



Priya S. Sanger, Esq.
Senior Counsel
Law Department
633 Folsom Street, 5th Floor,
MAC A0149-059
San Francisco, CA 94107
Telephone: (415) 396-4113
Fax: (415) 975-7861
Email: SangerPS@wellsfargo.com

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September 13, 2004

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Washington DC 20580

Re: CAN-SPAM Act Rulemaking, Project No. R411008, 16 C.F.R. Part 316

Ladies and Gentlemen of the Commission:

Wells Fargo & Company (“Wells Fargo”) appreciates the opportunity to comment on the “primary purpose” of a commercial e-mail message [“CAN-SPAM Act Rulemaking, Project No. R411008, 16 C.F.R. Part 316”] in response to the Federal Trade Commission (“Commission”) request for public comment. Wells Fargo is one of the country's leading integrated financial services organizations. Wells Fargo includes a national bank with branches in more than 23 states, a consumer finance company, insurance agencies and brokerages, and securities broker-dealers and investment advisors.

The ease of using e-mails to communicate with large numbers of people to sell products and services has led to an avalanche of unwanted spam which threatens the reliability and usefulness of e-mail as a channel of communication. Wells Fargo believes that congressional action to stanch the flow of spam is paramount and necessary; however, Wells Fargo believes that the Commission’s approach in its Proposal, which is

largely based on the subjective “reasonable recipient’s interpretation” of a message rather than more objective criteria as evidenced by the message itself, is at odds with the requirements set forth by the Congress in the CAN-SPAM Act.

The Commission sets forth criteria to determine the primary purpose once the types of purposes of a message are identified. The Commission, however, provides little guidance as to what types of messages have “commercial” or “transactional or relationship” content necessary to make such a determination. To address these issues, and to seek more clarity around the tests currently proposed by the Commission, Wells Fargo provides the following comments for consideration.

Substantive Comments on the Notice for Proposed Rule-Making (NPRM).

1. Primary purpose test is useful only when adequately defined by primarily objective, not subjective, criteria.

The Commission has set forth three sets of criteria to be applied in specified circumstances for determining the “primary purpose” of an e-mail message. The first standard proposed in Section 316.3(a)(1) is that email messages containing only content that advertises or promotes a product or service (“commercial content”) would be deemed to be commercial. The Commission further states that it will look to the subjective test of the “reasonable recipient’s interpretation” in defining primary purpose in its proposed Section 316.3.(a) (2) and 316.3(a)(3), where email messages contain both commercial content and transactional/ relationship content or commercial content and non-commercial/non-relationship content in the same message.

The Commission’s approach to rely on the subjective “reasonable recipient’s interpretation” of a message rather than objective criteria would appear to be at odds with the requirements set forth by the Congress in the CAN-SPAM Act. The CAN-SPAM

Act sets forth a purpose test to determine whether a message is commercial which it has asked the Commission to define. Rather than setting forth criteria to determine the purpose, the Commission has proposed an “effects” test that relies on the recipient’s subjective response to that e-mail, or a “reasonable recipient” standard.

The “effects” test has some utility but places its full emphasis on the response of the recipient rather than on the primary purpose of the message, the latter which, in the Commission’s stated view, is what CAN-SPAM is intended to cover. The Commission’s approach also leaves considerable ambiguity for businesses that send e-mail, because the reasonable recipient standard is subjective and the Commission has provided very little guidance as to how reasonable recipients would interpret different types of e-mail messages.

Wells Fargo believes that the Commission should follow a “but for” standard as set forth in our prior comments to the ANPRM previously issued by the Commission on this topic, which includes looking at the intent of the sender to determine primary purpose. We believe such an approach is required by the Act, provides more notice to the sender of the e-mail as to what kind of e-mail falls into a particular category, and provides clear and objective criteria to both senders and recipients as to the classification of the e-mail being sent out.

Even if the Commission declines to adopt the “but for” standard, in order for businesses to apply the Commission’s proposed criteria to e-mail, the Commission should expand and clarify the types of content that are “transactional or relationship” in nature. Without such clarification, businesses will not know whether some messages have transactional or relationship content and the Commission’s proposed criteria will prove difficult to apply. Left undefined, the proposed criteria may place a chilling effect on

legitimate business communications, an effect which Congress did not intend to have in its desire to strike an appropriate balance between consumer protection and legitimate industry activity.

2. Methods to better clarify the Commission’s proposal.

Wells Fargo offers the following suggestions on the Commission’s proposal, discussed in more detail below, which it believes will provide more certainty for businesses in determining the primary purpose of a message:

- Expand and clarify with objective criteria that certain messages are transactional or relationship messages.
- Specifically identify certain types of e-mail, including e-mail that contains billing statements, as never having a primary purpose that is commercial (i.e. exempt specifically identified types of e-mail from being classified as commercial)
- State in the rule that the subject line does not in any instance require an indication that the message is commercial or transactional or relationship.
- In developing its criteria, the Commission has read “primary purpose” out of the statute. If the Commission proceeds in adopting a reasonable recipient standard, the standard should evaluate the reasonable consumer’s perception of the “primary purpose” of the subject line.
- E-mail with content that is “commercial” and “transactional or relationship” should have a commercial primary purpose only if both (1) the message has a subject line that a reasonable consumer would determine has the [primary purpose] of advertisement or promotion and (2) the message’s transactional or relationship content does not appear at or near the beginning of the message.

- Clarify that in instances when e-mail contains content from multiple businesses, that each business is not a “sender” under the Act.

3. Multiple Senders and Corresponding “Opt-Outs” are not addressed.

Wells Fargo believes the Commission should attempt to address the issues surrounding whether there can be multiple “senders” and corresponding “opt outs.” This is a complicated issue, and the lack of clarity creates confusion in the marketplace. As indicated in Wells Fargo’s ANPRM comments, some interpretations of the Act suggest that multiple parties provide commercial content that advertise in an e-mail are all senders. Such an interpretation would require multiple opt outs, suppression against multiple lists, and inclusion of multiple physical addresses in such e-mail. We do not believe that this is what the Congress intended, and the Commission should address this issue in this rulemaking.

If the Commission ultimately follows the approach taken in the NPRM to determine the primary purpose, the Commission must provide more specificity in articulating the objective standards to businesses that send e-mail. The NPRM is entirely focused on determining the primary purpose of a message depending on whether the message includes purposes that are “commercial,” “transactional or relationship,” other content that does not fit into either of these categories, or a combination of these categories. The Commission sets forth criteria to determine the primary purpose once the types of purposes of a message are identified. The Commission, however, provides little guidance as to what types of messages have “commercial” or “transactional or relationship” content, necessary to make such a determination.

4. The Commission should identify the types of messages that have a non-commercial primary purpose.

The Commission should identify specific types of messages that have a primary purpose that is not “commercial,” including: (1) e-mail messages that contain billing statements; (2) e-mail messages where the recipient has requested the e-mail or consented to receive the e-mail; (3) e-mail that contains primarily editorial content; (4) one-to-one e-mail sent in a business capacity by individual employees; and (5) e-mail containing legally required content. Such messages should not be evaluated based on the reasonable recipient’s interpretation of the body of the message. These messages are too critical to business communications to leave their classification as ambiguous in a manner such that they could be classified as “commercial.” Each of these additional categories will provide helpful guidance to Wells Fargo and other businesses regarding these types of messages, allowing business operations to continue without unnecessarily burdensome changes in the manner in which we communicate using e-mail.

4(a). E-Mail that includes billing statements should never be classified as having a “commercial” primary purpose.

E-mail messages that contain billing statements and other similar messages that cannot be opted out of or are legally required should always be considered to have a primary purpose that is “transactional or relationship.” Under the Commission’s proposal, if either the billing statement is not at or near the beginning of the message, or the reasonable recipient would interpret the subject line of the message to be for an advertisement or promotion, even if the e-mail is a bill, the Commission would deem the e-mail to have a commercial primary purpose, thus allowing customers to opt-out of billing statements. This is contrary to the intent of Congress. The alternative is for the

sender to not include any promotional material in bills. This also is not the intent of Congress.

The Commission should not include evaluating an electronic billing statement under its proposed criteria, because a reasonable consumer would never expect to be able to “opt out” of a bill. Similarly, if a bank is required by law to send certain information such as a disclosure or notice, a reasonable recipient should not expect to be able to opt out of the receipt of such a message. Financial institutions also use e-mail, which may be combined with commercial messages, to send their account holders notices and other information required by law, including disclosures under Federal Reserve Board’s Regulations E and Z and privacy notices that are required under the Gramm-Leach-Bliley Act. E-mail that includes such content should never be deemed to have a “commercial” primary purpose.

4(b). E-mail sent at the recipient’s request should be classified as “not commercial.”

The Commission should add messages that are sent to recipients at the recipient’s request to the list of e-mail that is “transactional or relationship.” Under the CAN-SPAM Act, there may be situations where an individual has provided consent that does not fit within the existing types of messages considered to be “transactional or relationship” messages. For example, many of our mortgage bankers, when requested by a consumer, send consumers who are in the process of purchasing or refinancing a house e-mail that includes the latest interest rates.

If an individual has requested the material, then clearly there is a relationship that should not be limited by this Act. If these types of e-mail are not included in this category, it is possible that individuals could not receive e-mail that they have asked to

receive. This could be the case if an individual has requested a specific message from an entity whose commercial e-mail the individual has previously opted out of. This is not a result that either senders or recipients desire. Thus, the Commission should indicate that any e-mail requested by a consumer should have a “primary purpose” that is transactional or relationship. In order to ensure that recipients maintain the ability to terminate their request, the Commission could require the following additional criteria:

- the sender may only send e-mail within the scope of the request;
- upon termination of the request, the sender will not initiate messages within the scope of the original request

4(c). E-mail that contains primarily editorial content should be deemed transaction or relationship e-mail, not commercial.

The Commission should clarify that e-mail that provides substantial editorial content, including newsletters, is not “commercial.” Wells Fargo lines of business often send their customers editorial content in the form of newsletters, intended to educate customers and employees about financial issues, such as managing their 401(k) or how to save money on taxes. Such messages are not the advertisement or promotion of a particular good or service and should not be treated as commercial.

4(d). E-mail sent in a business capacity by individual employees

Like e-mail sent pursuant to the recipient’s request, one-to-one e-mail that is sent by employees in the business-to-business context should not be treated as “commercial” e-mail. Both large and small businesses engage in corporate-to-corporate e-mail exchanges that involve complex transactions with a lot of e-mail flowing both ways. For example, in the commercial real estate business, e-mails are sent to brokers by individual representatives of lenders to inform them of current mortgage rates. In addition, in the

context of the equipment leasing industry, it is typical for lenders to e-mail equipment vendors a rate sheet that describes the amount of interest a lender would charge on a given piece of equipment. One interpretation of the Act could require that such e-mail contain an opt out and be run against the business's suppression list prior to transmission. Wells Fargo believes that such a result would be very difficult for businesses to administer and was not intended by Congress.

Business e-mail systems are not designed to scrub each e-mail sent by an employee against the business's suppression list. Such a requirement would result in the need to redesign numerous businesses' e-mail systems and would be extraordinarily burdensome and expensive. In addition, such a requirement would interfere with legitimate practices that are critical to business relationships and operations and e-mail that provides information critical to developing the financial marketplace. Moreover, regulating this type of e-mail would restrict legitimate e-mail without addressing the spam problem.

5. E-mail that contains both “commercial” content and “transactional or relationship” content should be determined by a more objective test.

The Commission proposes that, if e-mail messages contain both “commercial” content and “transactional or relationship” content, the primary purpose will be deemed commercial if either: (1) a recipient reasonably interpreting the subject line of the message likely would conclude that the message advertises or promotes a product or service; or (2) the message's transactional or relationship content does not appear at or near the beginning of the message.

Wells Fargo believes that the criteria set forth by the Commission for this category of dual-purpose messages only begin, but do not completely satisfy, the creation

of a bright-line standard that will prove useful for businesses that send e-mail. In addition, Wells Fargo believes that this standard will result in some e-mail, whose primary purpose is not the “advertisement or promotion of a commercial product or service.” being treated as a “commercial.” For these reasons, Wells Fargo suggests several changes to the Commission’s proposal that we believe will adhere to the intent of Congress that a commercial message must have a primary purpose that is commercial.

First, in order for a message to be deemed “commercial,” the message should satisfy both criteria, rather than the current proposal that satisfying either one of these criteria would result in classification of the message as having a primary purpose that is commercial. Second, Wells Fargo believes that a reasonable-recipient standard must evaluate the reasonable recipient’s view of the “primary purpose” of the subject line rather than solely whether the e-mail is an advertisement or promotion. Finally, as discussed above e-mail that contains billing statements, even if the e-mail also contains advertisements or promotions, should not be classified as having a primary purpose that is commercial. When a bill is included in an e-mail, the e-mail should always have a primary purpose that is “transactional or relationship” in nature.

5(a). If the Commission adopts its proposed criteria for determining the primary purpose of an e-mail message, it should focus on the reasonable consumer’s evaluation of the primary purpose of the subject line.

In determining whether an e-mail has a “commercial” primary purpose, one criterion the Commission has proposed in the categories of dual-purpose messages that it would look to whether the reasonable recipient’s interpretation of the subject line is that the e-mail is an advertisement or promotion. In proposing this standard, the Commission

has omitted the statutory requirement of evaluating the “primary purpose” of the message.

The statute, by stating “**the**” primary purpose, indicates that an e-mail message can have only a single primary purpose. Many messages sent by Wells Fargo have multiple purposes. The Commission’s proposed criteria would evaluate the reasonable consumer’s perception of whether the message includes an advertisement or promotion. In a multiple purpose e-mail where one of the purposes is “commercial,” the reasonable recipient likely would interpret the e-mail subject line to include an advertisement, when in fact, the reasonable consumer may not interpret the **primary purpose** of the e-mail to be an “advertisement or promotion” regardless of the subject line. If the Commission proceeds with this reasonable recipient approach, the standard should be revised to include the reasonable recipient’s perception of the **primary purpose** of the subject line.

5(b). Wells Fargo seeks to expand the Commission’s proposed criteria for dual-purpose email which has both commercial and non-commercial purposes.

Wells Fargo believes that the Commission’s proposed “either/or” criteria toward defining dual-purpose email as commercial is too broad. Wells Fargo advocates that dual-purpose e-mail with content that is commercial and transactional or relationship should have a primary purpose that is “commercial” only if both (1) the subject line that a reasonable recipient would conclude that the message is an advertisement and (2) the message’s transactional or relationship content does not appear at or near the beginning of the message.

The Commission’s proposed “either/or” criteria will lead to a result that an e-mail message that primarily has transactional or relationship content that is not near the beginning of the message alone will cause the message not to be a “transactional or

relationship” message. There may be instances where the transactional or relationship content is near the end of a message, yet the message has a primary purpose that is transactional or relationship. By requiring both of the criteria rather than one for the message to be determined to have a commercial primary purpose, the Commission will ensure the potential of having a result intended by the Congress.

6. The Commission should modify the existing categories in an expansion of definition to provide greater clarity to both senders and recipients of e-mail.

In addition to indicating that the above types of e-mail do not have a commercial primary purpose, the Commission should modify several of the other categories to provide clarity to businesses that certain types of content are “transactional or relationship” in nature. These modifications should include as being “transactional or relationship” e-mail: (1) sent to a recipient as part of an ongoing relationship concerning products or services that the recipient has received or will receive from the sender; (2) relating to the provision of goods or services received as a result of the opening of a service relationship with the sender; (3) negotiating transactions; and (4) sent by a company to its employees regarding products or services available to the employees, including products or services of third parties.

6(a). E-mail sent to a recipient as part of an ongoing relationship concerning products or services that the recipient has received or will receive from the sender should be deemed non-commercial.

The Commission should extend § 3(17)(A)(iii) of the Act to include information related to products or services that a client or customer will often expect as a part of an ongoing relationship. The current category classifies as “transactional or relationship” messages that provide “(I) notification concerning a change in the terms or features of;

(II) notification of a change in the recipient's standing or status with respect to; or (III) at regular periodic intervals, account balance information or other type of account statement with respect to a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender." The FTC should amend this provision by adding a new (IV) "concerning information, products, or services that the recipient has received or will receive from the sender." This section, as currently drafted, is limited to account statements or a change in terms of a customer's account. This category should be expanded to include information that a customer expects to receive, such as a prospectus, inventory, research, and information about seminars.

Additionally, Wells Fargo believes that the Commission should eliminate the words "at regular periodic intervals" from § 3(17)(A)(iii)(III). Often there are account statements that are sent following a transaction, rather than on a "regular" temporal schedule. Such messages are clearly transactional or relationship in nature. Thus, this section should allow for the sending of account information even if it is not "regular."

6(b). E-mail sent pursuant to the terms and conditions of an agreement should be deemed transactional or relationship email and not commercial.

The Commission should clarify or, if necessary, expand the definition of transactional or relationship message so that messages sent pursuant to the terms and conditions of an agreement, including account opening documents or other documents that establish the terms of a relationship, are "transactional or relationship" messages. The Commission should clarify or, if necessary, expand the scope of § (3)(17)(A)(v) of the Act so that it is clear that e-mail sent pursuant to consent obtained in account opening or other documents that establish the terms of an agreement, are "transactional or

relationship” messages. This section currently includes e-mail that has a primary purpose “to deliver goods or services, including product updates or upgrades, 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.” The Commission should clarify that if an e-mail is sent pursuant to consent obtained at the establishment of the relationship, such e-mail constitutes “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.” Alternatively, the Commission should expand the scope of § 3(17) and add a new (vi) in order to include messages sent pursuant to the terms and conditions of an agreement.

6(c) E-mail negotiating transactions should be deemed transactional.

The use of e-mail has greatly facilitated the ease and efficiency of negotiating transactions and should not be restricted. Section 3(17)(A)(i) of the Act should be modified to include situations where parties are negotiating a transaction. The subparagraph should state: “to negotiate a commercial transaction or to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender.”

6(d) E-mail sent by a company to its employees regarding products or services available to the employees, including products or services of third parties, should be deemed transactional or relationship email.

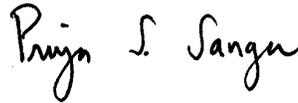
Section 3(17)(A)(iv) of the Act covers messages that have a primary purpose “to provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled.” The Commission should clarify the scope of this provision so that a company’s communications with

employees concerning products and services available to them are considered to be “directly related to an employment relationship or related benefit plan.”

Conclusion

Wells Fargo appreciates this opportunity to comment in this proceeding. For clarification of any issues presented herein, please contact the undersigned by phone at (415) 396-4113 or by email at SangerPS@wellsfargo.com.

Respectfully submitted,

A handwritten signature in black ink that reads "Priya S. Sanger". The signature is written in a cursive style with a horizontal line underneath the name.

Priya S. Sanger, Esq.
Senior Counsel