



NATIONAL AUTOMOBILE DEALERS ASSOCIATION
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Legal & Regulatory Group

September 13, 2004

Via E-Mail

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

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

Dear Sir/Madam:

The National Automobile Dealers Association (“NADA”) submits the following comments in response to the Federal Trade Commission’s (“FTC” or “Commission”) Notice of Proposed Rulemaking (“NPR”) requesting comment on defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message.

NADA represents approximately 20,000 franchised automobile and truck dealers who sell new and used vehicles and engage in service, repair and parts sales. Our members employ more than 1.3 million people nationwide. A significant number of our members are small businesses as defined by the Small Business Administration. Accordingly, NADA is particularly focused on regulatory changes that may increase the regulatory burden for small businesses.

As stated in our April 20, 2004 comments in response to the Commission’s Advanced Notice of Proposed Rulemaking, our members increasingly rely on e-mail messages to communicate product and service information to their customers. They also rely on e-mail messages to communicate non-advertisement and non-solicitation information to their customers. Because of the multiple purposes and situations in which automobile and truck dealers may use e-mail messages, it is critical that the FTC clearly set forth the factors the Commission will rely upon to determine the “primary purpose” of an e-mail message. It is also essential that the FTC provide non-exclusive examples of the application of these factors to different types of e-mail messages. The Commission has provided examples of appropriate compliance mechanisms in other recent rulemakings, such as in section 682.3(b) of the FTC’s proposed “Disposal Rule.” The need to provide such examples in this context is equally compelling. This is particularly important for small businesses and others that do not have the in-house expertise or resources to develop specific compliance solutions for implementing general regulatory standards. It is not easy for

non-technical employees to understand what it means when the FTC states that enforcement actions will focus on “such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transactions.” 69 Fed. Reg. 50,097 (August 13, 2004).

The Commission poses the question: “Should the same three category primary purpose criteria be applied to messages sent by for-profit entities and nonprofit entities alike?” 69 Fed. Reg. 50,105. We believe e-mail messages from trade associations should be excluded from the definition of a commercial electronic mail message (“CEM”), based on the non-profit purpose of these organizations. We also believe that e-mail messages from for-profit subsidiaries of a non-profit organization that are consistent with the organization’s purpose, should similarly be excluded from the definition. The nature of the trade association-member relationship necessitates this concern. Members voluntarily seek the benefit of the associations’ services when they decide to become a member. Benefits include such items as obtaining information on current legislative, regulatory and judicial developments as well as information on critical industry and operational developments. It also includes obtaining information on new products and services that increases the member’s ability to sustain its business and compete in the marketplace. While the e-mail messages may involve the marketing and promotion of a service, they remain consistent with the association’s non-commercial purpose. Nonprofit entities, including trade associations, therefore should not be subject to the same criteria that apply to for-profit entities.

In addition, the Commission seeks comment on whether its proposed “primary purpose” standard and three-category approach provide sufficient guidance as to when a message will be considered “commercial” under the CAN-SPAM Act. The burden of applying the Commission’s three criteria for determining the “primary purpose” of an e-mail message is particularly apparent with electronic newsletters. Notwithstanding the Commission’s statement about the likely treatment of “bona fide electronic newsletters,” 69 Fed. Reg. 50,099, the Commission’s proposed tests will require a case-by-case analysis of each newsletter to determine its appropriate status. For example, even though educational or industry information may dominate the content of most issues, the advertisement of a fee-based seminar, convention or other product or service may dominate a particular issue based on the importance and/or timeliness of the item. It would be unfortunate if trade associations were required to conduct an issue-by-issue analysis to ensure they are complying with the Commission’s three criteria for determining the message’s primary purpose. Thus, we urge the FTC to provide additional guidance and non-exclusive examples to assist entities with compliance.

The Commission also asks: “Where a recipient has entered into a transaction with a sender that entitles the recipient to receive future newsletters or other electronically delivered content, should such email messages be deemed transactional or relationship messages?” 69 Fed. Reg. 50,105. The answer is clearly affirmative. However, the Commission should realize that electronically-delivered messages may be disseminated to persons who have requested the

message but otherwise have not entered into a transaction with the sender. Accordingly,
messages sent in
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response to a request by the recipient should be expressly recognized as “transactional or
relationship” messages.

NADA appreciates the opportunity to comment on this matter.

Sincerely,

Smitha Koppuzha
Staff Attorney