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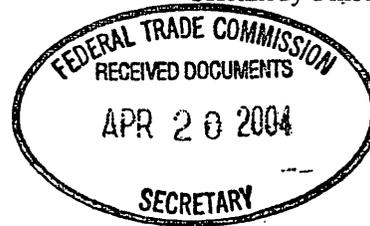
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April 20, 2004

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VIA HAND DELIVERY

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Room 159-H
Washington, DC 20580



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

Ladies and Gentlemen:

This comment letter is submitted by Morrison & Foerster LLP ("Morrison & Foerster"), on its own behalf and on behalf of clients that have approved and contributed to these comments, in response to the request for comment in the Advance Notice of Proposed Rulemaking ("ANPR" or "Notice") regarding the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act" or "Act"). We appreciate the opportunity to comment on the issues presented in the ANPR.

In fashioning rules to implement the CAN-SPAM Act, the greatest challenge facing this Commission is to control illegitimate and intrusive uses of electronic mail ("email") without crippling the ability of businesses, professional firms and other organizations to engage in truthful, non-pornographic communications that convey useful information to current and prospective customers and clients. Both Morrison & Foerster and its clients engage in many communications of this kind. Notably, as a multi-national law firm providing legal advice to companies in many industries and markets, Morrison & Foerster relies heavily upon newsletters and bulletins transmitted by means of email to apprise its clients of legal developments that may affect their interests. Morrison & Foerster's clients, in turn, often use email and other Internet-based channels to communicate with existing customers, engage in business-to-business communications, provide opportunities to participants in membership/award programs, and facilitate the forwarding of product and service offers from existing customers to prospective customers. Consumers and clients are unlikely to find these communications annoying or unexpected; in fact, most of these communications have been solicited by the recipient or are part of the ongoing relationship with the customer

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or client. Where legitimate communications of these kinds are concerned, overly restrictive interpretation and enforcement of the Act will not serve -- and in fact may frustrate -- the interests of consumers.

The Act can be implemented without causing these harmful results. Specifically, the Congressional Findings and Policy ("Findings") on which the Act is based declare an intention to address the problems posed, not by all commercial email, but by "unsolicited" and "unwanted" commercial email.¹ In fact, as the Findings make clear, one of Congress's purposes in restricting unsolicited email is to *facilitate* consumer access to those messages -- *including commercial messages* -- that consumers may *wish* to receive. So, for example, the Congress recognized that the volume of unsolicited email, combined with the difficulty of "accessing, reviewing, and discarding" such mail, must be addressed because it "creates a risk that *wanted* electronic mail messages, *both commercial and noncommercial*, will be lost, overlooked, or discarded amidst the larger volume of unwanted messages"² Congress's dual intent in passing the Act, therefore, was as much to free the stream of useful communications as it was to control the stream of harmful and annoying communications.

This dual purpose will be better achieved if ambiguities and uncertainties in the statute are resolved in terms of Congress's distinction between "unsolicited" email and other types of email. The term "unsolicited" is not defined in the Act but has a history and meaning, in state anti-spam legislation, of which the Congress was certainly aware when it used that term repeatedly in its Findings. Specifically, "unsolicited" email consistently has been defined as email that the recipient has declined to receive, has not asked to receive, or that comes from an entity with which the recipient has no existing business relationship.³ Messages that fall in these categories constitute the core class of objectionable, unanticipated "spam" that have given rise to public complaints and legislation for many years. Other kinds of email, including messages the customer has asked to receive and communications from entities with which the recipient recently has done business, do not create the level of annoyance and cost-shifting that have resulted in the enactment of dozens of anti-spam laws around the country. Nor, on the evidence of the Findings, does Congress intend the Act to be interpreted and enforced in a way that treats all of these categories of commercial email as equally harmful.

¹ CAN-SPAM Act sec. 2, Congressional Findings and Policy.

² *Id.* sec. 2(a)(3)-(4).

³ *See, e.g.*, Alaska Stat. 45.50.479(b)(3); Ariz. Rev. Stat. 44-1372.04.A; Ark. Code 4-88-602(10); Cal. Bus. & Prof. Code 17529.1(o); Colo. Rev. Stat. 6-2.5-102; Del. Code tit. 11, Part 1, ch. 5, sec. 937(a); Kan. Stat. 50-6, 107(b)(4); Mich. Comp. Laws 445.2502(g); Minn. Stat. 325F.964.3; Ohio Revised Code 2307.64(A)(9); 73 Pa. C.S. sec. 2250.

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This rulemaking proceeding gives the Federal Trade Commission an opportunity to effect Congress's intent and avoid results that are harmful to consumers and legitimate businesses alike. For example, the Commission can confine the category of "commercial electronic mail message" ("CEMM") to those messages that are of concern to Congress, by proper interpretation of "primary purpose" and the scope of "transactional or relationship messages." Also, as to those messages that properly belong in the CEMM category, CAN-SPAM Act provisions that regulate CEMMs, including the definition of "sender" and the scope of opt-out requirements, can be interpreted in ways that properly effect the intent of Congress. The following takes each of these points in turn.

I. "Commercial Electronic Mail Message" Should Be Defined in Ways That Encourage Legitimate Commercial Communications

The Congress noted, in the Act, that the present deluge of spam messages forces consumers to waste valuable time searching for the useful messages among the dross of unwanted and unsolicited spam.⁴ An over-inclusive definition of the CEMM category would aggravate, rather than relieve, this problem. The greater the number of messages that are labeled as CEMMs, the more time consumers will spend scrutinizing messages that they want to receive and may have requested, simply because those messages bear the prescribed CEMM label. In many cases, messages that consumers wish to receive will be deleted before they can be read. Application of the CEMM label to legitimate email also will impose the cost of opt-out compliance on initiators that are not part of the problem at which the Act is addressed. Those provisions of the statute that determine whether a message is a CEMM should be interpreted so as to avoid these results.

A. Professional Newsletters and Advertiser-Supported News Publications Should Enjoy a Presumption of Non-CEMM Status

By defining a CEMM as a message the "primary purpose" of which is to advertise or promote a commercial product or service, Congress made clear that an initiator's desire to induce a purchase, by means of an email message that also contains other content or discloses other purposes, will not necessarily cause that message to be classified as a CEMM. Only where the commercial content discloses a *primary* purpose to advertise or promote a commercial product or service will the CEMM classification be appropriate. Interpretation of this undefined term in particular cases, however, is a task that cannot be accomplished by means of a purely semantic analysis.

⁴ CAN-SPAM Act sec. 2(a)(3)-(4).

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Among the questions to which a semantic analysis provides no answer, for example, is the choice of the initiator whose purpose or purposes must be taken into account. A single email may be the product of multiple initiators, each with a different motive or combination of motives in initiating that communication. The publisher of an advertiser-supported online newspaper may be motivated by the desire to inform, or by the desire to earn advertising revenue, or by some unquantifiable combination of those motives; while the advertisers may be motivated solely by the desire to sell their products. Which of these actors' purposes should be scrutinized or treated as primary? Neither the Act, nor any dictionary definition, will answer this question.

Even where the circumstances permit the Commission to examine the purpose or purposes of only one initiator, the phrase "primary purpose" suggests no method of weighing multiple purposes to determine which are primary and which are secondary. In fact, any single rule or method of comparing the importance of multiple purposes, however appealing in the abstract, might lead to unhelpful results in particular cases.

For example, a purely quantitative test might be applied, according to which the primary purpose of an email is the purpose to which the larger number of words or volume of space in the email is devoted. Although the simplicity of this approach is appealing, it invites evasion by marketers who might accompany an ad with a slightly larger quantity of unrelated or meaningless text. This criterion also assumes that commercial and non-commercial text always can be separately identified and subject to separate word counts -- an assumption that begs the question of how to decide when the purpose of any given text is primarily commercial or non-commercial.

Another possible approach is the "but-for" test, according to which the primary purpose of an email is commercial if the initiator would not have sent it "but for" the advertising message that it carries; or, as one of the alternative rules on which the Commission requests comment puts it, "whether the commercial aspect of the email financially supports the other aspects of the email."⁵ This rule, too, will produce strange results if rigorously applied. For example, an advertiser-supported online edition of The New York Times likely would not be sent if advertising revenue was unavailable to support it. In fact, many of America's most distinguished publications, whether distributed in print or electronic form, would cease publication if advertising to support those publications could not be obtained. Nonetheless, those publications contain a great deal of highly substantive, non-commercial content. There is no reason to treat such publications as CEMMs, simply because they are supported by advertising.

⁵ ANPA at p. 17.

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As these examples suggest, the Commission is unlikely to fashion a meaningful, bright-line rule that will determine every email's primary purpose with absolute predictability. The Commission can, however, reduce the uncertainty the Act causes for users of certain kinds of legitimate email. This can be accomplished by adopting a presumptive conclusion that certain practices do not have a primary purpose to advertise or promote a commercial product or service. Two categories of email communication, at least, should enjoy this presumption.

The first such category is the professional newsletter, informing clients of developments within the sender's area of expertise that may affect the clients' interests. Although these newsletters serve the commercial interests of their senders indirectly, by informing clients of problems that may require the professionals' services, they ordinarily do not solicit business directly and consist entirely of news and analysis. In the legal profession, in particular, communications of this kind have become an accepted, even expected, supplement to the paid services that law firms perform. In fact, clients have become accustomed to the idea that by reading these newsletters, they can be alerted to sources of risk of which they might not otherwise be aware, and can obtain that information in time to take corrective or preventive action. For the most part, this service to clients does not result directly in additional business for the law firm; in fact, the legal analysis provided in these newsletters represents many hours of expensive attorney time that effectively are provided to the client free of charge.⁶ Law firm newsletters, therefore, have improved client service and reduced many clients' overall cost of legal services.⁷

The second category is the newsletter, newspaper, or journal that is supported by third-party advertising but offers substantial content that is not dictated by, or directly

⁶ These newsletters often are posted to law firms' websites or otherwise made widely available, not only to clients, but to the public and to other members of the bar -- including competitors of the firms that originated those newsletters. Accordingly, these newsletters serve functions, such as education and maintaining the competence of attorneys, that go far beyond the narrow purpose of generating business for the law firm.

⁷ CAN-SPAM Act regulation of professional newsletters is not needed to prevent abuse or annoyance of clients. Reputable firms, including Morrison & Foerster, will honor any client's request not to receive future newsletters. The market itself, and the law firm's desire to preserve its reputation and client relationships, are sufficient to compel this practice. There is no need to impose on such organizations the specific requirements imposed on CEMMs by the CAN-SPAM Act, including the ten-day compliance rule, or to create causes of action against reputable organizations for technical violations of the Act. It also would not benefit clients if these newsletters were labeled as advertisements and caught in spam filters, or if the cost of CAN-SPAM Act compliance discouraged their use.

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supportive of, the advertisers' messages. For example, a travel publication might (like the Travel section of the print edition of The New York Times) carry ads from hotels and other travel-related companies, but its articles on tourist destinations might be written by journalists and might not promote or recommend the advertisers' services. In these cases, the primary purpose of the publication, as opposed to the source of the economic support for its production and distribution, is to disseminate travel information. Like professional newsletters, these publications should enjoy a presumption that they do not have a primarily commercial purpose, and they should not be classified as CEMMs.⁸

Finally, the presumption in favor of these types of communications could be rebutted where the facts require. For example, some purported professional newsletters may consist of nothing more than press releases touting the initiators' successes, accompanied by direct solicitations to retain the professionals' services. Similarly, the "informational" text in an advertiser-supported publication might consist entirely of favorable articles about the advertisers. The proposed presumption in favor of legitimate professional newsletters and advertiser-supported publications will not prevent the Commission from dealing with such attempts at evasion of the CAN-SPAM Act requirements.

B. Communications to Participants in Membership/Rewards Programs Should Not Be Classified as CEMMs

Many businesses offer their customers the opportunity to participate in membership/rewards programs. Customers join these programs voluntarily and receive discounts or other benefits in exchange for their purchases of products and services offered by the program's sponsor and its business partners.

Membership/rewards programs are ideally suited to email communication. Because email is fast and inexpensive, it can be used to give members timely notice of new incentive and discount opportunities at a cost saving, compared to other methods of communication, that can be passed along to the customer.

⁸ Also, the purpose of the Act would not be served by treating these advertiser-supported newspapers, magazines or journals as having a "primary purpose" to advertise or promote the products or services of the advertisers. Where a recipient has subscribed to an online publication, that recipient already has made clear that the publication is neither "unsolicited" nor "unwanted." Accordingly, placement of a CEMM label on the publication would serve no purpose except to mischaracterize the publication, increase the risk of inadvertent deletion and raise the cost of publication, without protecting consumers against mailings that truly are "unwanted" or "unsolicited."

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Communications to membership/rewards participants that encourage the participants' purchase of products or services, as a means of earning additional program benefits, should not be found to have a "primary purpose" of advertisement or solicitation of the purchase. The primary purpose of such a communication is the offering to the recipient of the benefits for which the participant bargained when he or she joined the program. Even if the Commission finds that some communications of this kind have a primary purpose to advertise or promote, it should clarify that those communications, to the extent they announce additional program benefits that may be obtained by means of future purchases, are notices of "a change in the terms or features of a . . . membership . . . or ongoing commercial relationship . . ." and therefore are transactional or relationship messages under the Act.⁹

Such a clarification would aid consumers and would be entirely consistent with the purpose of the statute. Consumers who agree to participate in membership/rewards programs expect, and are likely to demand, that they receive frequent announcements of new incentive opportunities. These consumers' interests will not be served if the cost of compliance with opt-out requests, including the cost of constant updates to a large and rapidly-changing opt-out list, forces abandonment of the membership/rewards program or reduction of the benefits it offers to consumers.

C. Business-to-Business Email Communications Should Not Be Classified as CEMMs

Of all the features of the CAN-SPAM Act that have caused confusion and uncertainty for legitimate business, none is more troubling than the lack of an express exemption for business-to-business email communications. In order to avoid any possible claims of liability under the Act, many companies have instituted the bizarre practice of labeling ordinary emails from their marketing representatives to other businesses as CEMMs, and giving the business recipients the opportunity to "opt-out" of further such communications. In some cases, companies have had to furnish guidelines to their employees, according to which the employees themselves can determine whether a message is commercial and requires compliance with CAN-SPAM Act formalities. In other cases, companies simply have subjected all of their employees' outgoing email, or all email from employees with certain job descriptions, to those requirements.

⁹ CAN-SPAM Act sec. 3(17)(A)(iii). In the alternative, messages announcing new opportunities to program participants could be classified as delivery of "goods or services [*i.e.*, the incentive offers contained in the message] including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction [*i.e.*, the rewards program] that the recipient has previously agreed to enter into with the sender." *Id.* sec. 3(17)(A)(v).

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These efforts impose a needless burden on American business and confer no offsetting benefit on consumers. They also are inconsistent with the intent of Congress, which stated repeatedly in the legislative Findings that the Act is aimed only at protection from “unwanted” and “unsolicited” commercial email. Normal communications among corporate marketing and purchasing personnel do not fall in this category.

In its regulations implementing the Telephone Consumer Protection Act (“TCPA”) and succeeding telemarketing legislation, this Commission expressly created an exemption from those rules for business-to-business communication, recognizing that the TCPA, as a consumer protection statute, has no application to business communications.¹⁰ The Commission should make a similar finding in this proceeding. In support of that rule, the Commission could cite the pro-consumer intent of Congress in passing the CAN-SPAM Act, or could rely more specifically on the definition of a CEMM as an email communication the primary purpose of which is “advertisement or promotion” of a commercial product or service. As standard dictionary definitions make clear, advertisement and promotion are commonly defined as “calling to *public* attention,” giving “*public* notice,” and “active furtherance of sale of merchandise through *advertising or other publicity*.”¹¹ Individual communications between agents of businesses involve no announcement to the public and should not, therefore, be defined as CEMMs.

D. Messages That Are Individually Composed and Addressed to Specific Recipients Should Not Be Classified as CEMMs

Legitimate businesses often send email messages that are not part of an advertising or promotional program and that are addressed to individual consumers. Such messages are used in a number of contexts that do not involve any of the harmful effects addressed by the CAN-SPAM Act.

For example, a consumer may visit an auto dealership and express an interest in a model of car that is not available at the time of the visit. If the consumer leaves a card containing an email address, the dealership may decide to notify the consumer by email

¹⁰ Section 310.6(b)(7) of the Telemarketing Sales Rule exempts “calls between a telemarketer and any business, except calls to induce the retail sale of nondurable office or cleaning supplies” 68 Fed. Reg. 19 at 4674 (Jan. 29, 2003).

¹¹ Webster’s Third International Dictionary (*emphasis added*). The first two phrases are alternative definitions of “advertisement”; the third is the dictionary’s sole, relevant definition of “promotion.”

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when the desired model arrives. Such a message is unlikely to annoy the consumer and may be quite welcome -- especially if the car will be available only briefly.

Similarly, a real estate agent might learn from a neighbor that the neighbor's friend is looking for a house in a particular area. If the neighbor gives the agent the friend's email address, CEMM formalities should not apply if the agent sends a customized, individual email about a specific listing in the area in which the recipient is interested.

Individual communications of this kind, even when they have a commercial purpose and are sent to consumers rather than business recipients, are not part of the class of "spam" communications at which the Act's restrictions are aimed. By their nature, these individual communications are limited in volume by the time required to compose them and the necessity of addressing them individually. They also do not fit the normal understanding of "advertisement" or "promotion," which are activities aimed at the public rather than individual recipients. Accordingly, the Commission should adopt a presumptive rule that separately composed and addressed commercial emails are not CEMMs within the meaning of the Act.

Adoption of the proposed presumption does not, of course, prevent the Commission from responding to any misuse of the rule to evade the Act's restrictions. If a spammer sends an identical message to hundreds of individual addresses within a short period of time, the spammer should not be allowed to hide behind its use of a program that separately addresses and transmits those messages. Similarly, the Commission need not credit a claim that the automatic generation of minor variations in a bulk message's text converts a spam mailing into a series of individually-composed communications. The Commission should, however, clarify that email may be used as a channel of one-to-one communication between businesses and individual consumers, and may be so used without the needless burden of compliance with CAN-SPAM Act restrictions.

II. Legitimate Messages That Are Classified as CEMMs Should Not Be Subject to Unreasonable Restrictions

Even where email messages are properly classified as "CEMMs," those messages should be regulated in ways that carry out the intent of the Act. Specifically, the Commission should avoid interpretations of the Act that excessively burden legitimate communications without advancing the interests or expectations of consumers.

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A. CEMMs Should Have Only One Sender

As the ANPR points out, many email messages originate with one entity and contain material that advertises or promotes the products or services of other entities.¹² In cases (such as an advertiser-supported online newspaper) where the message is not a CEMM because advertisement or promotion is not the message's primary purpose, the question of multiple senders does not arise. However, if the primary purpose of the message is to advertise or promote the products or services of multiple entities, the possibility that there are multiple senders raises compliance and enforcement problems that may make many kinds of legitimate email advertising impossible.

The recognition of multiple senders in these cases, with the cumbersome regulatory burdens that would follow, is not required by the language of the Act and would not benefit consumers.

Notably, the Act contains considerable internal evidence of Congress's intention to recognize only one sender per CEMM. Notably, the Act defines "sender" as a "person who initiates [a CEMM] and whose product, service, or Internet web site is advertised or promoted by the message," but does not expressly state that a CEMM may have more than one sender.¹³ This omission contrasts with the Act's definition of "initiate," which expressly provides that "more than 1 person may be considered to have initiated a message."¹⁴ The impression that the Act contemplates only one sender per message is reinforced by the opt-out provisions of the Act, which refer consistently to "the" sender when referring to the obligation to implement and give notice of opt-out opportunities.¹⁵

Recognition of a single sender for each CEMM is entirely consistent with consumer expectations. If a consumer receives an email from his or her travel agent, and that email includes a commercial announcement from the travel agent and additional ads for a rental car company, a hotel chain and an airline, the consumer might expect the opportunity to decline future email ads from the travel agent. It is unlikely, however, that the consumer expects to be given the ability to refuse all future email ads for the rental company, the hotel chain and the airline, or any combination of those entities, regardless of the source of those future emails.

¹² ANPR p. 23.

¹³ CAN-SPAM Act sec. 3(16).

¹⁴ *Id.* sec. 3(9).

¹⁵ *Id.* sec. 5(a)(4)-(5).

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The complex obligations that recognition of multiple senders would impose also would burden legitimate business and degrade consumer privacy. To return to the example of the travel agent, all four entities involved in the email message might arguably be required to share their company-specific opt-out lists before the email was sent, and purge that list of the addresses of every consumer that had opted out of email ads from any of those entities. Also, one or more of the initiators would have to collect opt-out responses from recipients of the message and share those opt-out requests with all of the other entities. This constant, repeated sharing of email address lists would disclose proprietary information of the companies involved. More importantly, the constant transfer of consumer email addresses among companies would exponentially increase the risk of interception, loss or inadvertent disclosure of private customer information. Such an obligation, to the extent it requires sharing of customer information, also might put a foreign sender in violation of its home country's data security laws.

In view of these risks to legitimate businesses and consumers, and in light of the considerable evidence that the Act does not contemplate multiple senders of individual messages, the Commission should find that the Act is satisfied if one initiator of an email -- presumably, the initiator whose return address or other identifying information appears on the message -- provides recipients with the appropriate opt-out opportunity and physical address and honors requests from recipients not to send future CEMMs.

B. Customer-Forwarded Communications Should Not Be Encumbered With CAN-SPAM Act Requirements

As the ANPR points out, providers of goods and services sometimes give their customers the opportunity to forward email messages, composed and created by those businesses, to personal acquaintances of the customers.¹⁶ By their nature, these individually-forwarded messages, which are sent only after specific authorization by a customer, generate at most a tiny fraction of the commercial email transmitted by American business. Those messages also are the result of a screening process in which the original customer determines whether the recipient will find the message unwelcome.¹⁷ Because they present no threat of large-scale annoyance or cost-shifting, no public-interest purpose will be served by requiring these messages to comply with CAN-SPAM Act formalities.

¹⁶ ANPR at p. 24-25.

¹⁷ In order to avoid the occasional, malicious forwarding of email by customers to harass and annoy the recipients, many merchants limit the number of times a customer may authorize a message to be forwarded to the same address.

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Avoidance of CAN-SPAM Act requirements for customer-initiated messages also is entirely consistent with the language of the Act. Specifically, when a business furnishes a customer with the means to forward a commercial email message to a recipient of the customer's choosing, neither the customer nor the business is an "initiator" or "sender" of a CEMM within the meaning of the Act. This is especially true when the business offers no payment or other consideration to the forwarding customer and makes no other effort to influence the customer's decision to forward, or not forward, the message; and when the customer, rather than the business, clicks "send" or otherwise takes the physical action needed to forward the message.

The business in this case is not a CEMM initiator because it does not "originate or transmit [the] message or procure the origination or transmission of [the] message."¹⁸ The act of origination or transmission is taken by the customer, which chooses the destination to which the email is forwarded and directs its transmission. Because the business only provides the means of forwarding the message, without paying any consideration or attempting to persuade the customer to take that action, the business does not "procure the origination or transmission" of the message.¹⁹ In fact, the business in this case at most engages in "routine conveyance" of a message "for which another person [*i.e.*, the customer] has identified the recipients or provided the recipient addresses."²⁰ Accordingly, the business is neither an initiator nor (because senders must be initiators) a sender of the message that is forwarded by its customer.

Similarly, the customer in this case is not a CEMM initiator because it does not originate, transmit or procure the origination or transmission of a CEMM. Specifically, even though the customer chooses to forward the email and directs that action to occur, the primary purpose of the message, when forwarded by the customer, is not "the commercial advertisement or promotion of a commercial product or service . . ." Because the customer has no financial interest in the success of the business's advertising or promotional campaign, the primary purpose of the customers' act of forwarding the message must be to advise the recipient of a product or service that might be of value to the recipient, rather than to promote the business's commercial interests.

¹⁸ CAN-SPAM Act sec. 3(9).

¹⁹ In order to "procure" the initiation of a CEMM, a person must "intentionally . . . pay or provide other consideration to, or induce, another person to initiate such message on one's behalf." *Id.* sec. 3(12).

²⁰ *Id.* sec. 3(15).

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If this Commission takes a contrary position -- that is, if the FTC chooses to impose CAN-SPAM Act obligations on customers who take advantage of mechanisms for forwarding commercial email messages -- the logical result will be the extension of potential CAN-SPAM Act liability to all customers that forward CEMMs to their acquaintances. All email applications and Web browsers provide mechanisms by which any email message or Web page can be forwarded to any email address by any user, and there is no technical or policy basis for distinguishing those capabilities from a merchant-provided forwarding mechanism, unaccompanied by any inducement to the customer to use that mechanism. Congress cannot have intended to burden the use of message-forwarding capabilities by ordinary consumers with the labeling and opt-out obligations of the CAN-SPAM Act. Accordingly, those obligations should not be so extended in this proceeding.²¹

III. Conclusion

The CAN-SPAM Act of 2003 has a dual purpose: to liberate electronic mail as a means of legitimate communication, both commercial and non-commercial, and to control the use of email as an instrument of fraud, deception and annoyance. The FTC should, to the maximum extent consistent with the language of the Act, interpret the statute's terms in ways that give equal prominence to both purposes. Accordingly, the Commission should find that:

1. professional newsletters presumptively do not have a primary purpose of advertisement or promotion of a commercial product or service;
2. advertiser-supported newspapers, journals and similar publications presumptively do not have a primary purpose of advertisement or promotion of a commercial product or service;
3. communications to participants in membership/rewards programs are transactional or relationship messages;
4. business-to-business email messages are presumptively exempt from CAN-SPAM Act requirements;

²¹ Consistent with the Commission's request for comment on specific "friends and acquaintances" forwarding scenarios, Morrison & Foerster has confined this discussion to programs in which product and service providers merely offer a mechanism for customer forwarding of messages, with no accompanying effort to induce that decision. By confining its comments to this scenario, however, Morrison & Foerster does not suggest or concede that other customer-forwarding programs would fall within the scope of the CAN-SPAM Act.

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5. individually composed and addressed email messages to consumers presumptively are not classified as CEMMs; and
6. commercial electronic email messages should have only one "sender" for purposes of opt-out notification and compliance.
7. customers' forwarding of email messages created by businesses, where the businesses in question have merely provided a mechanism for forwarding the messages and have neither offered consideration for the customers' decisions nor tried to persuade customers to take that action, should not be subject to CAN-SPAM Act obligations.

Morrison & Foerster and its clients appreciate the opportunity to provide these suggestions to the Commission.

Sincerely,



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