



September 13, 2004

Federal Trade Commission
Office of the Secretary
Room 159-H
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
ATTN: CAN-SPAM Rulemaking, Project No. R411008

Re: Definitions, Implementation, and Reporting Requirements
Under the CAN-SPAM ACT
69 FR 50091 (August 13, 2004)

Dear Sir or Madam:

America's Community Bankers ("ACB")¹ welcomes the opportunity to comment on the Federal Trade Commission's (the "Commission") Notice of Proposed Rulemaking, which would implement the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "CAN-SPAM Act" or "Act").²

Specifically, the Commission is proposing to define the relevant criteria for establishing the "primary purpose" of an electronic mail message. As well, the Commission is proposing to define what constitutes a "transactional or relationship" message under the Act.

ACB Position

ACB seeks to reduce unnecessary regulatory burdens whenever possible. At the same time, we support the efforts of the Commission to develop CAN-SPAM Act regulations that recognize the legitimate business purposes accomplished through the use of electronic mail communications.

We acknowledge that the Commission has attempted through this rulemaking to address certain concerns about unnecessary restrictions on legitimate users of electronic mail, which were highlighted in our earlier comments submitted in response to the Commission's March 11, 2004 advanced notice of proposed rulemaking.³

¹ America's Community Bankers is the member driven trade association that represents the nation's community banks. ACB members pursue progressive, entrepreneurial and service-oriented strategies in providing financial services to benefit their customers and communities.

² 69 Fed. Reg. 50091 (August 13, 2004).

³ 69 Fed. Reg. 11776 (March 11, 2004).

Defining “Primary Purpose”

Under the proposed rule, email communications that contain both commercial and transactional or relationship components would be considered as having a primary commercial purpose if the subject line of the email, reasonably interpreted, would lead the reader to conclude that the message promotes or advertises a product or service. As well, the message would be deemed to have a primary commercial purpose if the transactional or relationship components of the message do not appear at or near the beginning of the electronic communications.

While ACB recognizes that these specific factors will offer useful guidance to senders of electronic communications when making “primary purpose” determinations, in its final rule, we urge the Commission to revise its proposed standard slightly to require that an email has a commercial “primary purpose” when *both* (1) the email has a subject line from which a reasonable recipient would conclude that the message is an advertisement or solicitation; *and* (2) the message’s transactional or relationship content does not appear at or near the top of the electronic communications.

At the same time, we remain concerned about the highly subjective nature of these determinations. ACB believes the Commission must consider the good faith efforts of senders of electronic mail messages in meeting their compliance obligations under the CAN-SPAM Act.

As with any subjective standard, compliance is easier to determine after the fact. And, notwithstanding the specific criteria, given the intensely fact-based nature of determining whether an electronic mail message has a commercial primary purpose under either of the Commission’s possible standards, it will be extremely important to recognize the good faith compliance efforts of legitimate originators of electronic mail messages.

Transactional and Relationship Messages

The Commission proposes to define “transactional or relationship” messages under the proposed rule to include messages:

- (1) To facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;
- (2) 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;
- (3) To provide--
 - (i) Notification concerning a change in the terms or features of;

- (ii) Notification of a change in the recipient's standing or status with respect to; or
 - (iii) At regular periodic intervals, account balance information or other type of account statement 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;
- (4) To provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or
- (5) 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.

ACB believes that the proposed definition of "transactional or relationship" appropriately recognizes the many forms of electronic communications that can occur as part of a regular, established business or customer relationship. Because business relationships can be quite varied, however, we also believe that the Commission should clarify in its final rule that such examples of "transactional or relationship" messages are not exhaustive. For example, ACB believes the following types of email specifically also should be considered transactional or relationship and not commercial in nature:

- E-mail sent at the request of the recipient. If a recipient has requested an e-mail message, then they do not expect to have an opt out in the message. Newsletters, e-magazines, requested advertiser services, and other types of messages requested by the recipient would fall outside of the scope of commercial electronic messages. If the recipient subsequently chooses to terminate their request, they would be able to do so.
- E-mail messages that provide or distribute editorial content, including newsletters.

We believe that making the list of transactional or relationship messages non-exhaustive is consistent with the purposes of the CAN-SPAM Act and its legislative history, as noted by the Commission in the preamble.⁴

Conclusion

ACB appreciates the opportunity to comment on this very important matter. We look forward to working with the Commission as it adopts final regulations implementing the CAN-SPAM Act.

⁴ "[T]he harm that CAN-SPAM is meant to address – primarily, the time and resources wasted in dealing with unwanted unsolicited commercial messages – probably does not result from messages that begin with transactional or relationship content, followed by commercial content, if any." 69 Fed. Reg. at 50096.

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Should you have any questions, please do not hesitate to contact the undersigned at (202) 857-3122 or via email at mbriggs@acbankers.org, or Charlotte M. Bahin, Senior Vice President, Regulatory Affairs, at (202) 857 3121 or cbahin@acbankers.org.

Sincerely,

A handwritten signature in cursive script that reads "Michael W. Briggs". The signature is written in black ink and is positioned to the left of the typed name.

Michael W. Briggs
Chief Legal Officer