

**FEDERAL TRADE COMMISSION
OFFICE OF THE SECRETARY
ROOM 159-H
600 PENNSYLVANIA AVENUE, N.W.
WASHINGTON DC, 20580**

CAN-SPAM ACT RULEMAKING

NATIONAL DO NOT E-MAIL REGISTRY

PROJECT NO. R411008

**COMMENTS OF ACA INTERNATIONAL IN RESPONSE
TO THE FEDERAL TRADE COMMISSION'S
NOTICE OF PROPOSED RULEMAKING:**

**DEFINITIONS, IMPLEMENTATION, AND REPORTING
REQUIREMENTS UNDER THE CAN-SPAM ACT**

FILED SEPTEMBER 13, 2004

Andrew M. Beato, Esq.
Stein, Mitchell & Mezines L.L.P.
1100 Connecticut Avenue, NW
Suite 1100
Washington, DC 20036
(202) 737-7777

*Federal Regulatory Counsel
ACA International*

CAN-SPAM ACT RULEMAKING
FTC PROJECT NO. R411008

INTRODUCTION

The following comments are submitted on behalf of ACA International (“ACA”) in response to the request by the Federal Trade Commission (“FTC” or “Commission”) for comments regarding the CAN-SPAM Act notice of proposed rulemaking. *See* Notice of Proposed Rulemaking, 69 Fed. Reg. 50091 (Aug. 13, 2004) (“NPRM”).¹ Pursuant to the NPRM, the FTC seeks to promulgate rules defining the relevant criteria to facilitate the determination of the primary purpose of commercial electronic mail (“email”) messages as required under 15 U.S.C. § 7702(2)(C). As discussed below, ACA respectfully requests that the Commission utilize this rulemaking to confirm that: (1) debt collection emails are not covered by the CAN-SPAM Act and the implementing regulation because they are not “commercial electronic mail message[s]” within the meaning of the Act; (2) debt collection emails are “transactional or relationship messages” exempted from the Act and regulation; and (3) debt collection emails are “communication[s]” under the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692a(2), and are exempted from CAN-SPAM regulation.

¹ These comments supplement those filed with the Commission by ACA on March 31, 2004, in response to the Commission’s Advanced Notice of Proposed Rulemaking regarding the CAN SPAM Act. *See Comments of ACA International, available at* <http://www.ftc.gov/os/comments/canspam/OL102206.pdf>.

CAN-SPAM ACT RULEMAKING
FTC PROJECT NO. R411008

I. Statement on ACA

ACA International is an international trade organization of credit and collection professionals who provide a wide variety of accounts receivable management services. Headquartered in Minneapolis, Minnesota, ACA represents approximately 5,300 third party collection agencies, attorneys, credit grantors, and vendor affiliates. Members comply with all applicable federal and state laws and regulations regarding debt collection, as well as ethical standards and guidelines established by ACA. Specifically, the collection activity of ACA members is regulated by the Commission under the FDCPA, 15 U.S.C. § 1692 *et seq.*, and the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, and other state and federal laws.

II. The Commission Should Clarify That Emails Sent to Collect Debts Are Not Subject to the Statute and Regulation.

Email communications sent to, or received by, debtors for the purpose of collecting debts (“debt collection emails”) are clearly not the kind of unsolicited “commercial electronic mail message” Congress intended to regulate under the CAN-SPAM Act. Instead, such emails are, at most, “transactional or relationship messages” which Congress explicitly exempted from the Act’s coverage. *See* CAN-SPAM Act § 3(2)(B) (“The term ‘commercial electronic mail message’ does not include a transactional or relationship message.”). The FTC should clarify the fact that debt-collection e-mails are not subject to the CAN-SPAM Act and, therefore, should not be included in the registry.

CAN-SPAM ACT RULEMAKING
FTC PROJECT NO. R411008

The CAN-SPAM Act defines the key jurisdictional term “commercial electronic mail message” as “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose).” CAN-SPAM Act § 3(2)(A). The Act further directs the FTC to issue regulations defining the relevant criteria for determining an e-mail’s “primary purpose.” Under the proposed rule, the Commission proposes to construe the “primary purpose” of an email as commercial if it:

- (1) contains only content that advertises or promotes a product or service;
- (2) contains content that advertises or promotes a product or service as well as content that relates to transactional or relationship functions such as facilitating, completing or confirming the transaction *if* the recipient reasonably interprets the subject line to advertise or promote a product or service or the transactional information does not appear at or near the beginning of the message; or
- (3) contains content that advertises or promotes a product or services as well as other content unrelated to a transactional or relationship function *if* the recipient reasonably interprets the subject line or body to convey such information.

See 16 C.F.R. § 316.3 (proposed).

It should be obvious that an email seeking collection on a debt does not have as its primary purpose the advertisement or promotion of a commercial product or service. Collection agencies send emails and other forms of communication to debtors for the purpose

CAN-SPAM ACT RULEMAKING
FTC PROJECT NO. R411008

of collecting preexisting debts owed either to the sender or, as is more often the case, a third-party creditor. Such communication does not advertise or promote products or services. It merely seeks to recover money owed for a product, service, or loan that has already been provided but has not been fully paid off by the debtor. The FTC should acknowledge as much in the final rule.

The FTC also should acknowledge that payment services incidental to the collection of debts by email are not subject to the CAN SPAM Act. Payment options are commonly offered as part of an email communication to collect a debt. If a debtor consents, a collection agency will send a collection notice electronically, or “e-collection” notice, to the debtor which includes an electronic payment option. If the debtor elects, the transaction is processed electronically by e-check, debit or credit card and the debt is paid off. Consumers, creditors and collection agencies all benefit by encouraging this type of efficient, elective payment transaction.

Regardless of the method of payment, the purpose of e-collection is to communicate with a debtor about his or her debt. An incidental aspect of the communication is to offer an additional option to the debtor to pay off the debt by an electronic process. Including this additional information about the consumer’s payment options, however, should not be deemed to be a “commercial advertisement or promotion of a commercial product or service” under the statute or final rule.

CAN-SPAM ACT RULEMAKING
FTC PROJECT NO. R411008

III. Debt Collection E-mails, at Most, are Transactional or Relationship Messages.

Congress explicitly exempted “transactional or relationship messages” from the CAN-SPAM Act’s coverage. The Act defines such messages to include emails, the primary purposes of which is “to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;” CAN-SPAM Act § 3(17)(A)(i), or “to provide— . . . account balance information or other type of account statement with respect to [an] account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender.” CAN-SPAM Act § 3(17)(iii)(III). The Act also authorizes the FTC to modify this definition to “accomplish the purposes of this Act.” CAN-SPAM Act § 3(17)(B).

ACA urges the Commission to make clear in this rulemaking that debt collection e-mails would be considered, at most, “transactional or relationship messages” within the meaning of the CAN-SPAM Act, and therefore not subject to the final rule. The language of section 3(17) would seemingly make this clear, except for the fact that a debt collector, the “sender” of the email, might not be considered the party with whom the recipient entered into a debtor-creditor relationship.

CAN-SPAM ACT RULEMAKING
FTC PROJECT NO. R411008

There is nothing in the Act, however, suggesting that Congress intended to create a loophole in the definition of “transactional or relationship messages” through which debtors could escape collection emails. A debt collection agency operates as an agent of the creditor. In the Act’s terminology, collection agencies are paid to “complete . . . a commercial transaction that the recipient has previously agreed to enter into. . . .”. It would defy common sense, not to mention congressional intent, for a debt collection email to be considered anything other than a “transactional or relationship” message. The Commission should make this point plain in the final rule. Otherwise, the final rule might be construed as blocking perfectly legitimate debt collection.

**IV. The FTC Should Exercise its Rulemaking Authority to Exempt
“Communications” as Defined by the FDCPA.**

Debt collection agencies are already subject to numerous regulatory mandates under the FDCPA, a law aimed specifically at the collection industry. The FDCPA regulates the practices of debt collectors in locating debtors, 15 U.S.C. § 1692b, in restricting how and how often debtors may be contacted, 15 U.S.C. § 1692c, in preventing harassment or abuse, 15 U.S.C. § 1692d, or false or misleading representations, 15 U.S.C. § 1692(e). The FDCPA imposes stiff penalties, *see* 15 U.S.C. § 1692k, and confers robust administrative enforcement powers on the FTC. *See* 15 U.S.C. § 1692l. Indeed, the FDCPA gives consumers the right to cease communications with debt collectors. *See* 15 U.S.C. § 1692c(c). In short, the FDCPA already establishes a welter of finely-tuned behavioral restrictions on the debt collection

CAN-SPAM ACT RULEMAKING
FTC PROJECT NO. R411008

industry, and it already protects debtors from abusive communications via the Internet or any other means.

The CAN-SPAM Act, by contrast, contains nothing that would suggest that Congress intended to classify debt collection emails as spam. The FTC should emphasize this point in its final regulation. The Commission should also exempt debt-collection emails from the regulation by excluding FDCPA-based “communication[s]” from additional regulation under the CAN-SPAM Act and the implementing regulation. The statutory definition of “communication” under the FDCPA is specific and broad: “The term ‘communication’ means the conveying of information regarding a debt directly or indirectly to any person through any medium.” 15 U.S.C. § 1692a(2). The regulatory regime established by the FDCPA protects consumers and limits communications by collection agencies. Ultimately, it would be counterproductive and economically wasteful to enable debtors to block email communications seeking collection on valid debts. In effect, subjecting collection agencies to the CAN-SPAM rule would do nothing to correct the spam problem and would do much to harm the nation’s economic well-being.

CONCLUSION

Debt collection is vital to the national economy. If anything, the advent of email makes a debtor’s life less intrusive than it was in the pre-Internet era when written letters or live phone calls were often the only means available to contact debtors. The bottom line for ACA is that the CAN-SPAM Act should not be construed by the FTC to hold that debt-collection e-

CAN-SPAM ACT RULEMAKING
FTC PROJECT NO. R411008

mails are spam. ACA asks the Commission to recognize this fact. There are at least three ways the FTC can accomplish this result. The final rule can acknowledge that: (1) debt collection emails are not covered by the CAN-SPAM Act and the implementing regulation because they are not “commercial electronic mail message[s]” within the meaning of the Act; (2) debt collection emails are instead “transactional or relationship messages” exempted from the Act and regulation; and (3) debt collection emails are subject to extensive regulation as “communication” under the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692a(2), and all such “communication” under the FDCPA are exempted from CAN-SPAM regulation.

ACA appreciates the opportunity to comment on the Commission’s proposed Disposal Rule. If you any questions, please contact Rozanne Andersen, ACA International General Counsel and Senior Vice President of Legal and Governmental Affairs, at (952) 928-8000 ext. 132, or Andrew M. Beato at (202) 737-7777.

Sincerely,

Rosanne Andersen
General Counsel
Senior Vice President of Legal and
Governmental Affairs

Andrew M. Beato, Esq.
Stein, Mitchell & Mezines L.L.P.
1100 Connecticut Avenue, NW
Suite 1100
Washington, DC 20036
(202) 737-7777