

**Comments to the Federal Trade Commission
From Consumer Action, Consumer Federation of America,
And the National Consumers League
Regarding CAN-SPAM Rulemaking
Project No. R411008
September 10, 2004**

Introduction

The National Consumers League (NCL) was founded in 1899 to identify, represent, and advocate for the economic and social interests of consumers and workers. Since 1971, the nonprofit organization Consumer Action (CA) has served consumers nationwide through complaint referral, education, and advocacy. Consumer Federation of America (CFA), established in 1968, is a nonprofit association of 300 consumer groups that seeks to advance the consumer interest through research, advocacy, and education. We applaud the Federal Trade Commission (FTC) for the thoughtful approach it has taken in the proposed rules to define the relevant criteria for determining the “primary purpose” of an electronic message. In these comments, we will attempt to answer some of the questions that the FTC has posed from the perspective of the recipients.

General Comments about Primary Purpose

The FTC has correctly rejected the suggestion that the primary purpose of an electronic message should be determined by the intent of the sender. This would be too subjective: neither recipients nor law enforcement authorities can look into the minds of senders in order to prove whether they intended the messages to be primarily for commercial or other purposes.

Another suggestion, using a formula based on the percentage of different types of content that a single message contains to determine its primary purpose, is also unworkable. Any such formula would be arbitrary and would not provide a fair standard by which to judge whether messages are primarily commercial or not.

NCL agrees that it may be helpful to use different criteria for determining the primary purpose of electronic messages in varying circumstances, as long as the criteria in each case are based on the fundamental principle that the FTC cites: the focus must be on “what the message’s recipient would reasonably interpret the primary purpose to be.”¹ Indeed, no matter what media they use, marketers spend considerable time and resources trying to anticipate how consumers

¹ Notice of Proposed Rulemaking, page 13.

will react to all aspects of their advertisements, including the placement of information, type size and style, wording, colors, graphics, etc. Therefore, it is perfectly fair to hold them to a standard based on the recipient's reasonable interpretation of whether their electronic messages are primarily commercial in nature or not.

Proposed Categories of Email Messages that Contain Commercial Content

Messages that Contain Only Commercial Content

It is reasonable to conclude that the primary purpose of an electronic message containing only content that advertises or promotes a product or service is commercial.

We also agree that the primary purpose of a message should be considered commercial if the subject line indicates that it is being sent to advertise or promote a product or service. The subject line is the first thing the recipient sees; it is often the sole basis on which the recipient decides whether to open the message or delete it, or which folder to store it in. It is unlikely that marketers would label messages in such way that they could be interpreted as primarily commercial if that is not their purpose.

Messages that Contain Commercial and Transactional/Relationship Content

We are concerned about the FTC's proposal not to consider electronic messages with both commercial and transactional/relationship content as primarily commercial if the transactional information is *at or near the beginning* of the message (italics added). This is an invitation to use such messages as Trojan horses for commercial solicitations that could wrap around and subsume the transactional information.

Email recipients should not have to wade through commercial content to get the information to which they are entitled as part of a transaction. It is easy to understand why marketers would want to include solicitations in transactional/relationship messages, rather than sending them as separate missives; recipients are more likely to open and read them. However, if the sender wishes to avoid the designation and requirements of messages that are deemed primarily commercial, the transactional information should be required to be provided *at the beginning* of the message and the commercial content should not interfere with, detract from, or undermine it in any way.

Messages that Contain Commercial Content and Content that is neither Commercial nor Transactional/Relationship

This is a scenario that could be even more easily abused by unscrupulous marketers eager to escape the obligations that attach to electronic messages whose purpose is primarily commercial. One can envision sales solicitations paired with minimal educational information, contests, horoscopes, inspirational messages – there is doubtless no end to the creative efforts we would see to disguise messages that are primarily designed to advertise or promote goods or services. The FTC proposes to assess these types of messages by the net impression they create, considering such factors as proportion of message dedicated to commercial content, how things like color, type and graphics are used to highlight the commercial content, etc. One question that the FTC poses is whether the identity of the sender should be considered.

We believe that it should. Electronic messages of this type from for-profit businesses should automatically be considered primarily commercial; there is no other purpose to send them to recipients with which the businesses have no transactional relationships. Nonprofit groups, on the other hand, have a broader social and public mission. Electronic messages from nonprofit organizations that include commercial content as well as content that is neither commercial nor transactional should be assessed by how the recipients would reasonably interpret their primary purpose.

Newsletters Delivered Electronically

Newsletters and some other goods or services can be delivered via electronic message. The CAN-SPAM Act (the Act) includes as a transactional or relationship message “an electronic mail message the primary purpose of which is to deliver 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.”² The FTC asks whether email messages that deliver newsletters or other electronically delivered content should be deemed to be transactional or relationship messages.

In our view, the newsletter is the “goods or services” that is being delivered. Assuming that the recipient has agreed to receive the newsletter, the electronic message that conveys or accompanies the newsletter may be deemed a transactional or relationship message, but not the newsletter itself. The amount of commercial content in the newsletter, the placement of that content within the newsletter, etc. should be immaterial in determining the primary purpose of the email. However, if the email contains commercial content which is not part of the newsletter,

² 15 U.S.C. 7702 (17)(A)(v).

and which advertises or promotes other products or services, that content should be considered commercial. It should come after any transactional information in the message about the newsletter, such as which issue it is, how to open the document if it is an attachment, what the renewal date is, etc.

If the newsletter content is in the body of the electronic message, any commercial information that precedes it may well be annoying to the reader – smart publishers will keep this to a minimum if they want to retain subscribers. It would be a mistake and a misinterpretation of the Act, in our opinion, for the FTC rules to extend to the content of the newsletter itself.

Conclusion

The FTC rules to define the relevant criteria for determining the “primary purpose” of an electronic message should be flexible enough to accommodate different types of senders and situations. At the same time, however, the FTC must avoid creating loopholes that can be exploited by unscrupulous marketers. The rules should be based on how the recipient would reasonably interpret the purpose of the message. We appreciate the opportunity to share our views and look forward to working with the FTC and others to educate the public about their rights and obligations in this regard.

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