

**BEFORE THE
FEDERAL TRADE COMMISSION**

CAN-SPAM Act Rulemaking

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Project No. R411008

Comments of American Business Media on Notice of Proposed Rulemaking
(“primary purpose”)

The following comments are submitted on behalf of American Business Media in response to the August 13, 2004 Notice of Proposed Rulemaking (the “NOPR”) issued by the Federal Trade Commission (the “Commission”) soliciting comments on its proposed “primary purpose” regulations implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the “CAN-SPAM Act” or the “Act”), 16 C.F.R. Part 316, 69 Fed. Reg. 11776 50091.

Introduction

American Business Media, which previously submitted comments in the Advance Notice of Proposed Rulemaking proceeding (69 Fed. Reg. 11776 (March 11, 2004), is an association representing more than 200 business-to-business information providers such as publishers, producers of print and other publications and websites, and organizers of trade shows and similar events.

As explained in those earlier comments, for members of American Business Media, and the Association itself, e-mail has become a crucial means of communication with existing and potential members, subscribers, advertisers and other customers. Much of the e-mail sent by American Business Media and its members consists of transactional or relationship messages that are exempt from nearly all provisions of the Act. Some American Business Media members, and the association, advertise their products and services, such as publications,

seminars or trade shows, via e-mail. These messages are targeted to those in the specific industries covered by the publication or other media of the sender. Although these messages are arguably within the definition of commercial e-mail, they are almost always welcome, and as a result, relatively few recipients routinely opt out of further e-mail communication from American Business Media members.

American Business Media and its members also distribute newsletters and other publications by e-mail, many of which contain advertising content along with editorial and informational content. By any reasonable standard, these publications should be deemed to be non-commercial under the “primary purpose” test and therefore not subject to the Act and the regulations.

Because e-mail is an integral aspect of the communication and advertising practices of its members, American Business Media encourages the Commission’s efforts to develop rules aimed at eliminating unsolicited “spam.” American Business Media supports rules that will protect businesses making legitimate use of e-mail communications while serving as an effective deterrent to spammers.

In the sections below, American Business Media will address issues related to each of the three categories of e-mails identified in the NOPR.

Mixed advertising and editorial content (proposed § 316.3(a)(3))

One of American Business Media’s key concerns in this proceeding is that legitimate newsletters produced by the association and by its members that contain advertising (as do nearly all editorial print products in this country) not be subject to colorable claims that they are “commercial” under a primary purpose test. Although we recognize that some have argued to the Commission that any e-mail with *any* commercial content should be deemed commercial, the

Commission has properly rejected such claims as inconsistent with Congressional imposition of the “primary purpose” standard.

That’s the good news. The bad news is that, like virtually all commenters, American Business Media would like there to be a bright line test applicable to e-mails that contain both commercial and non-commercial material, but Congress has assured that there will not be. American Business Media submits that no set of totally objective criteria can possibly do justice to a subjective statutory standard requiring the sender of e-mails, and ultimately the agencies charged with enforcing the Act, to apply a “primary purpose” test. The goal of this proceeding, therefore, should not be to avoid subjectivity but to develop an appropriate test with subjective features.

In American Business Media’s earlier comments we stated:

Among the Commission’s proposed criteria, the “net impression” standard provides the most viable primary purpose test, at least as a starting point. Several of the other proposed criteria should constitute additional factors to consider in a determination of whether or not an e-mail’s primary purpose is commercial. Evaluating the “net impression that the material as a whole makes on the reasonable” e-mail recipient ensures that an e-mail’s primary purpose will be measured against a relatively objective, common-sense standard.

The most important factor should be whether “an e-mail’s commercial advertisement or promotion is more important” than the e-mail’s other purposes. If the elements of the e-mail consisting of “commercial advertising or promotion” materials would be perceived by reasonable recipients as “more important” than the e-mail’s other contents, then the e-mail should be considered a commercial e-mail message subject to the Act. On the other hand, e-mail messages with significant editorial content intended to inform or educate the recipient (without endorsing or promoting a particular product in the manner of an advertisement) would not be considered a commercial e-mail message under this standard.

The NOPR appears to adopt this position, which American Business Media continues to support.

We recognize that other commenters, perhaps the majority of business commenters if one counted noses, previously contended that that the focus of the inquiry should be on the sender and not on the recipient, suggesting a “but for” test. Under this test, for example, an e-mail would be considered to be commercial if it would not have been sent but for the advertising content.

American Business Media’s concern with such a test is a very practical one. Electronic newsletters, like hard-copy magazines and newspapers, typically or perhaps usually consist of editorial content as well as advertising content. Very few publications, whether hard copy or electronic, are able to charge enough to their recipients to cover the cost of producing the editorial material and its distribution (with the latter being substantially higher, of course, in the case of hard-copy publications). Thus, they carry advertising, which is often welcome by readers, to support the editorial product.

Here’s the problem. American Business Media is concerned that, if a “but for” test were applied to the senders of electronic newsletters, who are certainly not intended to fall within the Act’s ambit, they could very well fail (unless the Commission also addresses newsletters specifically to assure that, by rule, they do not). Publishers of electronic newsletters (as well as magazines and newspapers) are usually commercial enterprises that seek to distribute information and, while doing so, earn a profit for their owners. Would they distribute these newsletters (or magazines) “but for” the advertising? In many cases, they would not.

Therefore, at this point and recognizing the dangers, American Business Media is willing to take its chances with a test that assesses the nature of a mixed ad/editorial e-mail by reference to its net impression on the recipient. Our relative comfort with this

result stems in part from the crucial fact that the CAN-SPAM Act, unlike the Telephone Consumer Protection Act, contains no private right of action by recipients against senders. This difference means that American Business Media's members, and others, can find themselves in jeopardy under the former only if the FTC or state officials determine that they have violated the Act, which American Business Media members will not do and which their electronic newsletters certainly do not do. In contrast, American Business Media members and many others have in the past couple of years been buffeted by (and forced by the cost of litigation to settle) totally meritless lawsuits for allegedly sending advertising faxes without the appropriate consent of the recipient. These suits and threats of suits have been prompted largely by a merry band of unscrupulous plaintiffs' lawyers who realized that legitimate companies sending legitimate and lawful faxes made easy targets. If the CAN-SPAM Act permitted these lawyers to expand their reach to senders of e-mails, American Business Media would be far less comfortable with the application of a subjective, net impression on the recipient test.¹

¹ The Commission either misread or misconstrued an earlier comment by American Business Media. The NOPR (69 Fed. Reg. at 50102) attributed to American Business Media, among others, the position that "it may be proper to treat a message as commercial when commercial content funds noncommercial content." In fact, what American Business Media said (comments at 6) was:

An additional factor that should bear on whether an e-mail is a commercial e-mail message is whether the purpose of the advertising is to support the other, non-advertising content of the message. American Business Media members may send trade-related newsletters, articles, and other informative material via e-mail. Sometimes, products or services of potential interest to recipients may be advertised alongside the informative material as a means of financing the newsletter or article. In this instance, the primary purpose of the e-mail is clearly not to advertise or solicit, but to inform. When the advertising material contained in an e-mail message is, according to a reasonable recipient, merely ancillary to the message's informative or editorial contents, then the message should be outside the scope of commercial e-mail. On the other hand, if the editorial content appears contrived, is *de minimis*, or consists of a lengthy "article" that clearly promotes the products or services that are advertised alongside the supposedly editorial content of the message, the primary purpose of the message is likely commercial, and the e-mail should be subject to the Act.

Mixed advertising and transactional or relationship content (proposed § 316.3(a)(2))

In American Business Media's initial comments, we suggested that an e-mail containing both advertising content and transactional or relationship content should be deemed to be a transactional or relationship e-mail. Having considered that Commission's NOPR and its reasoning, American Business Media can support the Commission's proposed net impression test applicable to e-mail messages that contain both transactional or relationship messages and advertising, for much the same reasons that we support the net impression test for combined advertising and editorial e-mails. Notwithstanding this general agreement, however, we are not convinced that a senders' honesty in making clear in the subject line that the message contains some advertising content ought to count against the sender.²

The all-advertising e-mail (proposed § 316.3(a)(1))

It seems inarguable that, as set forth in the NOPR, an e-mail message containing only content that advertises or promotes a product or service should be considered a commercial e-mail subject to the Act. The Act, however, is not quite so simple, because it is possible that an e-mail message contains only information that can be said to promote a product yet falls under the definition of a transactional or relationship message removing it from the "commercial" category. The NOPR touches on this possibility (69 Fed. Reg at 50,100) in addressing e-mails between a non-profit entity and its members, stating that "it is possible—or even likely—that such messages are 'transactional or

² The Commission proposes that this type of mixed message will be deemed commercial if *either* (1) the recipient reasonably interpreting the subject line would likely conclude that the message advertises or promotes a product or (2) the messages transactional or relationship content does not appear at or near the beginning of the message.

relationship messages’ under § 7702(17)(A)(v), depending upon the facts of the particular membership.” American Business Media seeks clarification and expansion of this statement.

The statutory reference is to a message the purpose of which is 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.” The NOPR goes on to say that, even if the message in question has commercial content, it will not be deemed to be a commercial message unless it meets either part of the two-part test established for mixed commercial/transactional-relationship messages.

It is not clear why the Commission believes that an e-mail from a non-profit association to its members would likely satisfy § 7702(17)(A)(v). It is possible that the Commission agrees with American Business Media’s earlier comments to the effect that an e-mail from such an association to its members promoting, for example, a seminar sponsored by the association for which an attendance fee is charged is transactional or relationship in nature, even though it contains no other content, because the information conveyed is information to which the recipient is “entitled” by virtue of the “transaction” of having joined the association. But it is also possible that the Commission does not agree.

For this reason, American Business Media seeks a further explanation, an explanation that ought to be crucial for the many associations that have submitted comments and for all of those that did not. It is common for associations to offer goods and services fully within the purposes of the organization to members, and to do so by e-

mail to save the cost of hundreds or thousands of mailings. These offers frequently carry a small charge to cover the costs of such goods and services.³ While such e-mails could be deemed to be 100% commercial, they could also be deemed to be transactional or relationship in nature. Because receipt of information about an association's products, services, events, or activities is a membership benefit that members pay for as a component of their membership in an association, it is reasonable to conclude that they are, indeed, transactional or relationship e-mail.⁴ The Commission would be doing a great favor to thousands of associations by ending any doubt and so ruling.

Respectfully submitted,

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³ For example, American Business Media offers media survey results, studies, publications, meetings and seminars to its members, usually for a modest fee.

⁴ Support for this assertion may be found in the fact that members of an association would have legitimate objections if they did not receive announcements of an upcoming seminar or of the results of a survey offered for sale by their association.