

**Before the
FEDERAL TRADE COMMISSION
Washington, DC 20580**

In the Matter of

CAN-SPAM Act Rulemaking) Project No. R411008

COMMENTS ON CAN-SPAM ACT RULEMAKING

On behalf of various marketers and advertisers who use a wide variety of communications media, including electronic mail, to reach clients and customers, Venable LLP submits these comments in response to the Commission’s advance notice of proposed rulemaking regarding definitions, implementation, and reporting requirements under the CAN-SPAM Act (“CAN-SPAM” or the “Act”).¹ Our clients use e-mail as a cost-effective and non-intrusive communications device to maintain and develop relationships with their clients and customers.

The Commission should be particularly mindful of the impact of CAN-SPAM on small- and medium-sized businesses that use email as a “convenient and efficient” tool for “the development and growth of frictionless commerce.”² The Act imposes substantial burdens on these firms, and the Commission must take care not to increase them by additional layers of unduly restrictive, complex, or subjective regulation. As it crafts rules to determine the “primary purpose” of e-mail messages and to expand or refine the categories of “transactional or relationship” messages, the Commission should provide clear criteria for separating strictly “commercial” messages from messages that are inherently “transactional or relationship” in purpose. Moreover, the Commission should weigh carefully the technical and practical limitations that legitimate businesses face as they adapt their business models to comply with a

¹ Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, *Advance Notice of Proposed Rulemaking*, 69 Fed. Reg. 11,776 (Mar. 11, 2004) [hereinafter “ANPRM”].

² CAN-SPAM Act § 2(a)(1).

law largely intended to control unwanted solicitations sent by persons who disguise their identities or attempt to mislead consumers.³

I. Responses to Customer Inquiries or Requests are Categorically “Transactional or Relationship” Messages.

The Commission has requested comment on additional categories of messages that warrant designation as “transactional or relationship messages.”⁴ We submit that sales messages sent to recipients at the recipient’s request or in response to a customer inquiry should categorically be delineated as transactional or relationship messages, even if they advertise or promote a commercial product or service.

As recognized by Congress, transactional or relationship message are messages sent “pursuant to existing transactional relationships between a consumer and an e-mail sender.”⁵ Thus, recipients of transactional or relationship messages expect to hear from the sender. Any follow-up or other response to a recipient who requested information from the sender or submitted an inquiry to the sender is neither unwanted nor unsolicited. Accordingly, these messages inherently fall outside the purview of the statute’s purpose, which is to control unsolicited commercial messages, and must be categorized as transactional or relationship. If a customer requests information from the company about a particular product or service, an e-mail response sent at the customer’s request does not compare to the types of unsolicited fraudulent schemes, privacy risks, and objectionable content that CAN-SPAM is intended to address.⁶ Indeed, the customer’s inquiry or request amounts to consent to receive information from the company.

³ See CAN-SPAM Act § 2(a)(3) and (6); S. Rep. No. 108-102 at 2 (explaining that “spam has become a favored mechanism of those who seek to defraud consumers and make a living by preying on unsuspecting e-mail users and those new to the Internet.”).

⁴ ANPRM at 11,777.

⁵ See Cong. Rec. E73 (daily ed. Jan. 28, 2004) (remarks of Hon. W.J. (Billy) Tauzin).

⁶ See S. Rep. No. 108-102 at 5.

II. Classifying Mixed Purpose Messages as “Commercial” is Contrary to the Act and Would Negate Congressional Intent to Preserve Legitimate Business Communications.

The Commission asks for comments on how to determine a message’s “primary purpose” in order to determine whether a message constitutes a “commercial electronic mail message.”⁷ The Commission also requests comments on the scope of “transactional or relationship” messages, which are excluded from the Act’s definition of “commercial electronic mail message.”⁸ In particular, the Commission seeks comments on the proper treatment of messages that have both commercial and transactional or relationship elements, and how to identify the “primary purpose” of such email.⁹ The Act, however, does not contemplate subjecting “mixed messages” to the requirements for commercial e-mail. The definition of “transactional or relationship” message makes no mention of mixed messages. Any message that meets one of the Act’s criteria for “transactional or relationship” messages is categorically deemed a “transactional or relationship” message. Moreover, a Senate Report accompanying the Act clarifies that the definition of commercial 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.”¹⁰

We urge the Commission to make this point explicit in its rules. When transactional or relationship messages also advertise or promote a commercial product or service, the “primary purpose” test becomes irrelevant – the inclusion of some advertisements or promotional elements does not change the inherently transactional or relationship nature of the message.

“Transactional or relationship” messages are narrowly carved categories of communication that

⁷ ANPRM at 11,777.

⁸ *Id.*

⁹ *Id.* at 11,780.

¹⁰ Sen. Rep. No. 108-102 at 14.

preserve the commercial relationship between businesses and their existing customers and clients. They serve as important communications and relationship-enhancing tools. Indeed, each transactional or relationship category designated by the Act presupposes some prior communication or transaction between the sender and the recipient, and the recipient is likely to expect to hear from the sender of a transactional or relationship message.¹¹ Congress recognized the business importance of transactional or relationship messages by excluding them from all but one of the Act's requirements. It would undermine Congress's goals and devastate businesses to apply the "primary purpose" test, or even tip the scale, toward the commercial designation, simply because a transactional or relationship message also includes promotional material. So long as the commercial aspects of the message do not overwhelm the message in a way that obviously and overtly reveals the transactional or relationship aspect as a sham, the Commission should honor the transactional or relationship purpose.¹²

Congress carefully crafted the Act to preserve the value and utility of messages in the transactional or relationship category by declaring that such messages are not, by definition, "commercial." The Commission should, therefore, clarify that transactional or relationship messages that include ancillary advertisements or promotions from the sender retain their transactional or relationship status.

III. The Distinction between "Transactional or Relationship" Messages and "Commercial" Message Must Be Absolutely Clear.

The Commission has asked for comments on practices or technologies that affect the definition of "transactional or relationship message."¹³ As a practical and technical matter, the Commission cannot leave the categorical determination of messages open to subjective

¹¹ See Cong. Rec. at E78 (daily ed. Jan. 28, 2004) (remarks of Hon. W.J. (Billy) Tauzin).

¹² See S. Rep. No. 108-102 at 16 (explaining that transactional or relationship messages can include promotional information about other products and services.)

¹³ See *ANPRM* at 11,780.

interpretation or opinion. If the Commission's criteria for determining "primary purpose" are too vague or subjective, then businesses may no longer be able to use e-mail as a tool to enhance customer relationships and respond to customer interests. Businesses that send messages to prospective and existing customers and clients must be able to give their sales and marketing staffs clear guidelines about what is, or is not, a "commercial" message as defined by the Act, without requiring a detailed legal analysis of the appropriate classification of each and every message. At the same time, the Commission must be mindful of the limitations small- and medium-sized businesses face, and avoid imposing complex or additional requirements that disproportionately impair or disadvantage them. For instance, where regulatory flexibility is solely dependent on software or programming design, the Commission must bear in mind that the cost of new or updated programming or software, as well as maintenance expenses, may be too high to enable small- or medium-sized business to avail themselves of such "flexibility."

Ambiguity about the application of regulations, as well as unduly complex or unnecessary requirements, impose substantial administrative and cost burdens. For example, given current practical and technological constraints, some of our clients, like many other businesses, must use software that automatically "stamps" every outgoing message with an opt-out notice. Thus, even exempt transactional or relationship messages are burdened with notices and disclosures meant for "spam." The programming and maintenance costs associated with tagging "commercial" messages alone are substantial. Yet, these clients face extraordinary opportunity costs, too. The practice of over-including relationship messages in the commercial category can cause confusion, unnecessarily limit the marketer's ability to communicate with clients, and may be off-putting to customers that have otherwise considered their relationships with the senders to be personalized and unique. Bombarding even the most loyal customers with

opt-out notices merely because the Commission has not provided clear enough guidelines to distinguish transactional or relationship messages from commercial messages could erode or destroy many of the customer relationships in which both they and our clients have invested substantial time and effort. Thus, in order for businesses to technically and practically implement CAN-SPAM compliance procedures, the Commission must strive to distinguish transactional or relationship messages from commercial messages as clearly as possible.

Conclusion

For the foregoing reasons, we respectfully submit that the Commission should provide that responses to customer requests or inquiries that contain commercial elements are transactional or relationship messages under CAN-SPAM. The Commission should also clarify that “mixed purpose” messages are by definition excluded from the “commercial” category and retain their character as “transactional or relationship” communications. Finally, in crafting its regulations, the Commission should, above all, adopt clear criteria for determining “primary purpose” so as not to overburden the legitimate, relationship-enhancing efforts of small and medium-sized businesses.

Respectfully submitted,

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