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VIA ELECTRONIC FILING

**Re: CAN-SPAM Act Rulemaking, FTC Project No. R411008
Comments of Sonnenschein Nath & Rosenthal LLP**

On May 12, 2005, the Federal Trade Commission (“FTC”) published a Federal Register Notice of Proposed Rulemaking (“NPRM”) seeking public comment on proposed rules regarding certain provisions of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2004’s (“CAN SPAM” or “the Act”) implementation. Among the topics considered in the NPRM are the definition of “transactional or relationship message” and how CAN SPAM applies to certain email marketing practices, including the transmission of messages distributed in response to an electronic subscription. Sonnenschein provides counsel to numerous clients on compliance with the CAN SPAM Act, and has an understanding of the impact various provisions of the Act will have on the practical, real-world operation of business marketing efforts. Sonnenschein appreciates the time and effort the FTC has given to this matter, and submits the following recommendations on behalf of itself, and not a particular client, for further clarification of the complex issues related to transactional and relationship messages.

In the NPRM, the FTC responded to numerous comments on email messages delivered pursuant to an electronic subscription. Specifically, a number of commenters requested that subscriptions to newsletters, membership clubs or other similar electronic delivered content be treated as transactional or relationship messages because they deliver goods or services that the recipient is entitled to receive under the terms of a previous transaction. In response to these comments, the FTC indicated that in its “primary purpose” rulemaking, the Commission had already stated that exclusively commercial email messages do not satisfy section 7702(17)(A)(v), citing footnote 91 of that rulemaking.¹ In footnote 91, the FTC stated that if an email message consists exclusively of commercial content (such as a catalog purely comprised of advertisements), then the email message would be a single-purpose commercial message. However, the FTC’s reliance on footnote 91 is undermined by contradictory comments by the FTC within the same primary purpose rulemaking. There is a significant tension between the cited footnote 91 and comments contained in footnote 90² of the rulemaking. In footnote 90, the FTC stated that “determining whether a periodical delivered via email will be deemed to be ‘transactional or relationship’ under 7702(17)(A)(v), however, requires consideration of the

¹ 16 CFR § 316 (2005), Project No. R411008: Definitions and Implementation Under the CAN-SPAM Act of 2003: Statement of Basis and Purpose and Final Rule, at fn. 91.

² Id. at fn. 90.

recipient's understanding of what he or she is entitled to receive under the terms of the agreed-to transaction. . . . If the content that a recipient has requested pursuant to 7702(17)(A)(v) is overwhelmed by commercial content that clearly exceeds what the recipient might reasonably have expected, then the sender cannot persuasively argue that the primary purpose of its message is to deliver content the recipient is entitled to receive under the terms of a previously agreed upon transaction.”

If, as stated in the primary purpose rulemaking, the test is based on a recipient's understanding of what he or she will receive, it is not at all clear why such a purely commercial message can never be considered to be a pure transactional or relationship message if that is the specific content that the recipient requested. There is no rational justification for making a distinction between commercial content and mixed commercial and informational content. The proper analysis is the *intent* of the consumer, and not the *content* of the message that the consumer transacted to receive. Accordingly, we respectfully disagree with the FTC's position that an exclusively commercial message cannot satisfy Section 7702(17)(A)(v) and we request that the FTC use its discretionary rulemaking authority to clarify the circumstances under which a purely commercial email message can be considered to be a transactional or relationship message.

Consider this example: a new parent visits a baby-oriented website with clear disclosure of electronic subscription services available to visitors, and the parent registers at the website knowing that under the terms of the transaction the parent has an opportunity to receive a 6 month subscription to a baby-oriented newsletter that combines product coupons with informative articles. Under the FTC's test, each edition of that newsletter would presumably be considered a transactional or relationship message, unless the commercial content exceeds what the recipient would have expected. Another parent, when faced with similar clear terms and disclosures, signs up for the same website and chooses to receive emails containing nothing but coupons for baby products, instead of coupons that are combined with articles. After reviewing the terms of the transaction, including an express disclosure that the subsequent emails will contain nothing but baby coupons and *no* informational content, the parent signs up and requests that content. Under the primary purpose rulemaking at footnote 90, the delivery of the requested baby coupons should be considered to be a transactional or relationship message because it is exactly what the recipient understood that she would be receiving. Under footnote 91, however, such emails cannot be transactional because the content is solely commercial.

It is unclear why CAN-SPAM would operate differently in these two examples. In both cases, the recipients are receiving exactly the content they sought, requested and expected. The distinction appears to be based on an assumption, not contained within CAN-SPAM itself, that no consumer would ever wish to receive pure commercial content. The popularity, however, of e-coupon websites, price drop alerts, and automatic eBay listing notifications belies that assumption. In the Internet space, many consumers want to receive emails alerting them to

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product sales or discounts. Forcing companies to combine such desired content with undesired non-commercial content in order to qualify as a transactional and relationship message gives less power to the consumer, rather than more.

Accordingly, in its discretionary rulemaking, the FTC should set forth a rule for determining when it is permissible for a purely commercial message to be delivered pursuant to the transactional and relationship exception. In so doing, the FTC should distinguish between a bona fide transaction of signing up for a service or subscribing to receive emails, coupons, or electronic newsletters and the mere provision of affirmative consent to receive commercial emails. Such a distinction is appropriate because the Act was crafted to deter *unwanted* commercial email, not to prevent consumers from subscribing to desired commercial email programs. If a transaction was formed properly, the protection provided by the transaction or relationship obviates the need for an evaluation of a message's content. This treatment would be consistent with the way in which physical world transactions occur, and the intent of Congress in creating a "transactional or relationship" exception.

Sincerely,

Marc J. Zwillinger

cc: Kerry E. Reichs, Esq.