



September 13, 2004

Mr. Donald S. Clark
Federal Trade Commission
Office of the Secretary
Room 159-H (Annex C)
600 Pennsylvania Avenue, NW
Washington, DC 20580

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

Dear Secretary Clark:

As a leading association of the Internet industry, the Information Technology Association of America (ITAA) represents more than 375 member companies. We are firmly convinced that the continued growth of the "information economy" depends on providing consumers with tools to exercise their online preferences in a manner consistent distinctive interactive nature of online communications.

The Information Technology Association of America has joined with approximately twenty other trade associations in comments prepared by Ron Plesser of Piper Rudnick regarding the above captioned proceeding. In addition to the points made in the joint "association" comments, we respectfully wish to underscore and elaborate on several essential points for the Commission's consideration.

1. Revise the standard for e-mail messages with content that is "commercial" and "transactional or relationship."

ITAA suggests that the Commission should develop more objective criteria, one that are not expectation of a reasonable recipient. The Commission should shift the presumption now contained in section 316.3(a)(2) so that a "dual-purpose" e-mail will be considered to be a transactional or relationship email by evaluating whether:

The recipient reasonably interpreting the subject line would likely conclude that the message relates to a transaction the recipient agreed to enter into with the sender, or a product or service the recipient purchased from the sender, or any other ongoing relationship the recipient has with the sender or the transactional and relationship message appears at or near the beginning of the message.

Such an option embraces the perspective of the recipient preferred by the Commission, while also presuming that an e-mail message does not have a commercial primary purpose if the recipient's reasonable impression is either that its primary subject is a transactional or relationship purpose or its clear text begins with a transactional or relationship message.

Even if these conditions are not met, the message could still be considered transactional and should be put to the further test utilized by the Commission for dual purpose commercial/non-commercial messages. In this case, the “net-impression” of the entire message should be applied to determine whether the message is transactional or commercial.

2. Acknowledge that e-mail that is “pure” transactional is excepted from consideration as having a “commercial” primary purpose.

The Commission should acknowledge that e-mail that solely consists of transactional or relationship content or does not contain any commercial content should not be subject to the CAN-SPAM rules. Such treatment is analogous to that set forth by the Commission that solely contains commercial content. The Commission should indicate in the rule that such messages always have a primary purpose that is transactional or relationship. These messages with solely transactional or relationship content or not commercial content represents a unique category of e-mail recognized by the Congress as outside of the scope of the regulations imposed on commercial e-mail.

In addressing this scenario, the FTC should indicate that if such e-mail contains commercial content that is within the scope of transaction or that a recipient would reasonably expected to receive based on the terms of a transaction, the "primary purpose" of such e-mail shall deemed transactional or relationship, and the dual purpose tests would not apply.

3. Evaluate the reasonable recipient’s expectation to opt out of messages with certain types of content.

Should the Commission adopt a reasonable-recipient standard, then the Commission should look first to whether a reasonable recipient could expect to receive an “opt out” prior to evaluating whether the recipient would interpret the message as having a “primary purpose to advertise or promote a commercial product or service.” There are many types of messages, such as e-mail that the recipient has agreed to receive in exchange for receiving a benefit like free e-mail accounts, from which a reasonable recipient would not expect to have the ability to opt out. The Congress did not intend that an opt-out apply to such messages.

Thank you for your careful consideration of these important issues.

Sincerely,

/s/

Mark Uncapher
Senior Vice President & Counsel