

BEFORE THE FEDERAL TRADE COMMISSION

Washington, D.C. 20580

*In the Matter of*

CAN-SPAM Act Rulemaking, Project No. R411008

*Comments of*

**Brown-Forman Corporation**

Brown-Forman Corporation (“B-F”) is a diversified producer and marketer of fine quality consumer products, including Jack Daniel’s, Southern Comfort, Finlandia Vodka, Canadian Mist, Fetzer and Bolla Wines, Korbel California Champagnes, Lenox, Dansk, and Gorham tableware and giftware and Hartmann luggage. B-F is one of the largest American-owned companies in the wine and spirits business.

B-F strives to maintain the privacy of data given to B-F by consumers, and, as a producer and marketer of alcohol beverages, B-F strives to ensure that its advertising and marketing communications related to alcohol beverages comply with the myriad federal, state and local laws and regulations applicable to the industry and its own internal marketing guidelines. Among other things, B-F takes great care to ensure that its marketing communications are not directed to persons who are not of legal drinking age. Finally, as a trademark owner, B-F is always concerned with the content of its advertising and marketing communications. As a matter of corporate policy and good business practices B-F maintains control over the content of its advertising and marketing communications for the products it owns, whether offline or online.

In its recent Notice of Proposed Rule Making, the FTC set forth proposed revisions to the definition of “sender.” B-F believes that the meaning of the term “control” as used in the FTC’s proposed revisions to the definition of “sender” should be modified to clarify that the exercise of “control” by one advertiser does not mean the other advertisers relinquish *all* control over the message. We therefore offer the following comments and suggestions.

Section 316.2(m)—Definition of “Sender”

In a typical marketing situation, two or more companies may market their products jointly in a single e-mail. For example, in a two company situation, Company A pays Company B for the right to send an advertisement about Company A’s products or services to Company B’s mailing list. Under this scenario, Company A usually does not know the identities of the persons on Company B’s mailing list, but, under the current CAN-SPAM Act, both Company A and B would likely be viewed as “senders” because Company A procures the transmission of the e-mail, while Company B transmits the e-mail. Therefore, among other things, multiple opt-outs would need to be placed within the joint marketing e-mail.

The FTC acknowledged the following concerns which support the view that there should be only one sender (typically, in the scenario discussed above, Company B):

1. multiple opt-out provisions would likely result in consumer confusion;
2. treating each advertiser in an e-mail as a sender would require multiple suppression lists, which would add unnecessary administrative costs and complexity for legitimate e-mail marketers, and could endanger traditional joint marketing arrangements and chill electronic commerce;
3. multiple suppression lists would force a business to disclose its suppression list in contravention of privacy policies and creating privacy risks; and
4. multiple opt-outs would run counter to consumer expectations that one company takes charge of the situation.

To address these concerns, the FTC correctly considered that there are two criteria for determining the identity of a single sender in a multiple-advertisement scenario: 1) control of the message; and 2) recipient expectations. The FTC then proposed rules that were intended to permit the situation where there would be only one sender for many joint marketing e-mails, by proposing that “when one or more person’s products or services are advertised or promoted in a single electronic mail message, each such person who is within the Act’s definition will be deemed to be a ‘sender,’ *except that*, if only one such person both is within the Act’s definition and meets one or more of the criteria set forth below, only that person will be deemed to be the ‘sender’ of that message:

- (1) the person controls **the content** of such message;
- (2) the person determines the electronic mail addresses to which such message is sent; or
- (3) the person is identified in the ‘from’ line as the sender of the message.”

Proposed 16 CFR §316.2(m)(emphasis added). The Proposed Rules state that one seller need not satisfy all three of these criteria, but no other seller may satisfy any of them.

While B-F, when it acts in the role of Company A, does not usually create the message in the e-mail sent by Company B, our policy is to insist on “veto rights” over the content. We do not necessarily tell Company B the exact language to use in its message, but we do review the content and notify Company B if parts must be deleted or revised, for example, if the message contains content to which we object either as a responsible marketer of alcohol beverages or as a trademark owner. Because B-F is a producer and marketer of alcohol beverages, we must control the content of the e-mail message, including controlling the content of parts of the e-mail message that we do not create. This is because federal and state laws and regulations (including those administered by TTB) require B-F to follow strict requirements in labeling, marketing and

promoting alcohol beverages, including, among other things, that the alcohol beverages be marketed only to those of legal drinking age. Therefore, B-F must exercise control over the content of a commercial e-mail message to ensure that co-marketers do not use words or images that may be viewed as being targeted toward persons under legal drinking age.

We have a similar concern in that the FTC's proposed rule may have the unintended result of preventing trademark owners like B-F from taking advantage of joint marketing agreements designed to meet the terms of this rule, lest they risk damage to their valuable trademark rights. United States trademark law requires that a brand owner like B-F exercise control over the use of its trademarks. This we believe is especially true when engaging in joint marketing programs because if the trademark owner yielded control over the use of a trademark in order to avoid running afoul of the CAN-SPAM Act, the trademark owner could over time seriously weaken its rights.

Due to this element of control, B-F could be construed as a "sender" satisfying (1) above, even though we fit within the "Company A" role, which should not be deemed a "sender" under the stated intent of the Proposed Rules. Thus, we believe that it is necessary for the FTC to modify the phrase "controls the content of the message" in order to avoid this unintended potential result. Because alcohol beverage manufacturers and marketers, and trademark owners need to be able to "control" the content of their advertising messages at least in giving their final approval for the messages, the FTC's definition should be clarified to address this issue. If the proposed rule is not modified, the FTC will have promulgated a rule that, depending on one's interpretation, could effectively prevent any trademark owner or alcohol beverage manufacturer or marketer, or others in highly regulated industries, from entering into a joint marketing agreement under which its co-marketer would be the sole sender of an e-mail, because the manufacturer or marketer cannot yield complete control over the content of the message. In this case, the proposed rule will not serve the purpose for which it was created, namely, to permit advertisers to contract with other companies or co-marketers so that only one company acts as the "sender" for the purposes of the CAN-SPAM Act.

Therefore, we ask that the FTC revise its proposed rule, to state in 16 CFR §316.2(m)(1) that "the person exercises physical control over the delivery of such message;" or equivalent language which will clarify the definition. We believe this will alleviate ambiguity and achieve the FTC's goal of eliminating the undue compliance burden facing multiple advertisers seeking to participate in a single message to consumers.

We appreciate the opportunity to comment on this proceeding and we hope that you will take our suggestions into consideration. If you have questions or would like further information, please feel free to contact me.

Respectfully submitted,

BROWN-FORMAN CORPORATION

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