

April 20, 2004

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Federal Trade Commission
CAN-SPAM Act
Post Office Box 1030
Merrifield, VA 22116-1030

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

American Subcontractors Association

The American Subcontractors Association, Inc., (ASA) is an IRS §501(c)(6) tax-exempt nonprofit, national, membership trade association of 5,500 construction subcontractors and suppliers. ASA's 52 auxiliaries and independent chapters represent subcontractors and suppliers in 32 states and the District of Columbia. The association, its chapters and its members increasingly use e-mail communications in the routine conduct of business.

Introduction.

ASA's interest in this rulemaking is twofold. ASA's members are mainly commercial and industrial subcontractors and suppliers in the construction industry. These members rely on e-mail to transmit and receive business information, including, but not limited to, clarifications of bid solicitations, requests for proposals, requests for information, and advertising and promotional materials targeted to potential clients. ASA, on the other hand, relies on e-mail messages primarily to educate members, nonmember subcontractors and suppliers, the business community as a whole, lawmakers, and the general public about the construction industry.

In April 2002, ASA conducted a scientifically valid survey of a sample of ASA members, the results of which indicated that 87.7% of ASA members used e-mail for business purposes. While the use of e-mail by ASA members has increased since 2002, the regulations implementing the CAN-SPAM Act have recently introduced new uncertainty into the proper use of this medium for business purposes. While many ASA members have expressed their support for the Act's overall goal of limiting nuisance commercial e-mails, many are uncertain as to which of their business e-mail communications are subject to the special requirements placed on "commercial e-mail messages" as against "transactional or relationship e-mail messages" not subject to these special requirements. ASA members are concerned with how best to ensure that their businesses follow the law.

As a tax-exempt nonprofit organization, ASA is similarly concerned with following the law, but from a somewhat different point of view. ASA's activities are, both by definition and as a matter of fact, mainly non-commercial in nature. ASA produces a number of newsletters, Web sites, educational workshops and other materials that are primarily educational, including materials transmitted by e-mail. Whereas ASA's essential educational mission is constant, from 2000 to 2002, the number of ASA

members who *most preferred* to receive information by e-mail increased from 21.4% to 30.7% of the membership. Furthermore, ASA is certain that the percentage of our members who most prefer to receive information by e-mail has increased since 2002. In other words, “E-mail is here to stay.” ASA is concerned to ensure that its communications do not run afoul of the regulations implementing the CAN-SPAM Act.

Regulations Regarding the Primary Purpose of Commercial E-Mail - § 3(2)(C).

Section 3(2)(A) of the CAN-SPAM Act defines a “commercial electronic e-mail message” as “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose).”

ASA believes that any regulation regarding the primary purpose of commercial e-mail messages, as required by § 3(2)(C), should recognize that the definition of a “commercial electronic e-mail message” does not apply to the e-mail communications of a tax-exempt nonprofit organization to its members, subscribers or donors. The definition of a commercial e-mail message in the statute narrowly focuses on the “*commercial* advertisement or promotion of a commercial product or service” [emphasis added]. By implication, the statute contemplates the *non-commercial* advertisement of such products/services. ASA fully supports the comments on this matter submitted to the Commission on April 9, 2004, by the American Society of Association Executives.

The Advanced Notice of Proposed Rulemaking in 16 *Code of Federal Regulations* 316 poses questions relating to possible criteria for determining whether “the primary purpose” of an electronic mail message is, or is not, the commercial advertisement or promotion of a commercial product or service. Possible “criteria” that are mentioned include the commercial advertisement or promotion being “more important than all of the e-mail’s other purposes combined,” being “more important than any other single purpose of the email, but not necessarily more important than all other purposes combined,” and being “more than incidental” to the message. None of these suggested criteria can provide a sufficiently objective standard against which to judge the primary purpose of an e-mail message. The relative importance or incidence of a commercial advertisement or promotion in an e-mail message is subject to interpretation except when the whole message, or none of the message, is a commercial advertisement or promotion. Is an e-mail message containing an article on a topic of interest to the recipient, but accompanied by a small but prominent commercial advertisement for a book, “primarily commercial”? The “criteria” that are contemplated here cannot consistently judge the truth. For similar reasons, a “net impression” standard would be flawed.

Rather, the purpose of the CAN-SPAM Act — to provide a disincentive to bulk commercial e-mailers that send nuisance e-mails — would best be served if the Commission were to adopt a set of precise regulatory criteria by which to judge the primary purpose of a commercial e-mail. For example, an e-mail message might be considered “primarily commercial” if it:

- States the availability of a commercial product or service for purchase, states its sale price, or states a discount, rebate or other financial incentive to purchase it; or
- Asks the recipient to provide payment or credit information related to the purchase of a commercial product or service; or
- Makes representations about the condition or performance of a commercial product or service, in particular superiority claims (e.g., “better than,” “stronger than”), superlative claims (e.g., “best,” “strongest”), testimonials or endorsements.

Such criteria would have the merit of allowing e-mail senders and recipients to readily identify e-mail messages that are “primarily commercial,” and the business community would already be familiar with the terms of such criteria.¹ In addition, senders of e-mail messages could be reasonably confident in knowing when they actually met the criteria or not — without trying to judge the relative “importance” or “incidence” of a commercial advertisement or promotion in the message. Meeting any of the criteria would serve as *prima facie* evidence of a “primarily commercial” e-mail message; meeting none would create a presumption to the contrary. Such precise criteria would also allow the Commission more easily to identify violators of the CAN-SPAM Act who send commercial e-mail messages without following the appropriate procedures.

Clarification of Definition of Transactional or Relationship Message - § 3(17)(A).

Section 3(17)(A) of the CAN-SPAM Act defines “transactional or relationship messages” as those e-mail messages the primary purpose of which is either:

- to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;
- to provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient;
- to provide specified types of information with respect to a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender;
- to provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled;
- or
- 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.

¹ See, for example, the Better Business Bureau’s Code of Advertising at <http://www.bbb.org/membership/codeofad.asp>.

Furthermore, § 3(17)(B) of the Act authorizes the Commission to modify this definition “to expand or contract the categories of messages that are treated as transactional or relationship messages for purposes of this Act to the extent that such modification is necessary to accommodate changes in electronic mail technology or practices and accomplish the purposes of this Act.”

ASA believes that the expression “to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender” is not sufficiently precise to cover the intended class of “transactional or relationship” e-mail messages. For example, a general contractor might send an invitation to bid (ITB) to a subcontractor, thereby initiating a potential “transaction” between the two parties. The subcontractor might then respond to the ITB with an e-mail message advertising its services and asking for clarification of parts of the ITB. Such communication is routine in the construction industry, but is it clear whether “the recipient [in this case, the general contractor] has *previously agreed to enter into*” a transaction with the subcontractor, or ought the subcontractor fear that its message could be construed as a violation of the Act? ASA believes that any regulation implementing this portion of the law would be all the better for recognizing the definition at § 3(17)(A)(i) to mean “to facilitate, complete, or confirm a commercial transaction that the recipient has initiated or previously agreed to enter into with the sender” [added section underlined]. This simple change would clarify the status of many routine business communications in the construction industry, and other industries in which ITBs are employed.

Conclusion.

In recognition of the realities of business relationships in the construction industry, ASA recommends that regulations implementing the CAN-SPAM Act properly define a transactional or relationship e-mail message to include e-mail messages that facilitate transactions initiated by the recipient. ASA also recommends that such regulations recognize the non-commercial relationship of tax-exempt nonprofit organizations and their members, subscribers and donors. Finally, ASA believes that such regulations must provide the most objective, and reasonably workable, criteria for determining that an e-mail message is “primarily commercial” in nature, or not.

Sincerely,

/s/ David Mendes /s/

David Mendes
ASA Director of Communications