

September 13, 2004

Via Electronic Filing

Mr. Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

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

Dear Secretary Clark:

By Federal Register Notice dated Thursday August 13, 2004 (69 Federal Register 50091), the Federal Trade Commission ("Commission") requested public comment by Notice of Proposed Rulemaking ("NPRM") in the above referenced project. As part of that ANPR, the Commission requested comments pursuant to the authority of the "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003", or the CAN-SPAM Act of 2003 ("Act"), on the issue of what is the primary purpose of an electronic mail message.

The Promotion Marketing Association, Inc. ("PMA"), which earlier submitted comments on the ANPR (69 Federal Register 11776, March 11, 2004) appreciates the opportunity to respond to this request and accordingly files the comments below.

Introduction

The PMA has been the leading non-profit association representing the promotion marketing industry since 1911. PMA has approximately 700 members representing diverse aspects of the industry, including Fortune 500 consumer goods and services companies, advertising and promotion agencies, and university faculty who educate about promotional activities as part of a business curriculum. The PMA's mission is to encourage the highest standards of excellence in promotion marketing. The objectives of the PMA are to educate its members on the laws that govern promotions and to act as a resource to state legislatures, state attorneys general, and federal regulatory agencies in drafting appropriate and focused legislation and rules to combat deceptive marketing and promotion practices.

Many PMA members currently follow an "integrated marketing" approach, which involves the use of a combination of different media and marketing tools to execute an overall marketing plan. E-tailing and other forms of marketing play an increasingly important role in such integrated marketing programs for many such members. The PMA

has a keen interest in ensuring both that e-mail marketing remains free of abuses and that this channel not become subject to unnecessarily burdensome regulation.

Summary

PMA supports efforts to combat spam. As a trade association representing the companies leading consumer product and service companies in connection with their promotional marketing activities, PMA and its members have a keen interest in the future viability of electronic commerce and the existence of a smoothly functioning legitimate e-mail medium. PMA recognizes that there have been abuses created by unwanted e-mails. However, e-tailing is also an important and increasingly vital part of good business in the U.S. Accordingly, PMA strongly supports interpretations and clarification of the Act, which will create better understanding among industry and consumers alike regarding the requirements of the Act.

PMA request that in its NPRM the Commission:

- address issues interwoven with “primary purpose”, including that each advertiser is not necessarily a “sender”.
- acknowledge that “pure” transactional e-mails are excluded from “commercial” primary purpose review.
- specify certain types of e-mails that are excluded from “commercial” primary purpose.
- exempt Forward to a Friend E-Mails from “commercial” primary purpose.
- modify standard for e-mails with content that is both “commercial” and “transactional/relationship”.
- evaluate a recipient’s expectation to opt-out with regard to certain content.
- when evaluating the subject line of “dual purpose” message, look at perception of “primary purpose” of the subject line.
- specify that “dual purpose” e-mails with a commercial purpose need not reference the commercial portion in the subject line.
- eliminate the dual purpose test as improperly restrictive of First Amendment Protected Editorial Content.

These issues are discussed below. Thus, PMA requests that in the FTC's final rule on "primary purpose", the Commission:

1. *Address critical issues raised in the ANPR that are inextricably linked to the "primary purpose," including clarifying that, in instances of multiple advertisers in an e-mail, each advertiser is not necessarily a "sender."*

The NPRM does not address critical interpretive issues surrounding the CAN-SPAM Act (15 U.S.C. §§ 7702 *et seq.*) that are raising concerns in the marketplace. Such issues are interwoven with the "primary purpose" of a message and should be addressed in the immediate proceeding. Without addressing such issues, it is difficult for PMA to fully evaluate the impact of the Commission's proposed rule. Specifically, PMA reiterates its request set forth in response to the ANPR to clarify that in instances where there are multiple advertisers in an e-mail message, each advertiser is not a "sender" under the Act.

Congress did not intend for advertisers and other legitimate actors that are not attempting to avoid the law and who honor consumer opt-outs to become "senders" for any e-mail in which the advertiser's product or service is advertised or promoted. Treating each advertiser in an e-mail as a "sender" would: necessitate burdensome and unworkable multiple suppression; require each message to contain multiple opt outs and physical postal addresses that would crowd e-mail and create consumer confusion; and undermine, rather than enhance, privacy by requiring significant transfers of personal information.

2. *Acknowledge that e-mail that is "pure" transactional is excepted from consideration as having a "commercial" primary purpose.*

The Commission should acknowledge that e-mail that solely consists of transactional or relationship content or does not contain any commercial content should not be subject to the CAN-SPAM rules. Such treatment is analogous to that set forth by the Commission for e-mail messages that solely contain commercial content. The Commission should indicate in the final rule that such messages always have a primary purpose that is transactional or relationship. These messages with solely transactional or relationship content or no commercial content represent a unique category of e-mail recognized by the Congress as outside of the scope of the regulations imposed on commercial e-mail.

In addressing this scenario, the FTC should indicate that if such e-mail contains commercial content that is within the scope of the transaction or that a recipient would reasonably expect to receive based on the terms of a transaction, the "primary purpose" of such e-mail shall be deemed transactional or relationship, and the dual-purpose tests would not apply.

3. *Identify certain types of e-mail that never should be classified as having a “commercial” primary purpose.*

The Act requires that the Commission issue rules to determine what “constitutes” the primary purpose of an e-mail message. The statute contemplates that the sender of the message determines the primary purpose. Often messages have several purposes, some that are “commercial” and others that are not. By referring to “*the* primary purpose” (emphasis added), the statute is clear that a message can have only one primary purpose. Thus, for messages with multiple purposes, the provisions of the statute that apply to them will be determined by which of the purposes is the primary purpose of the message. In response to the ANPR, PMA stated that it is critical that the Commission’s criteria for determining the “primary purpose” provide a clear standard that allows for the certainty required for senders of e-mail and Internet Service Providers to manage their e-mail operations. PMA believes that following a “but for” test would provide such a clear standard. The CAN-SPAM Act suggests that the “primary purpose” of an e-mail message should be determined from the perspective of the sender of the message and not that of the recipient.

Rather than following the dictates of the statute to adopt a “purpose test,” the FTC has chosen an “effects” test in adopting a standard determined by the impression of a reasonable recipient. This test creates no certainty for either the consumer or the sender. Indeed, PMA believes that in establishing a primary purpose standard, which by definition is a “purpose” test, Congress clearly intended the criteria to focus on the intent or purpose of the sender rather than on the effect of or impression the message on the recipient. By establishing criteria based on the net impression of the message on the recipient, we submit that the Commission has exceeded the scope of its statutory authority by substituting an “effects” test for the Congressionally mandated “purpose” test.

Thus, in defining criteria for the term “primary purpose,” there are specific types of e-mail that the Commission should clarify do not have a primary purpose that is “commercial” in nature. These categories should include:

- *E-mail sent at the request of the recipient.* If a recipient has requested an e-mail message, then he or she does not expect to have an opt out in the message. Newsletters, e-magazines, requested advertiser services, and other types of messages requested by the recipient would fall outside of the scope of “commercial messages.” Treatment as non-commercial is critical to avoid issues that would result if multiple advertisers and advertisements in a periodical requested by the consumer were treated as commercial. For such e-mail, a consumer should have the easy ability to terminate such a request.

- *E-mail messages that contain billing statements and similar transaction confirmations, subscription notifications, or statements of accounts.* The Congress did not intend the CAN-SPAM Act to allow recipients to opt out of bills and similar statements. Nor did they seek to eliminate the ability of merchants or banks to add commercial messages to billing statements.
- *E-mail messages that provide bona fide editorial content, including newsletters and electronic magazines.* This classification is rendered even more necessary, lest the proposed regulations fall of their own weight as not meeting the “strict” or “intermediate” tests of scrutiny applicable to protected speech and protected commercial speech, respectively. See infra, point 9.
- *E-mail messages that invite a consumer to participate in the opportunity to play games, primarily for entertainment value but do not contain an offer to sell any goods or services.* As the Commission is aware, these sites are often sponsored by advertisers; however, there are no products or services offered for sale on the site, the purpose of which is to provide an entertainment vehicle to the consumer.

4. *Exempt Forward to a Friend E-Mails from classification as having a “commercial” primary purpose.*

The Forward to a Friend email (hereafter the “Friend Message”) is a technique commonly employed by online marketers who provide incentives to the original email recipient to forward the message to another person (“A Friend”) who the marketer reasonably believes may be interested in the marketer’s products or services. The incentive could take the form of a discount on a future purchase, a premium item or even an additional entry into a sweepstakes but the Friend Message should not be deemed a commercial message within the meaning of the Act.

Primary support for this position can be found in the definition of a commercial email, which is defined as an email message whose “primary purpose . . . is the commercial advertisement or promotion of a commercial product or service . . .” (emphasis added). The recipient’s intent in sending the e-mail is two fold: (1) to alert the Friend of a product offer in which he/she may be interested and (2) to take advantage of the incentive offered by the marketer. As such, the Friend Message does not meet the primary purpose standard for commercial email and differs little from a conventional personal email in which the sender attaches a website or link. Unless that personal email satisfied the primary purpose standard, it cannot be deemed a commercial email even when commercial information has been attached.

To include the Friend Message would also shift the statute’s emphasis from the marketer to the recipient. If the Friend Message fell within the scope of coverage simply

because it included the marketer's commercial information, the marketer would be obligated to include therein a physical postal address, an opt-out-from-future-email feature and an advertising designation to comply with the law. The marketer, however, has no control over the Friend Message and has no practical method to fulfill its obligation, short of importuning the recipient to include the necessary information. Moreover, even if the recipient complied and the friend opted-out, the marketer would be presumably bound even without knowledge of the friend's request, unless the recipient provided the marketer with notice. Clearly, the Act does contemplate that the marketer must seek the aid of the recipient to guarantee its compliance with the Act. Moreover, if the Friend has already opted-out from receiving the marketer's email, and the Friend Message were deemed to have been sent by the marketer itself, the marketer would be in technical violation of the Act even though it was unaware that the Friend Message was sent.

To characterize the Friend Message as a commercial email fails to further the primary purpose of CAN-SPAM—to protect consumers from unwanted commercial email messages. A Friend's Message actually increases the likelihood that the Friend will receive information about products of services in which he/she has an interest. Based on what we believe to be current practice in business, there is a reasonable likelihood that the recipient will know the tastes of his/her friend and will only forward messages that contain subject matter of some concern or interest. In addition, the marketer will benefit when its messages are sent to persons who may be reasonably inclined to buy. Clearly, an exemption for Friend Messages will not, in our view, undermine the stated purpose of the Act.

As in any consumer protection laws, the equities must be balanced and the desire to shield consumers from unwanted commercial emails must be weighed against the legitimate needs of the marketer. Friend Messages are an essential part of marketing and provide the marketer with an important sales tool to reach potential customers in a highly targeted and efficient manner, while at the same time fulfilling the CAN SPAM aim of reducing the level of fraudulent or deceptive emails in the marketplace. It follows that friends are unlikely to knowingly forward to other friend emails that contain false or deceptive information. If the Commission has a continuing concern in this regard, it can address the problem by treating a Friend Message as a “transaction or relationship message”.

5. *Revise the standard for e-mail messages with content that is “commercial” and “transactional or relationship.”*

As discussed supra, the Commission should develop objective criteria that are not based on the reasonable-recipient standard. However, if the Commission retains a “reasonable recipient” test, at a minimum, the Commissions should create a “safe harbor”

in lieu of what is now contained in section 316.3(a)(2) so that a “dual-purpose” e-mail will be considered to be a transactional or relationship e-mail by evaluating whether:

1) the recipient reasonably interpreting the subject line would likely conclude that the message relates to a transaction the recipient agreed to enter into with the sender, or a product or service the recipient purchased from the sender, or any other ongoing relationship the recipient has with the sender; *or*

2) the transactional and relationship message appears at or near the beginning of the message.

This “safe-harbor” option embraces the perspective of the recipient preferred by the Commission, while not presuming that an e-mail message has a commercial primary purpose. If the safe harbor does not apply in a particular circumstance, then the content of the message would be subject to a “net-impression” test.

6. *Evaluate the reasonable recipient’s expectation to opt out of messages with certain types of content.*

If a reasonable-recipient standard is adopted, the Commission should look first to whether a reasonable recipient could expect to receive an “opt out” prior to evaluating whether the recipient would interpret the message as having a “primary purpose to advertise or promote a commercial product or service.” There are many types of messages, such as e-mail that the recipient has agreed to receive in exchange for receiving a benefit like free e-mail accounts, from which a reasonable recipient would not expect to have the ability to opt out. The Congress did not intend that an opt-out apply to such messages.

7. *When evaluating the subject line of a dual-purpose message, the standard should evaluate the reasonable consumer’s perception of the “primary purpose” of the subject line.*

The CAN-SPAM Act requires that for an e-mail message to be “commercial,” it must have a primary purpose of advertisement or promotion of a commercial product or service. In defining the characteristics for evaluating categories of e-mail, the Commission proposes to evaluate for certain types of e-mail whether the recipient would interpret the message as an advertisement or promotion. In doing so, the Commission appears to be effectively reading the “primary purpose” requirement out of the Act. If the Commission evaluates the perspective of the reasonable recipient’s view of content of the subject line, in addition to evaluating the primary purpose of the content of the body of the message, it should evaluate the reasonable recipient’s view of the primary purpose thereof.

8. *Indicate in the rule that dual-purpose e-mail with a commercial purpose does not need to refer to the commercial component in the subject line.*

The Commission indicates that, depending on the facts of a given situation, a dual-purpose message may use a subject line that is not deceptive and does not refer to commercial content. The Commission should state in the rule that in no instance is a subject line required to refer to the commercial content of a message. The CAN-SPAM Act prohibits the Commission from promulgating rules that require a reference to commercial content in the subject line. 15 U.S.C. §§ 7711(b). Senders of commercial e-mail should have certainty that the sole fact of not referencing the commercial component in a message would not be considered deceptive or violative of law or regulation.

9. *Eliminate the Dual Purpose Test as Improperly Restrictive of First Amendment Protected Editorial Content.*

Finally, PMA submits that the purported regulation of speech under the dual purpose rule falls afoul of the “strict” scrutiny test applied to fully protected speech as well as the “intermediate” scrutiny test applied to commercial speech. This is particularly true where the content is editorial in part but also applicable to other non-commercial speech transmitted.

Thus, PMA believes that the primary purpose test for dual purpose e-mails is unduly burdensome and restrictive, particularly as it imposes a standard looking at placement and proportion of e-mail messages involving commercial content, as well as the ways in which graphics, font size and color are deployed. This conflicts with the protection of editorial and other content, and any pre-configured ratios purporting to solve the problem are much more chilling of First Amendment rights than they are likely to advance any interest in government regulation of potentially deceptive advertising.

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PMA appreciates the opportunity to comment on this proceeding and looks forward to continuing to discuss these important issues with the Commission. For additional information, please contact Edward Kabak, Director of Legal Affairs, PMA at 212-420-1100 ext. 236.

Sincerely,

PROMOTION MARKETING ASSOCIATION, INC

By: _____
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cc: Claire Rosenzweig, President, CAE, PMA
Rick Murray, Chairman of the Board, PMA

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