American Bankers Association
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Jonathan Thessin
Senior Counsel
Center for Regulatory Compliance
Phone: 202-663-5016
E-mail: Jthessin@aba.com

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Submitted electronically

Mr. Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex B)
Washington, DC 20580

Re: Request for Comment on Rule Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM Rule, 16 CFR part 316, Project No. R711010)

Dear Mr. Clark:

The American Bankers Association[1] (ABA) appreciates the opportunity to comment on the Federal Trade Commission's (Commission) rule implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act[2] (the CAN-SPAM Act or the Act).[3] The Commission seeks comment on the "efficiency, costs, benefits, and regulatory impact"[4] of the rule[5] (the CAN-SPAM Rule or the Rule), as part of the Commission's "systematic review of all Commission regulations and guides" that it conducts on a 10-year schedule.[6]

ABA supports the Commission's efforts, through this review, to ensure that the CAN-SPAM Rule and the Commission's implementing Compliance Guide for Business[7] "remain relevant and are not unduly burdensome."[8] Electronic mail messages (referred to in this letter as e-mail messages, messages, or e-mails) provide an efficient means for banks and other businesses to communicate important messages to their customers, particularly time-sensitive, non-commercial marketing notifications regarding the customer's account. We urge the Commission not to

[1] The American Bankers Association is the voice of the nation's $17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits and extend more than $9 trillion in loans.
[2] Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. § 7701 et seq.
[3] Rule Review and Request for Public Comment, Rule Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM Rule), 82 Fed. Reg. 29,254 (June 28, 2017) (hereinafter CAN-SPAM Rule Review).
[4] *Id.* at 29,254.
[5] CAN-SPAM Rule, 16 C.F.R. § 316.
[6] CAN-SPAM Rule Review, 82 Fed. Reg. at 29,254.
[7] Fed. Trade Comm'n, *CAN-SPAM Act: A Compliance Guide for Business*, Sept. 2009, https://www.ftc.gov/tips-advice/business-center/guidance/can-spam-act-compliance-guide-business.
[8] *See* Intent to Request Public Comments, Regulatory Review Schedule, Fed. Trade Comm'n, 82 Fed. Reg. 29,259, 29,259 (June 28, 2017).

impose additional barriers on the ability of banks to use e-mail to communicate with their customers.

We also urge the Commission to clarify that educational e-mails and invitations to events that are sent to existing customers constitute a "transactional or relationship message" under the CAN-SPAM Act.[9] These messages provide beneficial information to customers and are sent to further the customer's existing relationship with the bank.

I. Background

The CAN-SPAM Act imposes restrictions on the sending of commercial e-mails. These restrictions include prohibiting the use of header information (i.e., the "to," "from," and "date" of the e-mail) that is false or misleading and prohibiting the use of subject headings that would be likely to mislead a recipient about a material fact regarding the e-mail.[10] The Act also requires that senders of commercial e-mails identify the e-mail as an advertisement, advise recipients how to opt out of receiving such e-mails in the future, and respect a recipient's desire to opt out.[11]

The Act defines a commercial e-mail as an "electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service . . . ."[12] The Act also states that a commercial e-mail "does *not* include a transactional or relationship message."[13] In 2005, the Commission issued CAN-SPAM Rule provisions to provide criteria for determining whether the primary purpose of an e-mail message is commercial (and thus subject to the CAN-SPAM Act's restrictions) or transactional or relationship in nature (and not subject to the Act's restrictions).[14] Specifically, the Rule describes four categories of e-mails and discusses whether messages in each category are commercial:

(1) If an e-mail contains exclusively commercial content, then its primary purpose is commercial.

(2) If an e-mail contains exclusively transactional or relationship content, then its primary purpose is transactional or relationship.

(3) If an e-mail contains both commercial content and "transactional or relationship content," then the primary purpose of the e-mail is commercial if a recipient would conclude from the subject line that the e-mail contains commercial information or if the e-mail's transactional or relationship content does not appear, in whole or substantial part, at the beginning of the body of the e-mail.

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[9] *See* 15 U.S.C. § 7702(17).
[10] *Id.* § 7704(a)(1) & (2).
[11] *Id.* § 7704(a)(3) - (5).
[12] *Id.* § 7702(2)(A).
[13] *Id.* §§ 7702(2)(B) (emphasis added).
[14] Definitions and Implementation Under the CAN-SPAM Act and Final Rule, 70 Fed. Reg. 3,110 (Jan. 19, 2005).

(4) If an e-mail contains both commercial content and other content that is neither commercial nor transactional or relationship in its content, then the primary purpose of the e-mail is commercial if a recipient would conclude from the subject line that the e-mail contains commercial information or if a recipient would conclude from reading the body of the e-mail that the primary purpose of the e-mail is commercial.[15]

II. Discussion

A. The Commission Should Not Impose Additional Restrictions on the Ability of Banks to Send Important Messages to Consumers

Consumers receive important communications from banks through e-mail messages. Banks use e-mail to advise customers of a number of non-telemarketing communications, such as suspicious activity on the customer's account, data security breaches, low account balances, delinquent accounts, and loan modification options, and to confirm customer-initiated servicing requests and account changes (such as a change of address).[16] Banks also use e-mail to advise customers of a product similar to one that the customer previously purchased or to provide a promotional incentive for the customer's increased utilization of a product or service previously purchased. In addition, banks send e-mails to existing or prospective customers to promote new or existing products or services.

We urge the Commission to preserve the ability of existing and prospective customers to receive these valuable messages by not imposing additional requirements on these communications.

B. The Commission Should Clarify that Educational E-mails and Invitations to Events Sent to Existing Customers Are Transactional or Relationship Messages[17]

We appreciate the Commission's efforts, through the 2005 CAN-SPAM Rule provisions, the additional Rule provisions issued in 2008,[18] and the Commission's Compliance Guide for Business, to distinguish commercial from transactional or relationship messages. We agree with the Commission's conclusion that, if the primary purpose of an e-mail is not the "advertisement

[15] 16 C.F.R. § 316.3(a) - (c).
[16] Banks choose to send e-mail messages, in many instances, because of the unnecessarily burdensome requirements that must be followed, under the Telephone Consumer Protection Act, for sending the same information by a phone call or text message.
[17] In response to the Commission's request, we note that ABA's request for clarification responds to Issue B.1 of the Commission's Rule review: "Should the Commission modify the Rule to expand or contract the categories of messages that are treated as transactional or relationship messages?" CAN-SPAM Rule Review, 82 Fed. Reg. at 29,255.
[18] Definitions and Implementation Under the CAN-SPAM Act and Final Rule, 73 Fed. Reg. 29,654 (May 21, 2008).

or promotion of a commercial product or service," the presumption is that the e-mail is not a commercial e-mail under the Act.[19]

Despite these efforts, the Commission has not spoken directly to the application of these categories (commercial and transactional or relationship) to two types of e-mails that banks and other businesses frequently send, particularly to existing customers: educational e-mails and invitations to events. Consequently, there is uncertainty about how to treat these messages and, out of an abundance of caution (largely to avoid litigation risk), some banks treat these messages as commercial in the context of the regulations.

The Commission should clarify that educational e-mails and invitations to events that are sent to individuals with whom the bank (or other company) has a preexisting customer relationship constitute a "transactional or relationship message" under the CAN-SPAM Act. Educational e-mails and invitations to events do not promote a specific product of the bank. Thus, they are not commercial, in that their primary purpose is not the "advertisement or promotion of a commercial product or service."[20] Instead, these messages deepen the bank's relationship with its existing customer by providing valuable information to the customer. Educational e-mails include newsletters or "alerts" that inform customers about developments at the bank or within the banking industry. Invitations to bank events similarly provide customers with opportunities to learn about the bank or industry developments.

These two categories of e-mails should be considered a "transactional or relationship message" under the CAN-SPAM Act. The Commission's 2008 additional Rule provisions stated that a sender's "previous dealings with the recipient" of the e-mail is a "predicate for a message to be deemed 'transactional.'"[21] Similarly, one definition in the Rule for "transactional or relationship content" is premised on the "ongoing commercial relationship" between the sender and recipient.[22] Educational e-mails and invitations to bank events are sent to customers with whom the bank has had prior dealings and are intended to further the bank's ongoing relationship with the customer. The Commission should clarify that these e-mails are transactional or relationship content under the Rule.

III. Conclusion

ABA supports the Commission's efforts to review its CAN-SPAM Rule to determine if the Rule and the Commission's Compliance Guide for Business are relevant and not unduly burdensome for banks and other businesses. Consumers receive important communications from their banks through e-mail messages, and we urge the Commission not to impose additional restrictions on these messages. We also ask the Commission to clarify that educational e-mails and invitations to events that are sent to the bank's existing customers constitute a "transactional or relationship

[19] *Id.* at 29,663 (quoting 15 U.S.C. § 7704(a)(2)(A)).
[20] 15 U.S.C. § 7702(2)(A) (defining commercial e-mail).
[21] Definitions and Implementation Under the CAN-SPAM Act and Final Rule, 73 Fed. Reg. at 29,664.
[22] 16 C.F.R. § 316.3(c)(3).

message" under the CAN-SPAM Act. These messages are sent on the basis of the bank's relationship with the customer and provide the customer with valuable information.

We look forward to working with the Commission as you continue your review of the CAN-SPAM Rule.

Sincerely,

Jonathan Thessin
Senior Counsel, Center for Regulatory Compliance