



September 13, 2004

VIA Electronic Submission

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

NetCoalition respectfully submits the following comments on the Federal Trade Commission's ("Commission") Notice of Proposed Rulemaking ("NPRM") to implement the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act" or "Act")¹. Sections 7702(2)(C) and 7711(a) of the Act direct the FTC to prescribe rules, within 12 months after December 16, 2003, defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message and making such other modifications as the Commission deems appropriate to implement the provisions of the Act. The Commission requested comments on the NPRM by public announcement dated August 13, 2004.

NetCoalition serves as the public policy voice for some of the world's largest and most innovative Internet companies on the key legislative and administrative proposals affecting the online world.²

The President signed into law the CAN-SPAM Act on December 16, 2003, and the Commission was charged with issuing regulations "defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message." The term "primary purpose" is incorporated in the Act's definition of the key terms "commercial electronic mail message" and "transactional and relationship message." Specifically, "commercial electronic mail message" encompasses "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 web site operated for a commercial purpose)." Similarly, "transactional and relationship message" means "an electronic mail message the primary purpose of which is:

¹ Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, 69 Fed. Reg. 50091 (Proposed August 13, 2004)(to be codified at 16 C.F.R. pt 316).

² Current membership of NetCoalition includes Bloomberg LP, CNET Networks, Google, Yahoo!, California ISP Association, North Carolina Consortium of ISPs, Ohio ISP Association, Virginia ISP Association, Wyoming ISP Association, and a number of small and local ISPs.

- (i) to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;
- (ii) 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;
- (iii) 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;
 - (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;
- (iv) to provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or
- (v) to deliver goods or services, including product updates or upgrades, which the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.”³

NetCoalition recognizes the challenging task faced by the Commission in drafting this Rule, and is writing to provide the Commission with some practical considerations from the perspective of implementing the intent of the Act without hampering businesses’ ability to respond to consumer requests and interests. Specifically, the Commission should consider the Rule’s effect on the every day ability of companies to respond to and fulfill consumer requests for content, including newsletters and special offers that are part of an increasingly important Internet relationship legitimately desired by both bona fide senders and consumer subscribers.

As an initial matter, NetCoalition commends the Commission’s recognition of the value of email messages of a transactional or relationship nature. By creating three sets of criteria, the Commission has adopted the common sense view that the regulations should distinguish between messages which arise from a business relationship and those which are basically “cold call” contacts with no pre-existing relationship. The Commission recognizes that it was the intent of Congress to protect messages of a transactional nature. Appropriately, the Commission’s criteria distinguish between messages that package commercial content with transactional or relational content, and messages that package commercial content with some other type of content. Despite the Commission’s sensible treatment of dual purpose messages in the NPRM, the current criterion does not address certain key questions, particularly with regard to the use of the term “primary purpose” in the definition of transactional and relationship messages, does not employ the Net Impression test broadly enough, and does not provide sufficient guidance to the industry in areas of ambiguity, such as what is required in the subject line of dual purpose messages.

Accordingly, NetCoalition respectfully suggests the following essential points for the Commission’s consideration. **First, the Commission should adopt a fourth set of criteria to distinguish messages that fall within the definition of transactional and relationship messages (and therefore are not subject to the dual purpose test), even when the messages contain content that promotes goods and services. Second, the criteria proposed by the**

³ Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. §§ 7701-7713 (2004).

Commission for dual purpose messages that contain both commercial and transactional content should be considered only a “safe harbor.” If a message does not qualify for the safe harbor, the Commission should still analyze the message under the Net Impression test rather than solely under a subject line or content placement test to determine whether the message’s primary purpose is commercial. Third, the Commission should provide additional guidance on when a subject line must reference the commercial content in a dual purpose message. Fourth, the “deliberate structuring” concept should be expressly rejected by the Commission as unworkable.

1. A Fourth Set of Criteria Is Necessary to Provide Clear Guidance to the Industry

The three proposed standards cover messages that (a) contain solely commercial content; (b) combine commercial content with transactional or relationship content; and (c) combine commercial content with content that is neither commercial nor transactional or relationship. The FTC has not, however, proposed standards for determining when a message (that may promote a product or service) consists solely of “transactional or relationship content,” and is therefore not subject to any of the three new FTC tests. It is critical to clarify this definition because the term “primary purpose” is twice incorporated in key definitions under the Act, defining both key terms “commercial electronic mail message” and “transactional and relationship message.” This need for a fourth standard to identify such messages is pressing because, as discussed below, the delivery of certain online materials, such as newsletters, magazines and circulars may fail the dual purpose test even in circumstances where the materials were requested and/or paid for by the recipient.

A transactional or relationship message represents a unique category of email. The nature of the association between the sender and recipient in these categories excludes such emails from consideration as commercial under CAN-SPAM. Congress clearly recognized the desirability of transactional and relationship emails to both senders and consumers, and has sought to protect them from inappropriate regulation, by excluding from the definition of a commercial email message those messages whose primary purpose is the “deliver[y of] goods or services . . . 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,” or those messages that are sent to “complete . . . a commercial transaction,” ***without regard to whether such messages contain content pertaining to products or services available for purchase.***

Furthermore, as discussed more completely in section (ii) below, the proposed regulations should incorporate key indicators for categorizing certain messages as transactional or relationship-based messages, to which the dual purpose test should not be applied. Instead, the Commission’s proposed regulations could be applied to deem such messages as “dual purpose,” resulting in an inappropriate application of the subject line and content placement tests.⁴

⁴ Just as the Commission created a test for “pure” commercial messages, the Commission should have an opposing test for “pure” transactional messages. Messages outside of the pure commercial or pure transactional tests could fall into either category depending on the outcome of the dual purposes analysis.

i. Emails that are Covered by the Definition of Transactional or Relationship Messages Should Not Be Considered Commercial, Even If Such Messages Have Content that Promotes Goods or Services.

One simple way to illustrate the need for a fourth “primary purpose” criterion is through illustration.⁵ Assume that the terms of a purchase agreement for an online computer gaming platform provide that the consumer will be entitled to receive monthly emails announcing when software titles playable on that platform are available for purchase. In this example, the subsequent monthly e-mails containing the information expected by the consumer would fall completely under the “transactional and relationship exception,” and would not be subject to the dual purpose test.

As an additional example, a consumer who purchases spa services from a spa facility may be entitled to a monthly newsletter with editorial content and advertisements for products consistent with a healthy-living lifestyle. If the newsletter were properly described to the consumer in the terms accompanying the spa purchase, the entire content should be covered by the transactional and relationship definition and the dual purpose test should not apply regardless of the product-related information contained in the newsletter.

In both of these examples, the commercial nature of the content in the e-mail messages should not transform the message into a dual purpose email. Despite the fact that the e-mails may promote goods or services, the transaction with the consumer expressly contemplated that these types of emails would be delivered to the recipient. In such circumstances, it would be inappropriate to apply any form of dual purpose test, because the primary purpose of the email is to fulfill the consumer expectations, as manifested in the original transaction.

Similarly, under this scenario, it would be inappropriate to apply a subject line test for similar reasons – the consumer has transacted to receive the email and knows what he or she is receiving. In fact, mention of such commercial content in the subject line may be helpful or necessary to identify the emails as containing the content previously requested by the consumer. This serves the goals of the Act and facilitates consumers’ ability to recognize and process requested messages. As no useful purpose is served by deeming a message commercial merely because of its subject line, the Commission should also clarify that when a subject line that appears to be commercial is attached to a transactional or relationship message, such a subject line does not indicate that the message is automatically commercial. It could be an unreliable indicator, in fact, where a transaction that involves the delivery emails of commercial goods is involved.

The FTC should specifically include the fourth test because the Act is not designed to place additional obligations on companies who are distributing content, even commercial content, to consumers based on a consumer’s request and a transaction between the consumer and the business entity. The Act was crafted to deter *unwanted* commercial email, not to prevent consumers from subscribing to email programs that provide emails related to products or

⁵ The following examples are not meant to be exhaustive as to the types of messages that can or should be considered as “pure” transactional or relationship messages. Just as the Commission created a test for “pure” commercial messages, the Commission should have an opposing test for “pure” transactional messages. Messages outside of the pure commercial or pure transactional tests could fall into either category depending on the outcome of the dual purposes analysis.

services. Accordingly, the analysis for this category of emails should turn more closely on the relationship between the sender and the recipient of email, not solely the content. If emails containing discount grocery coupons are sent to a consumer because that consumer signed up for a grocery coupon service, the “commercial” content of the coupons contained in the email should be irrelevant for purposes of CAN-SPAM compliance, because such content was understood and requested by the consumer, and does not need to be evaluated beyond the fact of the consumer’s transaction in requesting the content. This treatment would be consistent with the way in which physical world transactions occur, and the intent of Congress in creating a “transactional or relationship” exception.

As an illustration, discount coupon books, women’s fashion magazines, and computer shopper magazines, are often purchased more for the commercial advertising content than the editorial content. Nevertheless, the electronic delivery of such materials could fail the dual purpose test because advertising content often appears at the beginning of, and dominates, such publications. We believe that this would be an incorrect application of CAN-SPAM. The key factor is the nature of the recipient’s expectations at the time that the transaction or relationship that generated the subsequent messages was formed. If that transaction was formed properly, the protection provided by the transaction or relationship obviates the need for an evaluation of a message’s content.

In addressing this fourth scenario, the FTC should consider promulgating the following language — **where commercial content, if any, of “transactional or relationship” mails, such as electronic newsletters, do not go beyond what the recipient reasonably expected to receive based on the terms of the initial transaction, the “primary purpose” of such email shall be deemed transactional or relationship, and the dual purpose tests shall not apply, provided that the initial transaction with the recipient was a legitimate, verifiable transaction.**

ii. Emails Sent Pursuant to a Legitimate, Verifiable Transaction should and can be distinguished From Emails Sent Pursuant to Consent

The transaction of signing up for a service or subscribing to receive emails, coupons, or electronic newsletters is distinct from mere provision of affirmative consent to receive commercial emails (which, alone, only exempts a sender from the labeling requirements of the Act). Obviously, any clarity provided by the FTC in drawing this distinction would be helpful to both senders and recipients of such mailings. The following criteria, while not required or exhaustive, sharpen the boundary between mere consent and a bona fide transaction.

First, as a foundational matter, any transaction commences with consent. Consent is the baseline of the transaction, where the consent represents a “meeting of the minds” as to the terms of the transaction or relationship formed. Each party understands the “four corners” of what will occur under the transaction. For example, the consumer understands what content he or she will receive in requested messages, and the sender understands the limits of what content can be conveyed based on the reasonable expectations of the consumer.

Second, and a necessary corollary to the first point, the terms of the transaction must be clearly and conspicuously disclosed. The complete terms should be available to the consumer at the time the consumer enters into the transaction. This ensures that the consumer and the sender

each have a clear understanding of the terms, and that the consumer knows how to commence the defined relationship, and what conditions accompany those actions.

A third potential indicator of a transaction is consumer control. In transacting or subscribing to receive services or content via email, the consumer is often able to set the terms of the email to be received, by revising or updating their preferences. For example, a consumer can select to receive diaper coupons for a period of time, and may later change the request from diaper coupons to coupons for toddler-related items. Or, a consumer can allow a time limited subscription to lapse without renewing. Where a transaction is not time limited, the terms of the agreement should define for the consumer the method for terminating the relationship (and any conditions related thereto, as disclosed at the time of subscription).

While not determinative or necessary in all situations, the above indicia can serve as a useful guideline to trigger recognition of emails sent pursuant to a transaction or relationship. Whereas the dual purpose test is focused on content, the test for transactional or relationship messages should focus solely on the legitimacy of the transaction or relationship, and whether the delivered content was within the scope of the transaction.

iii. The Exchange of Funds Is Not Required to Form a Transaction or Relationship Between A Sender and Recipient of Email

In considering the appropriate definition for determining when an email consists solely of transaction or relationship content, the FTC should also address the difference between the term “commercial transaction” in the definition of “transactional and relationship messages” in Section 17(A)(i) of the Act and the term “transaction” in Section 17(A)(v), by expressly acknowledging that the latter definition does not require the exchange of funds.⁶ Accordingly, emails could be sent pursuant to this exception where no purchase is involved, and the underlying transaction consists of signing up to be a registered user of a commercial website, provided that the registration process is a legitimate and verifiable transaction.

2. The Commission Should Use A “Net Impression” Test For Dual Purpose Emails That Do Not Satisfy The Proposed Criteria For Dual Purpose Messages That Include Transactional And Relationship Content.

Where an email message has both commercial and transactional/relationship or other non-commercial content, the Commission has proposed criteria that create a safe harbor if the message does not fail either of two prongs. However, the proposed criteria are too arbitrary because if a message “fails” either prong in these criteria, it is automatically considered “commercial” even if a reasonable consumer would not perceive it to be. Therefore, the Commission should (1) reduce reliance on a subject line test as solely determinative of primary purpose; and (2) employ a Net Impression test in every instance where a dual purpose message does not satisfy the safe harbor criteria.

⁶ Clearly, the intent of Congress was to recognize that non-commercial transactions can form a valid commercial relationship, and different types of transactions are included in the scope of the “transactional or relationship” exemption. If Congress had wanted to limit included transactions to only those that involve that payment of funds or the purchase of any goods and services, it would have expressly done so.

i. A Subject Line Test Is Inappropriate as a Single Criteria for Transactional Emails With Commercial Content

As drafted, under the criteria proposed in the NPRM, the primary purpose of an email message automatically will be deemed to be commercial if a recipient reasonably interpreting the subject line of the message would likely conclude that the message advertises or promotes a product or service. This technical subject line test is overly arbitrary and does not accord with the intent of the Act. When evaluated in accordance with the Commission's preferred analysis -- the impression created in the mind of the consumer -- the subject line alone is not a reasonable indicator of whether a message should be considered commercial versus transactional. For example, as discussed above, in many instances a consumer transacts to receive emails with commercial content, for example subscribing to receive coupon collections or a software shopper newsletter. In those cases, even though the recipient could reasonably interpret from the subject line of the message that the message advertises or promotes a product or service, such commercial content may be exactly the content for which the consumer transacted. So long as the impression created by the subject line does not go beyond what the recipient requested or reasonably expected to receive based on the terms of the initial transaction, the "primary purpose" of such email should be deemed to be to fulfill the transactional or relationship exception, and the subject line test should not apply.

A subject line must not be misleading, in accordance with the Act. But, reference to commercial content in the subject line should not by itself change categorization of the message from transactional to primarily commercial.⁷ While the subject line has been termed a "key indicator" by the FTC in some contexts, such an analysis does not suit transactional messages. In transactional circumstances, the consumer already has knowledge of the email content because that consumer affirmatively subscribed to receive the emails based on that content. The "preview" that the FTC deems essential in a subject line is redundant in this case. Therefore, an arbitrary judgment based on that subject line would be inappropriate, and in some cases, would defeat the Commission's goal of maximizing consumers' ability to quickly determine whether or not to read or delete an email. If the consumer has transacted to receive certain coupons or commercial material, mention of such commercial content in the subject line will serve to identify the message to consumers as that email previously requested by them, and facilitate their ability to recognize and process the desired message. In contrast, no beneficial purpose is served by treating a message as primarily commercial based solely on the subject line. Therefore, the Commission should clarify that when a subject line that appears to be commercial is attached to a transactional or relationship message, such a subject line does not automatically make the message commercial.

ii. The Net Impression Test Should Be Applied In Any Analysis Where a Dual Purpose Message Does Not Satisfy the Safe Harbor Criteria

⁷ Moreover, over-reliance on a subject line test does not accord with clear Congressional intent to avoid over-regulation of subject lines. Section 13(b) of the Act expressly states that the Commission is *not* authorized to establish a requirement pursuant to section 5(a)(5)(A) to include any specific words, characters, marks, or labels in a commercial electronic mail message, or to include the identification required by section 5(a)(5)(A) in any particular part of such a mail message, including the subject line.

In its third set of proposed criteria for evaluating whether a message containing commercial content and other non-transactional content is subject to CAN-SPAM, the Commission proposes a “Net Impression” analysis, derived from its traditional review of advertising under the FTC Act. While NetCoalition does not necessarily agree that the Net Impression test is better suited to CAN-SPAM than the “but for” test advocated in certain responses to the NPRM [get cite to ANPRM comments], NetCoalition believes that if Net Impression is to be utilized generally as the applicable standard, it should be applied across the board, even when a commercial subject line is used. This standard focuses on the perception of an ordinary or average consumer acting reasonably under the circumstances, and looks to the impression made by the content as a whole. The Commission has noted that elements evaluated in assessing the “Net Impression” of an email include placement and prominence of commercial content, location of commercial content at or near the beginning of an email, the proportion of the message dedicated to commercial content, and how color, graphics, type size, and style are used to highlight commercial content.

As drafted, under the Commission’s proposed criteria for a dual purpose message that contains some transactional or relationship content, such an email will not be considered commercial if the subject line does not create a commercial impression **and** the message’s transactional or relationship content appears near the beginning of the message. If an email does not satisfy this criteria, it will be considered a commercial message under the Act. To implement the law in the spirit that Congress intended, and to comport with the approach articulated by the Commission in the NPRM, the Commission should follow this initial inquiry with a Net Impression analysis as a second step. Despite the Commission’s acknowledgement of the importance of preserving transactional messages, the proposed test may actually *disadvantage* senders who send dual purposes messages that contain transactional content compared to senders who send dual purpose messages without such transactional content. This situation would occur where a dual purpose email has a non-commercial subject line but has commercial content at the top of the message. For dual purpose e-mails without transactional content, the Commission would then apply a Net Impression test to determine the primary purpose of the message. For dual purpose emails with transactional content, the proposed regulations, as written, would not call for the application of a Net Impression test, but would deem the message “commercial” even where the overall Net Impression of the body of the message (as opposed to the header or frame atop the body) is that the message was designed to deliver the transactional or relationship content.

Accordingly, to ensure that dual purpose messages are properly evaluated based on their content and not just the subject line, and to guarantee that messages containing commercial and transactional content are treated no worse than messages with commercial content and non-commercial, non-transactional content, NetCoalition suggests that the Commission adopt a two-stage analysis for all dual purpose messages with transactional content. First, the Commission should apply the criteria set forth in the NPRM regarding the subject line and the placement of the content. If that “safe harbor” is not satisfied, the Commission should employ the same “Net Impression” analysis applied for other dual purpose messages.

3. The FTC Needs to Provide Greater Guidance on when Commercial Subject Line Content Is Required for Dual Purpose Messages

The Commission addressed the issue of subject lines in detail in the NPRM, stressing their importance in a consumer's determination of whether to read a message or delete it. Under CAN-SPAM, a subject line representation, omission or practice must not mislead an ordinary consumer acting reasonably under the circumstances about a material fact regarding the content or subject matter of the message. The NPRM expressly states that when the body of an email contains only content that promotes a product or service, then the subject line must be consistent with that content. However, the NPRM does not as clearly address subject line content for dual purpose emails. In footnote 37, the Commission acknowledged that it does not intend to require that every email message with any commercial content must use a subject line that refers to the message's commercial content. Without any specific guidance, the Commission then states that depending on the facts of the situation, a dual purpose message may use a subject line that "is not deceptive and does not refer to commercial content." NetCoalition respectfully suggests that additional parameters are necessary to provide guidance in complying with the Act. Specifically, NetCoalition suggests a combination of a "close alignment" test to specifically exempt certain commercial content in transactional emails, as well as a "Net Impression" and "deceptiveness" test to evaluate whether a subject line should reference commercial content in the best interests of the consumer.

An email subject line should compliment and be consistent with the body of a dual purpose email message. In consideration of practical application, NetCoalition offers to the Commission certain suggestions as to when a dual purpose message need not refer to commercial content in the subject line. In a dual purpose message that contains both commercial content and content that is transactional, a subject line should not need to refer to commercial content where the commercial content is "closely aligned" with the transactional or relationship content. This applies to both alignment of content and sender. Under a close alignment test, if the commercial content of a dual purpose email promotes products and services offered by the business with which the consumer has the underlying relationship, then the subject line does not need to reference commercial content. For example, where a travel agency sends an email message confirming the purchase of an airline ticket, and the message contains commercial content promoting destination location tours offered by the same travel agency, the subject line need not disclose the commercial content. Similarly, the subject line need not be commercial if the commercial content promotes products or services -- regardless of the entity offering those products or services -- that commonly accompany the underlying transaction or relationship from which the transactional message is generated. For example, if the email relates to the sale of a car, and the commercial content advertises motor oil or an auto servicing business, that commercial content does not need to be indicated in the subject line. Where the transactional content and the commercial content are closely aligned, the email as a whole would reasonably accord with consumer expectation, and thus a subject line indicator is unnecessary.

For all dual purpose messages, not just those with transactional content, a variation on the Net Impression test should be adopted in determining whether a subject line should refer to the commercial aspect of the message. This assessment would consider the diversity of goods and services promoted, placement and prominence of commercial content, location of commercial content at or near the beginning of an email, the proportion of the message dedicated to commercial content, and how color, graphics, type size, and style are used to highlight commercial content. If the overall net impression of the email is that it primarily promotes a good or service, then the subject line should so indicate. Key to this analysis would be whether a

single good or service is being promoted by the commercial content, or whether numerous different things are being advertised. Clearly, if a message is visually and proportionally dominated by commercial content promoting a single product or service, then that content should be indicated in the subject line. However, where a dual content message has non-commercial content and a diverse array of commercial content in relative balance -- or even slightly greater or more eye-catching commercial content -- subject line reference to the commercial content would not be feasible and should not be required. Where a newsletter, for example, has editorial and informational content about fashion and beauty, accompanied by a variety of commercial elements promoting cosmetics, clothing, accessories and plastic surgery, it would be impractical to require reference to all of the commercial content in the subject line regardless of the proportion of the email devoted to the commercial content. A subject line is brief and inadequate to reference diverse commercial content. Moreover, it would be meaningless to the consumer to create a generic "commercial content" indicator.

Finally, NetCoalition recommends that where a net impression test results in a neutral or balanced analysis, the Commission rely primarily on a "deceptiveness" test. If an email subject line is not deceptive, and the email genuinely contains commercial and transactional /relationship or other non-commercial elements, a sender should not be faulted for not referencing commercial content in the subject line. NetCoalition agrees with the Commission's belief that where an email has purely commercial content, the subject line should serve as an indicator of that content. But, where a message contains mixed content of reasonable proportion, reference to the non-commercial content is not misleading. Consumers recognize the reality of the Internet. Nearly every website is generally supported by a certain amount of commercial content. Non-personal emails similarly so. A normal consumer may understand that some commercial content will accompany informational or transactional content. Depending on the email, the consumer may desire one category of content over the other - in some cases preferring the commercial content. For example, a subscriber to a Sierra Club newsletter may be more interested in editorial content, whereas a subscriber to a computer software newsletter may be more interested in the advertisements. In each instance, so long as the consumer is alerted to the fact that the desired content (whether commercial or non-commercial) is included in the message, it is unlikely that the consumer will be shocked or offended to find some other commercial content as well. It is also unlikely the consumer would forgo opening an email with desired non-commercial content based on the disclosure of some commercial content in the subject line. Therefore, it is not as essential in a dual purpose email that the existence of some portion of commercial content be highlighted in the subject line.

4. A "Deliberate Structuring" Concept Is Unsuitable and Contrary to Congressional Intent and FTC Analysis Articulated in the NPRM

On pages 50105 of the NPRM, the Commission suggests that if a "sender deliberately structures his message to create a mistaken impression in the mind of a reasonable recipient that the message has a noncommercial primary purpose" and evade regulation under the Act, then that message should be considered to have a commercial primary purpose. While NetCoalition recognizes the Commission's interest in preventing bad actors from sidestepping the Act, NetCoalition strongly objects to this standard. Such a test is inappropriate, because it undermines the Net Impression test, sows enforcement uncertainty, is unfair to senders by not rewarding senders who have positive intentions when sending messages, and could discourage

companies from adopting a robust CAN-SPAM compliance program because of the fear that actions intended to comply with CAN-SPAM could be wrongly construed as “deliberate structuring.”

The behavior sought to be addressed by the Commission’s “deliberate structuring” approach is adequately governed by application of the Net Impression test. The CAN-SPAM Act was designed with consumer protection in mind. The Net Impression test focuses on the perspective of the recipient. Although the Commission has expressed concern that a sender could deliberately structure an email to *appear* as if the primary purpose was not commercial to a reasonable consumer, if the consumer does not perceive that message to have a primary commercial purpose, then the message is *not* the type of email that Congress sought to address with the Act.

In traditional FTC enforcement in the advertising context, intent to deceive is not required to find a deceptive practice – instead the question turns on the impression created in the mind of a reasonable consumer. Similarly, here, under the standard proposed by the FTC, the enforceability of the Act should turn only on the impression created by the message in the mind of the recipient. If the intent of the sender is to be examined at all (which the Commission previously rejected as a meaningful standard in favor of the Net Impression test), the sender should also be rewarded for efforts to comply with CAN-SPAM, even if the result falls short under the Net Impression test. The Commission, however, has decided that intent cannot work as a positive factor to immunize a sender when the message ultimately fails the Net Impression test. As a matter of consistency, therefore, intent should not work to penalize a sender if the transmitted messages do satisfy the FTC’s preferred standard. This is especially true because a sender’s bona fide intent to comply with CAN-SPAM could be viewed as “deliberate structuring.” For example, on page 41 of the NPRM the Commission suggested that “a marketer who has concerns about the net impression of an email message with both commercial and noncommercial content could always copy test a planned email to determine whether the reasonable recipient would interpret it to have a primary purpose that is commercial.” Under the Commission’s “deliberate structuring” standard, such copy testing would likely be used against the sender as proof of “deliberate structuring.”

Moreover, a deliberate structuring analysis could create conflicting enforcement precedent. For example, if the Commission determined that a “commercial” email were deliberately designed to approximate the commercial versus non-commercial content ratio of a bona fide newsletter, application of a “deliberate structuring” analysis could result in the identical emails being treated differently. This would chill mixed content messages because of the legitimate uncertainty as to what might be perceived as deceptive. Ultimately, the unintended consequence would be that consumers were harmed because companies ceased to provide desired mixed-content messages because of uncertainty over potential enforcement exposure.

By combining a result oriented test with an intent-based test, the Commission would do email senders a significant disservice, because a sender could never be satisfied that messages that leave a non-commercial net impression would result in CAN-SPAM compliance. Adopting a “deliberate structuring” approach would significantly undermine the principles set forth in support of the Net Impression test and would create tremendous enforcement uncertainty. Because the harms sought to be addressed by such an approach are already adequately addressed

by the “Net Impression” test, the Commission should reject a “deliberate structuring” concept and rely solely on a “Net Impression” test in determining primary purpose, or replace the Net Impression test with an intent-based analysis.

* * *

Thank you for providing NetCoalition with this opportunity to comment on the criteria for determining “primary purpose” proposed in the NPRM. Careful determination of these criteria are necessary for effective implementation of the CAN SPAM Act. NetCoalition also notes that the Commission still has to address the key issue of multiple senders under the Act. While not a subject of the current NPRM, the issue of multiple senders is inextricably intertwined with the issues addressed in these comments, and is one of critical importance. NetCoalition strongly urges the Commission to consider these issues in tandem, and has provided earlier comments on the specific issue of multiple senders in the CAN-SPAM ANPRM issued March 11, 2004 on p. 11778.⁸

NetCoalition prides itself on diligent and complete compliance with all provisions of CAN SPAM, and encourages the Commission to carefully consider the practical analysis of the NPRM contained in these comments. We look forward to working with the Commission to craft a Rule that reasonably implements the intent of the Act, but also provides clarity and greater guidance to the industry on the scope and applicability of CAN SPAM.

Sincerely,

Markham C. Erickson
General Counsel
Director of Policy

⁸ Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act; Advanced Notice of Proposed Rulemaking, 69 Fed. Reg. 11778 (Proposed March 11, 2004)(to be codified at 16 C.F.R. pt 316).