

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

**COMMENTS
of the
DIRECT MARKETING ASSOCIATION, INC.**

Responding to the Notice of Proposed Rulemaking re: “Primary Purpose”

CAN-SPAM Act Rulemaking, Project No. R411008

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I. Introduction, Summary, and Background

The Direct Marketing Association (“The DMA”) is pleased to submit these comments on the Federal Trade Commission’s (“Commission” or “FTC”) request for public comment on what constitutes the “primary purpose” of an electronic mail message under the “CAN-SPAM Act Rulemaking, Project No. R411008.” 16 C.F.R. Part 316; 69 Fed. Reg. 50091, August 13, 2004. The DMA also submitted comments on the Advance Notice of Proposed Rulemaking, 69 Fed. Reg. 11776, March 11, 2004.

The DMA is the largest trade association for businesses interested in direct, database, and interactive marketing and electronic commerce. The DMA represents more than 4,600 companies in the United States and 53 other nations. Founded in 1917, its members include direct mailers and direct marketers from 50 different industry segments, as well as the non-profit sector. Included are catalogers, financial services, book and magazine publishers, retail stores, industrial manufacturers, Internet-based businesses, and a host of other segments, as well as the service industries that support them.

The DMA member companies have a major stake in the success of electronic commerce, and are among those benefiting from its growth. The DMA’s leadership extends to the Internet and electronic commerce through its subsidiaries the Internet Alliance and the Association for Interactive Marketing. We agree in general with the FTC that the acceptance by consumers of electronic commerce is critical to our better serving the consumer and solidifying economic growth for our industry in the future.

The DMA supported passage of the CAN-SPAM Act, Pub. L. No. 108-187, 15 U.S.C. §§ 7702 *et seq.* (the “Act”). The Act will be of significant help in the battle against spam. Spam is clogging consumer inboxes in a manner that is significantly hurting the ability of DMA

members, legitimate businesses that send e-mail for business purposes, to communicate with consumers to sell them something or to transact business with them. The Act creates a uniform and predictable national standard for senders and recipients of commercial e-mail. These standards empower consumers with an opportunity not to receive further commercial e-mail messages. Likewise, requiring senders of commercial e-mail messages to provide a valid postal address will provide accountability. The Act also empowers Internet Service Providers and attorneys general to seek legal action against spammers—already both The DMA and some DMA-member ISPs have done just that. On August 26, 2004, the Justice Department announced the results of Operation Web Snare, a major enforcement effort against cybercriminals, including spammers. The DMA is pleased that it was able to provide assistance to this initiative through Operation SLAM Spam (see <http://www.ifccfbi.gov/strategy/websnare.pdf>).

The Act is not intended to interfere with the sending of legitimate commercial e-mail. As The DMA indicated in its ANPRM comments, there are several instances where the FTC can provide clarity to the Act to avoid the potential for unintended consequences and burdens on legitimate senders of commercial e-mail, and to improve the consumer experience with respect to e-mail, including providing clarity to help consumers understand the rules that apply to this space. The Act’s requirement that the Commission determine the “primary purpose” of an e-mail message is one of these instances. This proceeding is being conducted pursuant to that requirement.

We comment below on the Commission’s proposed criteria. Specifically, we recommend the that the Commission:

- ◆ *Not adopt a “reasonable recipient” standard*

◆ *Identify specific types of e-mail messages that do not have a commercial primary purpose, including:*

- ◆ e-mail messages that contain billing statements;
- ◆ e-mail messages that contain primarily editorial content;
- ◆ e-mail messages sent pursuant to the request of the recipient;
- ◆ one-to-one e-mail sent in the business-to-business context regarding ongoing account management; and
- ◆ e-mail that is directly related to a product or service already purchased or requested.

◆ *Clarify that the subject line of an e-mail message does not in any instance have to refer to the commercial or transactional or relationship content in the e-mail message.*

◆ *Address other issues raised in the ANPRM; specifically, address the potential for “multiple senders.”*

II. A “Reasonable Recipient” Standard is Contrary to the CAN-SPAM Act

In its ANPRM comments, The DMA emphasized its belief that the Commission should “set forth factors that provide businesses with **objective** standards to determine the primary purpose of a message.” While the Commission appears to be attempting to set forth objective standards, its approach looks in large part to the reasonable recipient’s interpretation of a message, which is contrary to the requirements of the CAN-SPAM Act. The statute requires a “purpose” test, and The DMA believes that by focusing on a consumer’s perception as to what the sender’s intent was, the FTC has instead chosen an “effects” test.

Rather than providing clarity to businesses that send e-mail, the Commission’s approach results in ambiguity for determining the primary purpose for some types of e-mail messages. Such ambiguity results from the fact that businesses would need to determine first whether

certain content is “commercial,” “transactional or relationship,” or neither of these categories and then apply the Commission’s primary purpose test. This two-step process is more difficult than a business evaluating its primary intent for sending a message.

If the Commission decides to keep its reasonable-recipient test, while the test will be less clear, The DMA believes that further clarification and the addition of categories and more detailed criteria could provide businesses with more clarity and a more objective standard.¹ The DMA believes that the Commission should expand the reasonable-recipient test to include an initial evaluation of whether a reasonable recipient would expect to be able to opt out of receiving such a communication. For example, a reasonable recipient would not expect to be able to “opt-out” from a message that they have requested. Similarly, a reasonable recipient would not expect to be able to opt out of receiving account notices, fraud alerts, billing statements, upgrades, or other account information simply because an advertisement or promotion may be included in such communication.

Under this framework, only after a determination that a reasonable recipient would expect to be able to opt out of the receipt of a communication would the analysis proceed to determine whether a reasonable recipient would interpret the message to have a primary purpose of advertisement or promotion.

III. The Commission Should Identify Specific Types of Messages That Are Not Commercial

In the NPRM, the Commission proposes three categories of e-mail and criteria to evaluate the primary purpose of messages in these categories: messages with purposes that are

(1) only commercial; (2) both “commercial” and “transactional or relationship”; and (3) “commercial” and neither “commercial” nor “transactional or relationship” messages (referred to herein as “categories”). Under this proposed framework, there are messages that could be classified as “commercial” that in all instances have a “transactional or relationship” primary purpose or a primary purpose that is neither “commercial” nor “transactional or relationship” as contemplated by the Congress.

To avoid such an unworkable result, the Commission should state that some messages are always non-commercial, and thus not subject to the criteria set forth for messages with dual-purpose content. Several specific types of e-mail that never should be classified as having a primary purpose that is commercial are (1) e-mail containing billing statements or transaction statements such as confirmations or statements of account, (2) e-mail sent at the recipient’s request, (3) e-mail that contains bona fide editorial content, (4) one-to-one e-mail sent in the business-to-business context regarding ongoing account management; and (5) e-mail that is directly related to a product or service already purchased or requested, including subscription renewals. These types of messages are described in more detail below.

A. Billing statements and other transactional content sent via e-mail do not have a primary purpose that is “commercial” in nature

E-mail messages that contain billing statements or certain other transactional content and similar messages never have a primary purpose that is “the commercial advertisement or promotion of a commercial product or service.” Moreover, reasonable consumers would not

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¹ The DMA believes that additional factors that are illustrative of a reasonable recipient’s perception of an e-mail as set forth in section II(B)(1)(b)(ii) of the NPRM, 69 Fed. Reg. at 50096-97, will provide more certainty to businesses

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expect that they would be able to opt out of receiving bills or certain other transactional content. Under the Commission's proposal, e-mail with billing statements or certain transactional content either where the reasonable recipient would interpret the subject line as having a purpose of advertising or promoting a product or service, or where the billing content does not appear at or near the beginning of the message, would be deemed to have a primary purpose that is commercial.

This would have the extreme result of a consumer being able to opt out of billing statements or confirmations of transactions. Congress did not intend this result. The only sure way for businesses to avoid financial chaos would be to eliminate all commercial messages from communications like billing statements. This choice between economic chaos or entirely non-commercial messages is not what Congress had in mind when it used the phrase "primary purpose." When bills are sent via e-mail, such messages always have a primary purpose that is "transactional or relationship." Irrespective of any promotional or advertising material in the subject line or the location within the message of the billing content, the primary purpose of the message is to send the bill to the recipient. The e-mail would be sent irrespective of whether there is any purpose other than sending a bill. Thus, the Commission should, in the final rule, indicate that messages accompanying a legitimate bill sent on regular basis (for continuing relationships), or sent in response to a transaction, are not "commercial" messages.

Such an approach is analogous to the U.S. Postal Service's treatment of mail that includes billing statements. The fact that a communication contains a billing statement determines its

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that send dual-purpose messages.

status. The Postal Service treats any message with a billing statement as “first class” mail, irrespective of the existence or intensity of advertisement or promotions in such message. Messages that do not contain billing statements may be treated as a different class of mail. This same approach should apply to billing statements sent via e-mail: the existence of a billing statement being the sole factor in determining the classification of an e-mail.

Thus, if an e-mail contains a billing statement or similar transactional or relationship information, further analysis of the subject line and placement of the “transactional or relationship” content would be unnecessary.

B. E-mail sent at the recipient’s request

It is critical that the Commission clarify that all messages where the recipient has requested the message be classified as having a primary purpose that is “transactional or relationship.” Such e-mail is fulfilling a relationship between the sender and recipient. It is clear that if recipients request e-mail messages from a specific sender, then they desire to receive such e-mail. Types of messages sent at the recipients’ request where commenters sought clarification in the ANPRM include:

- ◆ newsletters to which the recipient has subscribed that may contain content that advertises or promotes a commercial product or service;
- ◆ services where the recipient has requested e-mail messages that solely provide offers and promotions of interest to the recipient;
- ◆ subscription-based “e-magazines” that may contain advertisement or promotions; and
- ◆ subscription renewal notices and other information related to products or services that the recipient has purchased from the sender.

The DMA believes that the Commission should indicate that these types of e-mail messages always have a primary purpose that is not “commercial.” In making this

determination, the Commission may define additional criteria to be followed by the sender of the message. Such requirements are:

- (1) e-mail sent falls within the scope of the e-mail requested by the recipient; and
- (2) the sender will not initiate e-mail to the recipient within the scope of the request, upon termination of the request.

The DMA believes that by providing such clarity, the Commission can provide much greater certainty to businesses and recipients. Such an approach would ensure that recipients maintain the ability not to receive e-mail that they have requested, and would recognize the difference between terminating a request and opting out of commercial e-mail. Such an approach would avoid the potential for the unintended result of an opt out of a truly commercial message resulting in the consumer not receiving the message they have requested from the sender.

Business then would have certainty with respect to the types of messages described above. For example, e-mail sent with multiple advertisers that the recipient has requested will not require an analysis of whether there are potentially multiple senders such that each advertiser in a single e-mail would need to provide an opt out and meet the other requirements on senders of “commercial” messages. This is because such messages would be “transactional or relationship” in nature and not subject to the requirements of commercial e-mail. Similarly, e-mail newsletters sent at the request of the consumer would not have to be evaluated for how a reasonable consumer would view the subject line content or placement of content in the message.

C. E-mail that contains bona fide editorial content is not commercial in nature

The Commission similarly should state that any e-mail that provides bona fide editorial content shall not be considered commercial e-mail. The primary purpose of such messages is not

the commercial advertisement or promotion of a commercial product or service, but rather the provision of editorial content. Newsletters are an example of a widely used method of communication with legitimate editorial content that should not be treated as commercial e-mail. Such communications provide recipients with content including developments in the marketplace, certain products or services, and similar information. In many cases, newsletters do not contain offers within the text of the messages. In other instances, newsletters contain advertisements that are incidental to the editorial content. Neither the content of the subject line nor the placement of a commercial message within the editorial content changes the fact that the purpose of the communication is not commercial. The Commission can require that the editorial content be real and not just a sham.

D. One-to-one e-mail sent in the business-to-business context regarding ongoing account management

As stated in our ANPRM comments, an additional concern has been raised by several DMA members regarding one-to-one e-mail sent in the business-to-business context regarding ongoing account management, by an individual or employee of a company whose responsibilities include ongoing account management. Such e-mail generally is sent to individuals or small groups of existing clients, and not on a mass mailing basis.

Without this exception, the statute might be interpreted to require employees who communicate with clients via e-mail to run recipient e-mail addresses against opt-out databases. For example, if an account manager wants to inform an existing client about a new product or service that would be helpful to them, that e-mail address should not have to be run against the opt-out file. This would be enormously expensive, would not further the purpose of the statute, and would frustrate clients who want to receive this information via e-mail and are unlikely to

view it as spam. The DMA does not believe that Congress intended this. To avoid such a result, the Commission should clarify that such messages have a primary purpose that is “transactional or relationship” in nature. These types of e-mails form part of the ongoing communications between company and customer in the context of a commercial relationship.

E. E-mail that is directly related to a product or service already purchased or requested

The DMA believes that the Commission should clarify 15 U.S.C. § 7702(17)(A)(v) to ensure that it includes all e-mail that is directly related to a product or service already purchased or requested. This section currently includes e-mail that has a primary purpose “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.” This section should not be limited to delivery of goods or services. For example, there are many types of e-mails, such as account opening statements and other documents that establish the terms of a relationship or service, as well as offers relating to the product or service, that are related to a transaction and should be included as having a transactional and relationship primary purpose.

IV. An E-Mail is Not Deceptive if it Does Not Refer to the Commercial or Transactional Content in the Subject Line

The DMA believes it is important that e-mail subject lines not be deceptive. Section 5 of the FTC Act prohibits deceptive subject lines. However, the DMA does not believe that specific content should be required to be included in the subject line of the message in order to not be considered deceptive. Rather, businesses should have flexibility in determining the text in the subject line of a message so long as it is not fraudulent or deceptive. The CAN-SPAM Act follows this approach, and prohibits the Commission from promulgating rules that require

reference to commercial content in the subject line.² In a footnote in the NPRM, the Commission stated that it is not indicating that the subject line of a message must refer to the message's commercial content if the message contains commercial content.³ However, the Commission indicates that "depending on the facts of a given situation, a dual-purpose message may use a subject line that is not deceptive and does not refer to commercial content."⁴ This statement should not be interpreted to infer that there are instances where a message must describe either the commercial or transactional or relationship content in the body of the message. To avoid such an interpretation, the Commission should state clearly in the text of the final rule that in no instance will a message be required to have any type of content. In no way should the rule result in a requirement that a message indicate in the subject line that the message contains commercial or transactional or relationship content.

For this reason, the final rule should make clear that if the subject line describes any purpose other than a commercial or transactional or relationship purpose, and is not deceptive with respect to that description, the message will not be considered deceptive for not referencing the commercial content in the subject line. The Commission should state specifically that the rules permit, but do not require, a subject line to refer to the commercial or transactional or relationship content of the message.

² 15 U.S.C. § 7711(b).

³ 69 Fed. Reg. at 50093 n.17.

⁴ 69 Fed. Reg. at 50095 n.37.

V. The Commission Should Address Other Issues Raised in the ANPRM in this Rulemaking

Finally, a significant concern about the NPRM is that it does not address critical interpretive issues surrounding the CAN-SPAM Act—issues raised in comments to the ANPRM that are related to the “primary purpose” of a message. Without addressing such issues, it is difficult to fully evaluate the impact of the Commission’s proposal on businesses’ e-mail communications. There are important issues surrounding the potential for multiple senders, tell-a-friend messages, and other issues regarding the relationship between the terms “sender,” “procure,” and “initiate” that the Commission should address in this rulemaking.

One of these issues, the multiple sender issue is perhaps the most perplexing and difficult of these issues to address. This is particularly the case in connection with an online publication that contains advertisements from multiple parties. This could be tied with content or it could be the equivalent of a “penny saver”-type publication requested by the recipient. This issue should be resolved so that only the “publisher” is the “sender” and not each advertiser. Then the ability to apply the rules will be greatly simplified. Having a true sender maintain “opt outs” is fairly straightforward. However, having all advertisers maintain opt outs is procedurally very complicated and would require the exchange of e-mail opt-out address lists, would create potential privacy problems in itself. The Commission must clarify this issue for the market and the consumer to be protected.

A multiple-sender requirement in the context of advertising would result in a blizzard of confusing opt outs to consumers. For example, an “e-magazine” may have a number of advertisers. Would each of these advertisers have to include an opt out in the e-mail message? This is particularly problematic in the Commission’s proposed category of e-mail that has

commercial content and content that is neither “commercial” nor “transactional or relationship.” The “other” content may be of the sender and the commercial message may be from an advertiser. The primary purpose of the message in this context is less important than who is responsible for the message under CAN-SPAM. We hope that the Commission can shed some light on these issues.

VI. Conclusion

The DMA appreciates this opportunity to comment on the important issues raised in the NPRM. We look forward to continuing to work with the Commission as it promulgates its final rule.

Respectfully submitted,

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