

THE NATIONAL BUSINESS COALITION ON E-COMMERCE AND PRIVACY

September 13, 2004

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room H159
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

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

Dear Mr. Secretary:

On behalf of the National Business Coalition on E-Commerce and Privacy (the "Coalition") and our fifteen members, we are pleased, once again, to have the opportunity to submit comments on the Federal Trade Commission's ("FTC" or "Commission") proposed rule implementing specific portions of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "CAN-SPAM Act," or "Act"), pursuant to its Notice of Proposed Rulemaking ("NPR"), issued on August 13, 2004. Definition, Implementation, and Reporting Requirements Under the CAN-SPAM Act, 69 Fed. Reg. at 50,991. On March 14, 2004, the Commission published an Advance Notice of Public Rulemaking ("ANPR") in which it sought comments on a number of issues relating to the Act. The Coalition submitted comments on that ANPR but, as requested by the Commission, the comments contained in this letter will focus on the criteria for determining "Primary Purpose," as set forth in the NPR.

As you know, the Coalition is comprised of nationally recognized companies from diverse economic sectors dedicated to the pursuit of a balanced and uniform national policy pertaining to electronic commerce and privacy. Our member companies are top competitors in the e-commerce marketplace, and are strongly committed to ensuring the privacy and security of our customers, both on-line and off-line.

As some of America's most reputable companies, we are deeply concerned about the problem of spam and false or misleading email advertisements. The credibility of legitimate companies who market and advertise using the medium of email is always at risk when email is perceived as being either deceptive or a nuisance. The Coalition is eager to act as a resource to the Commission during implementation of the Act, and the "primary purpose" rule in particular, in order to insure that the FTC creates an effective, realistic, and efficient framework allowing for the continued success of email marketing.

The Coalition believes the Commission should make several important changes to the proposed "primary purpose" rule in order to ensure a coherent, workable and effective policy that achieves the goals of the Act.

I. Summary

1. Consistent with the Act, the Commission should clarify the rule's treatment of "commercial" content, as narrowed by the word's modification of "advertisement or promotion," in order to create a bright line standard. Likewise, the Commission should clarify the types of content that are "transactional or relationship." In so doing, the Commission would eliminate the current uncertainty surrounding content which is clearly not commercial, such as billing or account statements.

2. The Commission should eliminate altogether the Subject Line Test under sections 316.3(a)(2)(i) and 316.3(a)(3)(i). The test not only duplicates, to some extent, the existing prohibitions on deceptive subject lines under the Act, but it conflicts with existing state laws against deceptive headers. It also eliminates the "primary purpose" test Congress created, in favor of the functional equivalent of an "any purpose" test.

3. If the Commission retains the Subject Line Test, we believe it should, at a minimum, make sections 316.3(a)(2)(i) and (ii), and section 316.3(a)(3)(i) and (ii), conjunctive, instead of disjunctive, or shift the presumption from "commercial" to "transactional or relationship."

4. The Commission should provide further clarification of several areas of the proposed rule including: the absence of the word "body" in section 316.3(a)(2) and inclusion in section 316.3(a)(3); the treatment of messages containing content which is strictly transactional or relationship; and the treatment of messages that combine all three categories of content addressed in the NPR.

5. Consistent with our comments on the ANPR, the Coalition believes that the CAN-SPAM Act requires that the intent of the sender determine the "primary purpose" of the message. We believe, therefore, that the Commission should reconsider its decision to ignore the perspective of the sender in favor of a "totality of the relevant facts" test.

II. The Commission's Proposed Rule is Vague and Unworkable as Drafted.

As has been made clear by the Commission's exhaustive treatment of the proposed rule, how the term "primary purpose," is ultimately defined will determine to a large extent the success or failure of the CAN-SPAM Act passed by Congress last year. It is therefore critically important that its meaning and application be unambiguously understood by those entities, including our members, who will inevitably find themselves subject to the Act's compliance obligations.

Under the specific language of the Act, a commercial email message may not be sent unless three conditions are met:

- 1) “Clear and conspicuous” identification that the message is an advertisement;
- 2) “Clear and conspicuous notice” of the opportunity to decline, or “opt-out,” of the receipt of any “further” such email messages; and
- 3) A valid physical postal address is provided for the sender. 15 U.S.C. 7704(a)(5).

An email message does not qualify as a “commercial” message, however, unless its “primary purpose” is “the commercial advertisement or promotion of a commercial product or service.” (15 U.S.C. 7702(2)(a)).

Specifically, the Act, and the compliance obligations that attach to it, does not cover (15 U.S.C. 7702(2)(B)) a “transactional” or “relationship” message, which is defined as a message, the “primary purpose” of which is to allow companies to engage in normal business activities with their customers. 15 U.S.C. 7702(17). As the NPR itself notes, Senator Ron Wyden (D-OR) in his Senate Floor remarks, stated that Congress’ goal in passing the Act was “not to discourage legitimate online communications between businesses and their customers.” 69 Fed. Reg. at 50,096 fn 40.

The Coalition was intimately involved with the Congressional process which brought about the eventual adoption of the CAN-SPAM Act, and remains wholly supportive of the need for federal preemptive legislation to regulate unsolicited commercial email. That said, many companies, including some of our members, are concerned about the difficulties of including mandated “opt-outs” in electronic mail, principally because, as a practical matter, it is systemically difficult to include an “opt-out” with every message, manage compliance in order to avoid stumbling into an unintentional or accidental violation and/or screen mailing lists for such email against a database of prior opt-out requests. Compliance is particularly difficult with respect to individual email sent by an in-house sales force personnel rather than via a bulk email department.

We believe that it is incumbent on the Commission to more clearly define what is or is not a transactional or relationship message. For example, we don’t think that billing or account statements can *ever* be anything other than transactional or relationship content. The same applies to newsletters and, for example, warranty notices. Even if a warranty notice is accompanied by an opportunity to extend that warranty, and even if that opportunity for extension is mentioned in the subject line, the email still should be a transactional or relationship message with no opt-out requirement. The Commission should articulate clearly the categories of messages that always will be immune from the opt-out requirement, in order to preserve companies’ ability to do business.

The Commission's Proposal

The Commission has chosen to divide potential commercial emails into three categories:

- 1) emails that contain only content that advertises or promotes a commercial product or service, as required by 15 U.S.C. 7702(2)(a);
- 2) so-called “dual purpose,” or hybrid, emails that contain both commercial and either “transactional or relationship” messages, as required by 15 U.S.C. 7702(2)(b); and
- 3) email messages that contain both commercial and non-transactional or relationship content.

The Coalition will first focus its comments on the second category of email, the “dual-purpose,” or “hybrid” email, although many of our observations are equally applicable to the third category of email.

The Commission proposes two distinct tests in order to decide whether an email is “commercial” and thereby subject to the obligations of the CAN-SPAM Act. Under the Commission’s proposed language, a message will be deemed to be commercial if either “the recipient reasonably interpreting the subject line” of the message “would likely conclude” that the message “advertises or promotes a product or service” (“Subject Line Test”), or, if the Subject Line Test is not determinative, the message’s transactional or relationship language does not appear “at or near the beginning” of the message (“Message Test”). 69 Fed. Reg. at 50,094.

III. The Commission Should Eliminate the Subject Line Test in its Entirety.

Subject Line Test. We fully recognize and share the concerns the Commission has about deceptive subject headings, and about the strength of the materiality requirement that the statute puts in place before deception, pursuant to 15 U.S.C. 7704(a)(2), can be established. However, we do not believe that the “Subject Line Test” is a practical solution. There are simply too many ambiguities. This test forces companies anxious to comply with the law into an untenable position. In deciding how to structure their subject lines, they will be called upon to “roll the dice” and weigh the relative risks of finding themselves at odds with applicable state laws affecting deceptive headers, as well as the CAN-SPAM Act’s own language on the subject, against the risks of coverage by the Act. We believe that section 7704(a)(2) already ensures that subject lines accurately reflect the content of email messages providing consumers with the necessary protection. Moreover, as proposed, the NPR erases the “primary purpose” test, even as applied to the recipient’s perspective, in favor of an “any purpose” test, whereby the slightest mention of a commercial reference in the subject line may lead the recipient to conclude that the message is a commercial message and thereby subject to the statute.

Congress clearly anticipated that businesses would be able to include commercial material in their transactional or relationship messages without becoming subject, among other things, to a mandatory opt-out, a point the Commission concedes on page 50,096. However, as we have noted, the Commission's own explanation of its proposed rule seems to indicate that the proposed rule will be interpreted to mean that virtually any expression of commercial purpose in the subject line can be interpreted by a reasonable recipient as a "commercial" message. On page 50,094, the Commission says the email will qualify as a commercial email if "a recipient reasonably interpreting the subject line of the message would likely conclude that the message advertises or promotes a product or service." Coverage does not appear to hinge, as it should at a minimum, on whether the recipient would believe the "primary purpose" of the message is to advertise or promote the product; instead all that is necessary is the recipient's perception that this is one purpose.

In footnote 37, by contrast, the NPR states that its discussion "is not intended to require that every email message with any commercial content must use a subject line that refers to the message's commercial content," (emphasis added) but the explanation does not give us any sense of comfort. We do not know when, if at all, the inclusion of a commercial reference in the subject line will not lead to the "likely" conclusion that the message is "commercial." The proposed rule appears to be slanted in favor of finding that the email is commercial.

Consistent with Congressional intent, we believe that the Commission should preserve the ability of companies to convey transaction-related and account-related information via dual purpose email rather than creating a mechanism, such as the Subject Line Test, by which consumers can decide that transaction-related information really is promotional based merely on the subject line, irrespective of the content of the message. We believe that it is in the best interests of the consumer for senders to be able to accurately reflect the content of their messages in the subject line, even if the commercial content is limited, without necessarily becoming subject to coverage by the Act, as the Congress intended.

For these reasons we believe the Commission's apparent decision to discard the "primary purpose" test articulated by Congress, and substitute, in effect, a wholly new "any purpose" test in the subject line, is contrary to what Congress intended and places senders in an untenable position. We continue to believe senders deserve a "bright line" test whenever possible, and the Commission's proposal fails to fulfill that obligation. We therefore urge the Commission to eliminate the Subject Line Test from sections 316.3(a)(2)(i) and 316.3(a)(3)(i) of the proposed rule.

Although we urge the Commission to eliminate the Subject Line Test in its entirety, should the Commission retain the test, we respectfully recommend that the Commission consider either of two alternatives to section 316.3(a)(2) as proposed.

First. The Commission might consider changing “or” at the end of section 316.3(a)(2)(i) to “and,” thereby lessening the uncertainty of the subject line criteria and yet allowing the consumer to read the transactional or relationship message and then ignore any commercial content that may follow. This option achieves Congress’s goal, which was to provide consumers with a mandatory opt-out for purely commercial emails as well as those with a primary commercial purpose, yet it also allows, again as Congress intended, for transactional or relationship messages to include commercial content without triggering the mandatory opt-out requirement. It also has the ancillary benefit of making it safe for companies to engage in “full disclosure” in the subject line of transactional or relationship emails.

Second. We propose a shift of the presumption now contained in section 316.3(a)(2) so that a “dual-purpose” or hybrid email will be considered to be a transactional or relationship if, based on the subject line:

1) the recipient reasonably interpreting the subject line would likely conclude that the message relates to a transaction the recipient agreed to enter into with the sender, or a product or service the recipient purchased from the sender, or a subscription, account, contract or other ongoing relationship the recipient has with the sender; or

2) the transactional and relationship content appears at or near the beginning of the message.

The second option has the benefit of embracing the perspective of the recipient, as the Commission prefers, while also presuming that an email message does not have a primary commercial purpose if the recipient’s reasonable impression is either that its primary subject is a transactional or relationship purpose or the transactional or relationship text is at or near the beginning of the message. The recipient can then simply ignore or delete any commercial content that may follow. The underlying goal of the CAN-SPAM Act, that of protecting the unsuspecting consumer from unsolicited commercial emails, is thereby preserved.

Message Test. In its analysis of proposed section 316.3(a)(2)(ii), the Commission concludes that if a recipient reasonably interpreting the subject line “would not likely conclude” that the message advertises or promotes a product or service, it then becomes necessary to use the “Message Test” in order to determine whether the primary purpose of the entire email is commercial. This second test involves determining where the commercial content is positioned in the message. If it appears “at or near” the beginning of the message, ahead of the transactional or relationship portion of the message, then it may be deemed to be commercial. 69 Fed. Reg. at 50,096. We believe this aspect of the analysis of proposed section 316.3(a)(2) is workable, but, as noted previously, not when used in the disjunctive with respect to subsection (a)(2)(i). The effect of the disjunctive is to make the first test potentially dispositive, so that even if transactional content appears first in the body of the message, if the recipient perceives the message is advertising based on the subject line, the sender will need to include an opt-out.

We urge the Commission to seriously consider our expressed concerns about the proposed language in the NPR, and to reflect, as well, on our suggested alternatives, both of which we believe will achieve the goals of both the Congress and the Commission without creating the compliance uncertainty that plagues the current language.

Because of the uncertainty surrounding what content is to be included in the first two categories of email messages, we remain concerned about the third criteria the Commission creates in section 316.3(a)(3), that of a message that contains commercial content as well as “other content” not pertaining to transactional or relationship material. What is “other content?” By offering guidance on whether, for example, newsletters or educational materials or new product or service announcements are considered transactional or relationship material, the Commission will eliminate much of the uncertainty surrounding the third category of email messages.

As explained in the discussion of section 316.3(a)(3)(ii), the Commission draws on its traditional analysis of advertising under section 5 of the FTC Act to use such factors as:

“The placement of content that advertises or promotes a product or service at the beginning of the body of the message; the proportion of the message dedicated to such content; and how color, graphics, type size, and style are used to highlight commercial content.”

There is no particular weight given to any of these factors so that, once again, it becomes difficult for businesses to determine, in advance, what their compliance exposure is. We therefore suggest that the last two elements in this list of factors be revised to read as follows:

“The content that advertises or promotes a product or service is at or near the beginning of the body of the message, or is the majority of the content, or is highlighted in a color, graphics, type size, or style that is likely to draw the recipient’s attention away from the other content.”

There is still a subjective element to this test, but we believe it will be easier for company personnel to understand and apply than that presently proposed by the NPR.

IV. The Commission Should Clarify Several Ambiguities under Section 316.3(a)(2).

First, with respect to subsection (a)(2)(ii), the NPR speaks of the placement of the functions listed in section 316.3(b) “at or near the beginning of the message.” However, for some unexplained reason it fails to include the word “body, “ as it explicitly does in the proposed rule contained in section 316.3(a)(3)(ii). By the use of the word “message,” in conjunction with the references to “body” throughout the discussion of Dual-Purpose Messages, and in particular in the heading “b. Analysis of the Body of a Dual-Purpose Message To Determine the Message’s Primary Purpose” on page 50,095, we assume that

the Commission's failure to include "body" in section 316.3(a)(2) was an oversight. If so, we believe the word "body" should be added to the language of the final rule, so that it reads "at or near the beginning of the body of the message," just as section 316.3(a)(3)(ii) does.

Second, the NPR's current categories do not appear to anticipate responses to a recipient's previous inquiry or request for information, such as a quotation on a transaction that has not yet been agreed to or entered into. We believe that the explanation of proposed section 316.3(b) relating to transactional or relationship functions of email messages should expressly state that the following types of email (in addition to email to existing customers or about transactions the recipient has agreed to enter into with the sender) will be considered transactional or relationship messages:

- 1) Those that have purchased a product or newsletter;
- 2) Those who have opted-in to receive emails from the sender;
- 3) Those that respond to an inquiry or request for quotation that the recipient has previously made to the sender; and
- 4) Emails sent to limited numbers of people in the context of a business-to-business relationship.

Third, as noted previously, there are emails about which there should be no debate as to their "transactional or relationship" nature, and to which "primary commercial purpose," cannot possibly apply, even if commercial content is included along with them. Such emails include bills and periodic account statements. The explanation of proposed section 316.3(b) should likewise include such a clarification.

Fourth, the Commission does not appear to recognize the existence of a fourth category of potential email, that of emails that include commercial, transactional or relationship and "other content" within a single message. How is this kind of email to be handled? Such emails could certainly be read as lumped into section 316.3(a)(2), and that would be fine with us, but we believe it needs clarification.

Finally, the Coalition recognizes the Commission's stated intention of only addressing "primary purpose" in this rulemaking. However, we believe it is important to note that a number of issues remain inextricably linked to primary purpose, including but not limited to the issue of multiple sender. As stated in our comments on the ANPR, the Commission should clarify that an email with multiple advertisers should not be treated as having multiple senders. Instead the sender should be the service that collects and maintains the email list, who often emails on behalf of multiple advertisers, and who are clearly identified by the email address from which the message is sent. Having multiple senders would require each advertiser to maintain opt-out lists, would be technically complicated and prohibitively expensive, and would undermine consumer privacy. Likewise, the Commission should clarify the categories of messages considered

“transactional or relationship,” in order to avoid the confusion that will exist if the Commission determines that there are multiple senders of commercial email.

V. The CAN-SPAM Act Requires that the Intent of the Sender Determines the “Primary Purpose” of an Email Message.

We note that the Commission has chosen, in this NPR, to propose a rule that rejects any definition of “primary purpose” that is based on the sender’s intent, noting that the CAN-SPAM Act “refers to the primary purpose of the message, not of the sender,” and then concluding that, “while one way to determine a message’s purpose could be to assess the sender’s intent, a more appropriate way is to look at the message from the recipient’s perspective.” 69 Fed. Reg. at 50,098.

Respectfully, we do not believe the Commission has the legal authority to change a “purpose” or “intent” test enacted by the Congress into a wholly different “effects” test, simply because it views the latter as “more appropriate.”

“[P]urpose,” as the functional equivalent of “intent,” is repeated time and time again by numerous United States Supreme Court cases equating a showing of, for example, discriminatory “purpose” with a showing of discriminatory “intent” *See, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252,265 (1977). In such circumstances, the Supreme Court has consistently equated the two terms and required the examination of all relevant evidence of intent or purpose, not just the “effects”, or the “impact” of the action, *Id.*, at 266. “[I]mpact alone is not determinative” in proving “purpose” or “intent”. *Id.*

In sum, prevailing law, which appears to have been rejected by the Commission in this proposed rule, holds that “*purpose* may often be established from the totality of the relevant facts,” which we believe rightly includes the perspective of the recipient, but also includes, among other relevant evidence, other evidence of the sender’s intent or purpose, as well. *See Washington v. Davis*, 426 U.S. 229 (1976) (emphasis added).

Interpretations of analogous statutes also appear to counsel in favor of our view and not that of the Commission. For example, Section 5 of the Voting Rights Act requires pre-clearance of changes in voting procedures to make sure that any change “does not have the *purpose* and will not have the *effect* of denying or abridging the right to vote on account of race or color.” 42 U.S.C. 1973 (emphasis added). In that context, discriminatory “effect” is judged without regard to the intent of the jurisdiction proposing the change, but a showing of discriminatory “purpose” requires an analysis of the intent of the jurisdiction making the change. *See, e.g., Reno v. Bossier Parish School Board*, 528 U.S. 320, 328 (2000).

We contend that the term, “primary purpose,” was created by the Congress to distinguish this statute from those where violations can be shown by either intent or effect. *See, e.g., 7 U.S.C. 192(d)* (prohibiting the sale of any article “for the *purpose* or

with the *effect* of manipulating or controlling prices” in the meatpacking industry) (emphasis added); 12 U.S.C. 1467a(c)(1)(A) (barring savings and loan holding companies from engaging in any activity on behalf of a savings association subsidiary “for the *purpose* or with the *effect* of evading any law or regulation applicable to such savings association)(emphasis added); 47 U.S.C. 541(b)(3)(B)(1994 ed., Supp. III) (prohibiting cable franchising authorities from imposing any requirement that “has . . . the *purpose* or *effect* of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof)(emphasis added). Nowhere in the statute does the Congress even inferentially suggest that the “perspective of the recipient,” or the email’s “effect” on the recipient, should be the controlling factor. “[P]rimary purpose” is all that the statute requires, and it is plainly stated.

Ironically, the Commission’s proposed rule may well have an effect which is contrary to that which Congress intended when it passed the CAN-SPAM Act. Specifically, companies, in an effort to ensure compliance with the law, may opt to send two separate emails to the same recipients, one exclusively commercial and the other exclusively transactional, thereby ensuring compliance while further clogging the recipient’s in-box and multiplying the impact on Internet Service Providers.

On page 50,094 of the NPR, the Commission notes that the “‘primary purpose’ of an email message *must focus* on what the message’s recipient would reasonably interpret the primary purpose to be” (emphasis added). This statement, however, is not accompanied by any legal authority whatsoever for the conclusion that such a message “must focus” on the recipient’s perspective. What reference there is to any legal precedent for this view appears on page 50,098 in footnote 69, and attempts to justify the Commission’s position on what is necessary for the Commission to prove a violation of section 5 of the Federal Trade Commission Act (FTC Act).

However, the plain language of the statute does not direct the Commission to interpret “primary purpose” in the context of what is necessary to enforce section 5 of the FTC Act. Indeed, if Congress had actually intended for the Commission, as it has, to interpret this critical phrase “consistent with the criteria used in enforcement of section 5,” it clearly would have said so, as it specifically did with regard to deceptive subject headings. 15 U.S.C. 7704(a)(2). But it did not.

Further along in its discussion on page 50,098 of the NPR, the Commission explains its decision to “decline[], at this time”, to consider the sender’s intent by referring to the analytical approach it has historically taken with respect to what constitutes “advertising,” presumably using the “commercial advertisement or promotion” language in 15 U.S.C. 7702(2)(A) as an analog.

Once again, though, the NPR provides no legal authority, in either the statute or in the legislative history, which would justify discarding the “purpose” test. Absent expressed Congressional intent to the contrary, we believe it is fair for the Commission to use its historic analysis of commercial advertising to determine what constitutes

advertising in an email, but “primary purpose,” as the NPR itself notes, again on page 50,098, applies to the “intent” or “purpose” behind the “message,” not to any “advertisement or promotion” it may contain.

We are therefore unaware of any Commission legal precedent for defining the term “primary purpose” as it has, and the NPR does not cite any. It is, then, the Coalition’s view that the Commission must be guided in the exercise of its regulatory authority by existing Supreme Court precedent, the plain meaning of the statute and the applicable legislative history, and not by its own policy preferences.

The Commission’s proposed language, if adopted, would ignore the sender’s perspective entirely, a view that we believe is unsupported by current law. We therefore urge the Commission to reconsider its current analysis and revisit its conclusions with respect to this portion of its proposal, with a view to providing that the “totality of the circumstances,” not those of the recipient alone, should determine what is and what is not the message’s “primary purpose.”

In conclusion, the Coalition appreciates the opportunity to comment on the Commission’s proposed rule. Should the Commission require or desire any further elaborations of our views, please feel free to call me or our counsel, Tom Boyd, at 202-756-3372. We look forward to continuing to work with the Commission as it navigates the “primary purpose” rule as well as other regulatory clarifications.

Sincerely,

A handwritten signature in black ink, appearing to be 'Susan Pinder', written over a horizontal line.

Susan Pinder
Chairperson