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September 17, 2004

VIA E-MAIL

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

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

Ladies and Gentlemen:

We appreciate the opportunity to submit comments on the Federal Trade Commission's (the "Commission") proposed rules to implement the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "CAN-SPAM Act."¹ As a financial services law firm, Schwartz & Ballen LLP provides advice to financial institutions and other business organizations concerning compliance with the CAN-SPAM Act. Because our clients will be affected by the Commission's proposed rules, we believe it is appropriate to provide the Commission with our views as to their consistency with the CAN-SPAM Act and their effect on the operations of companies engaged in electronic commerce.

SUMMARY

The Commission proposes to prescribe rules establishing criteria for determining the primary purpose of an electronic mail message.² Our review of the CAN-SPAM Act and its legislative history suggest that the Commission's proposed rules are not consistent with the language of the Act nor with Congressional intent. Moreover, the proposed rules do not provide meaningful guidance to businesses to distinguish between commercial electronic mail and transactional and relationship messages. Accordingly, we urge the

¹ 69 *Fed. Reg.* 50,091 (August 13, 2004).

² 69 *Fed. Reg.* at 50,093.

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Commission not to adopt the rules as proposed, but rather modify them to comply with the language and letter of the CAN-SPAM Act and Congressional intent.

DISCUSSION

The Proposal Fails to Address the Primary Purpose of Transactional Messages

The Commission's *Federal Register* notice correctly indicates that the CAN-SPAM Act § 3(2)(C) directs the Commission to issue regulations within 12 months of the date of enactment defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message.³ Moreover, the Commission's notice also states that the Commission proposes regulations establishing criteria for determining "the primary purpose" of an email message.⁴ However, the CAN-SPAM Act contains two terms that refer to the concept of "the primary purpose." Both "commercial electronic mail message" and "transactional or relationship message" use the term "primary purpose."

The proposed rules provide guidance only as to how to determine the primary purpose of a commercial electronic mail message and provides no insight into how one determines the primary purpose of a transactional or relationship message. Nothing in § 3(2)(C) suggests that the Congress intended to limit its direction to the Commission to promulgate rules only for determining the "primary purpose" of commercial electronic mail messages. We believe the statute is very clear. Congress has directed the Commission to issue guidance as to the relevant criteria to facilitate the determination of the primary purpose of a transactional or relationship message⁵ as well as of a commercial electronic mail message. This, the Commission has failed to do. Accordingly, the Commission should promptly issue a proposal to complete its statutory obligation under the CAN-SPAM Act.

The Commission's Proposal Fails to Follow the Language of the CAN-SPAM Act

The Commission's proposed rules establish three criteria for determining whether the primary purpose of an e-mail is commercial.

Content that Only Advertises or Promotes

The Commission first criterion states that the primary purpose of an e-mail is commercial if the message contains only content that advertises or promotes a product or service. § 316.3(a)(1). This proposed rule, however, is not consistent with the language of the CAN-SPAM Act. Section 3(2)(A) of the Act provides that a commercial e-mail message

³ 69 *Fed. Reg.* at 50,091.

⁴ 69 *Fed. Reg.* at 50,093.

⁵ A transactional or relationship message, of course, is an electronic mail message under § 3(17)(A) of the CAN-SPAM Act.

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is an e-mail message, the primary purpose of which is the commercial advertisement or promotion of a commercial product or service. The Commission's proposed rule, however, does not include the term commercial before the words "advertisement or promotion" and "product or service." We believe that the omission of the term commercial from the criterion proposed by the Commission fails to follow the language of the CAN-SPAM Act and therefore is inconsistent with the Act. The failure to include the word commercial before the words "advertisement or promotion" and "product or service" may inappropriately bring electronic mail messages that do not promote commercial products and services within the scope of the Act's coverage. Trade groups often promote activities or other matters via the use of email. Such messages are not subject to the CAN-SPAM Act because they are not commercial advertisements nor are they the promotion of a commercial product or service. The language of the final rule therefore, must be modified to accurately reflect the language of the CAN-SPAM Act.

Content that Both Advertises and Completes the Transaction

The Commission's proposal regards the primary purpose of an electronic mail message as commercial if (1) the message contains content that advertises or promotes a product or service as well as content that pertains to a transactional or relationship function (as set forth in the proposed rule) and (2) a recipient reasonably interpreting the subject line of the message would likely conclude that the message advertises or promotes a product or service. The proposed rules also provide that the primary purpose of an electronic mail message will be regarded as commercial if it comes within the language of (1) above and (2) the message's content relating to transactional or relationship functions does not appear at or near the beginning of the message.

We believe that this criterion is at odds with the language of the CAN-SPAM Act. Section 3(2)(B) of the CAN-SPAM Act provides that the term "commercial electronic mail message" does not include a "transactional or relationship message." Therefore, if the primary purpose of the electronic mail message is to accomplish the functions set forth in § 3(17)(A) of the Act, the message is not a commercial electronic mail message even if its primary purpose is the commercial advertisement or promotion of a commercial product or service, or even if a recipient interpreting the subject line concludes that the message advertises or promotes a product or service.

The Commission's proposed rule pays no attention to the fact that an electronic mail message that is a transactional or relationship message cannot possibly be a commercial electronic mail message. Because the Commission's proposal provides no additional guidance as to what constitutes a transactional or relationship message, any message that comes within the language of § 3(17)(A) of the Act is a transactional or relationship message. Accordingly, so long as information relating to the transaction that is the subject of the message appears somewhere in the message, the message is a transactional or relationship message under the CAN-SPAM Act and cannot possibly be a commercial electronic mail message regardless of where the information is positioned.

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The Commission's proposal would negate the transactional nature of the message if it does not appear at or near the beginning of the message. The proposal cannot override the language of the CAN-SPAM Act, which provides that the message is a transactional or relationship message if it has as its primary purpose a function specified in § 3(17)(A) of the Act.⁶ Accordingly, we believe that the Commission must recast the criterion it has proposed in § 316.3(a)(2) to reflect the language of the CAN-SPAM Act.

Content that is Both Commercial and Nontransactional

The Commission also proposes that the primary purpose of a message will be commercial if (1) the electronic mail message contains content that advertises or promotes a product or service as well as content that does not relate to a transactional or relationship function and (2) a recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message advertises or promotes a product or service. In addition, the primary purpose of an electronic mail message will be regarded as commercial if it comes within the language of (1) above and (2) a recipient reasonably interpreting the body of the message would likely conclude that the primary purpose of the message is to advertise or promote a product or service. § 316.3(a)(3).

We believe that this criterion also does not reflect the language of the statute nor the intent of Congress. First, as indicated above, § 3(2)(A) of the CAN-SPAM Act provides that a commercial e-mail message is an e-mail message, the primary purpose of which is the commercial advertisement or promotion of a commercial product or service. The Commission's proposed rule makes no reference to the term commercial. We believe that the omission of the term commercial from § 316.3(a)(3) must be corrected in the final rules in order to make them consistent with the language of the CAN-SPAM Act.

In addition, we believe that the primary purpose of an electronic mail message that contains commercial advertising or that promotes a commercial product cannot as a matter of logic be based solely upon whether or not the recipient regards the subject line as advertising or promoting a product or service. The Commission should take cognizance that the legislative history of the Act provides that the primary purpose of an electronic mail message is not necessarily commercial simply because it contains advertising or promotional material.

⁶ It is entirely conceivable that a message may have two primary purposes, commercial and transactional. See *Board of Governors of the Federal Reserve System v. Agnew*, 329 U.S. 441, 446 (1947) (Court held that the term "primary" does not necessarily mean "first." An activity or function may be primary if it is substantial). Because a transactional or relationship message cannot be a commercial electronic mail, a message that has as its primary purpose both commercial and transactional functions will not be a commercial electronic mail message.

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However, the definition [commercial electronic mail message] is not intended to cover an e-mail that has a primary purpose other than marketing, even if it mentions or contains a link to the website of a commercial company or contains an ancillary marketing pitch.⁷

Congress recognized that, as a matter of necessity, there must flexibility in the determination of what constitutes a commercial electronic mail message. The Commission's third criterion provides none. Accordingly, it should be revised to reflect commercial realities and practicalities.

Effect of the Proposed Rules on Electronic Commerce

The Commission's proposed rules fail to acknowledge that electronic commerce is a developing marketing and product delivery mechanism that is still in its infancy. Accordingly, the Commission's "one-size fits all" approach is uncalled for and inappropriate. The rigid and arbitrary nature of the Commission's proposed rules will prove unduly burdensome on businesses and will stifle the growth and development of electronic commerce in this country. Moreover, the manner in which the Commission has approached this rulemaking will leave legitimate businesses exposed to potential liability arising from a possible failure to comply with the ambiguous and vague standards set forth in the proposal.

Finally, as drafted, the proposed rules would impose significant additional costs on businesses to ensure compliance with the standards set forth in the proposed rules without providing significant benefits to recipients. The manpower and technological resources that will be required for such efforts will impose a costly burden on firms and their customers. The resulting costs will ultimately will be borne by customers.

In view of the above, we urge the Commission to revise its proposal and seek additional public comment on rules that reflect the language of the CAN-SPAM Act and the intent of Congress. We appreciate the opportunity to comment on this proposal.

Sincerely yours,



Gilbert T. Schwartz

⁷ H. Rep. 108-102, CAN-SPAM Act of 2003, Report of the Committee on Commerce, Science, and Transportation, July 16, 2003 at 14.