drawn criteria and definitions established by the Commission. We believe this approach is more consistent with Congress’s intent and provides a more logical and reliable enforcement framework than exempting specific types of messages. Under the Commission’s approach, for example, emails inviting recipients to participate in legitimate survey research would be “defined out” of the coverage of the regulations as non-commercial “informational” messages.

The Commission has requested replies to specific questions in connection with this portion of the NPRM. CASRO respectfully offers the following in response to those questions:

Question 1: *Does the Commission’s “primary purpose” standard provide sufficient guidance as to when a message will be considered “commercial” under the CAN-SPAM Act? When a message will be considered “transactional or relationship?” Why or why not? What “primary purpose” standard would provide better guidance?*

Answer: We believe that the Commission’s “primary purpose” standard does provide sufficient guidance to determine when a message will be considered “commercial” or “transactional or relationship.” It draws a distinction between messages that are sent with the intent to advertise or promote a commercial product or service and those messages that, while they may contain an advertisement or promotion, are sent not for the purpose of advertising but are sent for other, informational purposes, such as an invitation to participate in survey research.

Question 2: Does the Commission’s “primary purpose” standard fail to cover any types of messages that should be treated as commercial messages under the Act? If so, what types of messages are not covered? Does the standard cover any types of messages that should not be treated as commercial? If so, what types of messages are covered? Is there some other “primary purpose” standard that would provide more appropriate coverage, and if so, what is it?

Answer: We believe that the “primary purpose” standard effectively covers the types of messages that should be treated as commercial messages under the Act. If there is any commercial content within an email, it will fall within one of the Commission’s pre-defined categories. CASRO does not believe that there are any categories of messages within the Commission’s definitions that should not be covered by the Act.

Question 3: The Commission’s approach proposes different criteria for different categories of email messages. Is this approach useful for determining the primary purpose of email messages? Why or why not? Should the Commission use a single set of criteria for an email message? Why or why not?

Answer: The Commission was correct in establishing different criteria for the different categories of messages covered by the Act. In creating these categories, the Commission has been able to specify criteria for specific types of messages that would have been impossible to

effectively cover with the establishment of one all-encompassing set of criteria. As the amount and use of commercial content within an email varies, so to should the criteria used to determine if that the primary purpose of the email is “commercial” as contemplated by the Act. Under the proposed criteria, consumers and marketers would have scalable and reasonably flexible tools to allow them to determine whether an email message is “commercial” and as such, is subject to the Act. Incorporating such variations into one standard for determining whether an email message is “commercial” would be imprecise and impracticable at best and impossible at worst, and even if it could be accomplished, the resulting criteria would either be too generic or too confusing to provide any guidance to senders of emails.

Question 4: Does the proposed approach to email messages containing only commercial content provide criteria to facilitate the determination of the primary purpose of an email message? Why or why not? Would a different approach better accomplish this goal? Why or why not?

Answer: The proposed approach to emails containing only commercial content provides extraordinarily clear criteria to determine the primary purpose of that email. If a message contains only content that advertises or promotes a product or service, which by the Commission’s definition is commercial content, that message must be considered a commercial message. This method provides the easiest, most clear-cut method for determining that a message is commercial. It is a bright-line rule which requires no subjectivity or inference.

Question 5: Does the proposed approach to email messages containing both commercial and transactional/relationship content provide criteria to facilitate the determination of the primary purpose of an email message? Why or why not?

Answer: We respectfully suggest that the proposed approach to email messages containing both commercial and transactional/relationship content may not provide sufficiently clear and practical criteria to facilitate the determination of the primary purpose of that email message. We believe that there could be problems with both of the alternatives proposed, as each criterion depends upon the subjective understanding or impression of individual recipients. For example, a subject line that could indicate to one recipient that the message is advertising or promoting a product or service may not lead to the same conclusion in a different individual. In such a situation, would the message be determined to be commercial? The subjective nature of this criterion leaves the senders of email messages at a disadvantage in their attempts to comply with the Act. Without more clear guidance, senders of email messages may be unable to determine if their messages will be subject to the provisions of the Act. We think this is especially true in cases where an email sender tries to mask their true commercial intent by intentionally trying to make the recipient think that the email is for non-commercial purposes. For example, many unscrupulous email marketers engage in the practice of selling under the guise of research, a practice we call “Sugging”.

Indeed, we would respectfully suggest that the intention and/or objectives of the sender are more relevant to whether an email should be classified as Spam than the likely interpretation by the recipient.

Additionally, we would suggest that the Commission provide more guidance with respect to the second criteria for determining the status of a message with both commercial and transactional/relationship content. Specifically, we believe it would be helpful to have a more precise and/or objective definition for “at or near the beginning of the message” in order to avoid varying interpretations of that requirement.

Question 6: Would a different approach better facilitate the determination of the primary purpose of an email message that contains both commercial and transactional/relationship content? Why or why not? Are there any additional legal or factual issues that support an approach based on either (1) calculating whether a fixed percentage of the message is dedicated to transactional or relationship content, or (2) an exclusively “net impression” test? Are there any arguments supporting these approaches to which the Commission did not give adequate weight? Should the Commission consider additional factors to determine the primary purpose of an email message that contains both commercial and transactional/relationship content – such as whether the transactional/relationship content is clearly and prominently displayed, or whether the commercial content interferes with, detracts from, or otherwise undermines the presentation of the transactional/relationship content? Why or why not?

Answer: We would respectfully suggest that a different approach might better facilitate the determination of the primary purpose of an email containing both commercial and transactional/relationship content. A rule stating that a message containing commercial and transactional/relationship content would be deemed to be a commercial message unless legitimate transactional/relationship content, as opposed to paragraphs of random words, was the first item within the body of the message would provide much clearer guidance, and it would also better serve the stated purpose behind the Act – to prevent the time wasted by consumers’ sorting through unwanted commercial messages. Requiring the placement of legitimate transaction/relationship content at the beginning of a message would allow recipients to immediately see and read the relevant content of the message without sorting through advertisements or solicitations. Such a rule would also eliminate the need for a subjective rule regarding the “reasonable” interpretation of a subject line by the recipient of a message. If a

message contained only paragraphs of random words, poetry or other information irrelevant to the purpose of the message before the commercial content, such a message should be deemed a commercial email, and as such, should be subject to the provisions of the Act.

We do not believe that there are additional legal or factual issues that support the use of an approach based on either calculating whether a fixed percentage of the message is dedicated to transactional or relationship content, or an exclusively “net impression” test. In fact, as discussed within the Commission’s NPRM, there are numerous factual issues that should lead the Commission to not use either of these approaches. First, if the Commission instituted a fixed percentage test, it would be inviting marketers to add irrelevant, non-commercial content to their messages to avoid being covered by the Act. This irrelevant, non-commercial content would become as much of an annoyance to consumers as wholly commercial messages, thus defeating the purpose behind the Act. Additionally, such a rule could have the effect of extending the Act’s coverage to legitimate email messages that contain information requested by the consumer, such as product recall information, account statements, or confirmation messages. For example, if a consumer requested to be kept updated on product recall information from a manufacturer, and that manufacturer included advertisements at the end of these recall messages, the messages could unintentionally become a commercial message if the recall information is very short. Similarly, a financial institution’s email to a consumer containing an account statement could also be unintentionally covered by the Act as a commercial message if a consumer’s account statement for a particular period was very short and the financial institution included advertisements to the bottom of the message.

The Commission also asks whether it should consider other factors to determine the primary purpose of a message with both commercial and transactional/relationship content. All

of the examples of potential considerations given by the Commission in the NPRM are, however, based on the subjective impressions of the recipient, and therefore could create difficulties for marketers and consumers in determining whether their messages are commercial and as such, subject to the Act. If the Commission established definitions or benchmarks for when commercial content “detracts from” or “interferes with” transactional/relationship content, then relying on some of these additional factors could be helpful in determining whether a message with both commercial and transactional/relationship content is a commercial message under the Act. We believe, however, that factors based on the recipient’s subjective impressions, would be of more utility if the Commission also provided greater definitional guidance. Additionally, criteria based on the recipient’s subjective impressions could be inappropriate for preventing unsolicited commercial emails that intentionally create a non-commercial impression by masking their commercial nature with non-commercial content. We would respectfully suggest that the intention or objectives of the sender would be more relevant in these cases.

Question 7: Does the proposed approach to email messages containing both commercial content and content that is neither commercial nor transactional/relationship provide criteria to facilitate the determination of the primary purpose of an email message? Why or why not? Would a different approach better accomplish this goal? Why or why not?

Answer: We would respectfully suggest that the Commission’s proposed approach to emails containing content that is both commercial and content that is neither commercial nor transactional/relationship may not provide sufficiently clear criteria for the determination of the primary purpose of an email. The Commission’s approach is based upon subjective factors that could vary from recipient to recipient and, as a result, this approach may not offer the senders of these types of emails sufficient guidance as to whether their messages would be considered

commercial and therefore subject to the Act. It might be useful to supplement this approach with factors that rely on (i) the placement of the commercial content in relation to the non-commercial content and (ii) the intent or objective of the sender. Using these additional criteria could make the determination less subjective.

Question 8: Are the Commission's proposed factors for email messages containing both commercial content and content that is neither commercial nor transactional/relationship appropriate? Should additional factors be considered? Why or why not? Should the sender's identity be considered as a factor, and if so, how? Why or why not? Should the sender's intent be considered as a factor? Why or why not? If so, how? And if so, how should the sender's identity be measured?

Answer: The Commission's proposed factors for email messages containing both commercial content and content that is neither commercial nor transactional/relationship are appropriate. We respectfully suggest, however, that senders of emails may need additional guidance in order to determine whether their messages will be considered commercial and therefore subject to the Act. For example, the Commission could provide examples or benchmarks of how these factors will be considered and weighed.

We believe that the sender's identity should be considered as a factor. The sender's identity could provide critical information as to the nature of its business or non-commercial activities, its location, its relationship (or lack thereof) with the message recipient and its prior conduct with respect to sending unsolicited commercial emails.

Question 9: The Commission suggests that a message with a noncommercial "net impression" may still be deemed to have a commercial primary purpose if the sender deliberately structures his message to create a mistaken impression in the mind of a reasonable

recipient that the message has a noncommercial primary purpose. Should the sender's deliberate structuring of a message affect "primary purpose" analysis under CAN-SPAM, and if so, how? Why or why not?

Answer: We believe that the sender's structuring of his email should definitely affect the "primary purpose" analysis under the Act. For example, it is the deliberate structuring of messages that entices consumers to open messages received from marketers who "sell under the guise of research," as those messages are structured to mimic legitimate survey research messages. The structure of an email message is the clearest and most direct manifestation of the sender's intent, which we believe should be a central factor in determining whether a message is covered by the Act.

As discussed above, if any portion of the commercial aspect of the message is placed before any portion of the non-commercial aspect, the primary purpose of the email message should be deemed to be commercial. This rule would solve the primary concern behind the Act, to relieve consumers from having to wade through unsolicited commercial emails, and at the same time it would provide senders of emails clear guidelines as to when their messages will be determined to have a commercial "primary purpose."

Additionally, we believe that the sender's intent is relevant to the determination of whether a message is "commercial." This is especially true when senders deliberately structure a commercial email to make it appear to the recipient that the message's primary purpose is not commercial, as in the case of marketers selling under the guise of research.

Question 10: The Commission's proposed criteria use the subject line in one criterion to determine the primary purpose of "dual-purpose messages." Is this an appropriate criterion for this determination? Why or why not?

Answer: We believe that the subject line of an email is an appropriate criterion for determining the primary purpose of a “dual purpose message.” However, we respectfully suggest that the Commission may wish to consider providing more guidance or objective language in the criterion involving the subject line of an email, especially with respect to the criteria that refer to whether the recipient would “reasonably interpret” or “likely conclude,” that a message is commercial.

Question 11: *The Commission’s proposed criteria do not use the subject line as a criterion to determine the primary purpose of messages that contain only commercial content. Is this choice proper? Why or why not?*

Answer: The Commission’s choice to not take into account the subject line of a message that contains only commercial speech is proper. If the only content of an email message is advertising or solicitation, then it is a commercial message, and there is no reason to look to anything except the body of the message for that determination. In such a case, considering the content of the subject line could unnecessarily introduce the possibility of a sender manipulating whether the message is deemed commercial.

Question 12: *The Commission suggests that spammers could add unrelated noncommercial content (or paragraphs of random words) to commercial email messages if doing so might mean that CAN-SPAM would not likely apply to their messages. Is this likely? Why or why not?*

Answer: We believe that it is likely that spammers will take any and all steps within their powers to avoid having the Act apply to their messages. For example, some email marketers already send messages to consumers that resemble surveys or opinion polls, but are really commercial advertisements, a practice known as “sugging.” As a result, the Commission needs

to be prepared to continually monitor the effect the Act is having and continue to modify the Act's language of as necessary to combat spammers.

Question 13: *Should the same three category "primary purpose" criteria be applied to messages sent by for-profit entities and nonprofit entities alike? Why or why not?*

Answer: We do believe that the criteria the Commission enacts should be applied to commercial messages sent by for-profit and non-profit entities alike. There should be no distinction between for-profit and nonprofit entities that send messages containing financial solicitations or advertisements. Rather than creating "exemptions" for certain types of unsolicited commercial emails, the Commission should adopt rules that include or exclude emails from the coverage of the Act based upon whether their primary purpose is commercial, such as sales, advertising, marketing and fundraising emails, regardless of whether the sender is a for-profit or non-profit enterprise. Informational emails that do not sell, market advertise or solicit contributions, such as invitations to participate in survey research, should continue to fall outside of the Commission's definitions of commercial emails.

Question 14: *Where a recipient has entered into a transaction with a sender that entitles the recipient to receive future newsletters or other electronically delivered content, should such email messages be deemed to be transactional or relationship messages? Why or why not?*

Should the inclusion of commercial content affect this analysis? If so, how?

Answer: We believe that this scenario could fall squarely within the definition of transactional/relationship content. Pursuant to Section 7702(17)(A)(v), any message, the primary purpose of which is:

To deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender

is a transactional or relationship message. If, however, the messages contain commercial and non-commercial content, an analysis under the Act would need to be performed to determine if the messages were commercial, unless the recipient has given prior authorization to receive commercial messages from the sender, at which point, the primary purpose of the email message is irrelevant.

Respectfully submitted,

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