Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

In the Matter of:	)	
	)	
CAN-SPAM Act Rulemaking	)	Project No. R411008

COMMENTS OF VERIZON[1]

As a leader in the fight against spam, Verizon strongly supports efforts to stop unsolicited and misleading commercial e-mail.[2] However, Verizon, like other legitimate businesses, also uses e-mail to communicate critical, true and non-misleading information to consumers, including rendering bills and current account status, updating security information, updating the availability of a pre-requested service, offering innovative, custom-tailored services, and providing newsletters regarding services. The Commission should interpret the CAN-SPAM Act in a manner that accomplishes Congress's goal of eradicating spam, particularly the actions of "outlaw" spammers, while simultaneously not allowing its do-not-spam policies to infringe upon legitimate e-mail, which is a valuable, constitutionally protected medium of communication for businesses and their customers.[3]

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[1] These comments are filed on behalf of Verizon Internet Services Inc. and GTE.Net LLC d/b/a Verizon Internet Solutions (which operate under the trade name Verizon Online), and Verizon's affiliated local exchange carriers and long distance companies (collectively referred to herein as "Verizon"). Some of these companies are service providers subject to regulation under the Communications Act of 1934, as amended, and therefore are subject to the enforcement jurisdiction of the Federal Communications Commission, not the Federal Trade Commission. *See* Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699, § 7(b)(10) (2003) ("CAN-SPAM Act").

[2] *See* Comments of Verizon, Project No. R411008, filed March 31, 2004, at 1-2.

[3] Because the CAN-SPAM Act directly affects what can and cannot be said, the restriction, no matter how indirect, implicates the First Amendment. *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 790 n.5 (1988) (finding First Amendment implicated where "effect of the statute is to encourage some forms of solicitation and discourage others").

In particular, the Commission should use this rulemaking proceeding to define the "primary purpose" of both "commercial" and "transactional and relationship" e-mails in a coherent fashion, so that businesses have a clear understanding of what types of activities are permitted under the Act. The Commission also should define "sender" in such a way as to protect customers' ability to receive information in e-mails that they would want to know about – such as bundled offerings from businesses with whom they already do business – while allowing them to avoid receiving the type of bulk, unsolicited, and often misleading spam messages the Act was designed to prohibit.

I. THE COMMISSION SHOULD DEFINE THE "PRIMARY PURPOSE" FOR BOTH "TRANSACTIONAL OR RELATIONSHIP" AND "COMMERCIAL" MESSAGES IN THE UPCOMING MANDATORY RULEMAKING PROCEEDING.

As part of its mandatory rulemaking, Congress directed that "the Commission *shall* issue regulations … defining the relevant criteria to facilitate the determination of the primary purpose of an electronic message." *See* CAN-SPAM Act, § 3(2)(C) (emphasis added). Although the Notice only asks how the term "primary purpose" should be defined for commercial messages, the Act also uses the "primary purpose" language in determining whether an e-mail is a "transactional or relationship" message. *See* CAN-SPAM Act, § 3(17)(A) (defining "transactional or relationship message" as one "the primary purpose of which" satisfies one of the enumerated criteria). Thus, the Commission's rulemaking should address how the "primary purpose" test would apply to both parts of the Act. In particular, it should clarify that, if an e-mail falls into one of the five enumerated "transactional or relationship" categories, the primary purpose of the e-mail is "transactional or relationship," and thus is not "commercial." If the primary purpose of the e-mail is neither "transactional or relationship" nor "commercial," it is not regulated at all under the CAN-SPAM Act.

A. Transactional Or Relationship E-Mails Should Encompass Legitimate Communications Between Businesses and Customers

A "transactional or relationship" e-mail is one for which the primary purpose is to accomplish one or more of five enumerated objectives relating to dealings between a business and its customer.[4] The Act makes clear that the two categories, "transactional or relationship" and "commercial," are mutually exclusive. *See* CAN-SPAM Act, § 3(2)(B) ("The term 'commercial electronic mail message' does not include a transactional or relationship message."). Thus, under the plain language of the Act, a transaction or relationship message that also contains an advertisement or promotion is not "commercial" so long as the "primary purpose" of the e-mail fits the transactional or relationship statutory criteria.

The Act's distinction, between messages that merely *contain* commercial messages, and those that have a commercial message as a "primary purpose," reflect the differing privacy concerns that consumers would have in receiving such messages. For example, customers expect to receive e-mails with communications that are necessary to consummate a transaction (such as those that request additional information in order to complete the transaction), or information regarding upgrades or new service features, and such messages should be considered "transactional or relationship" messages if that is the primary purpose of the message. As the

[4] These five enumerated objectives include: (i) to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender; (ii) to provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient; (iii) to 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; (iv) to provide information directly related to an employment relationship or related benefit plan; or (v) 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. CAN-SPAM Act, § 3(17)(A).

Act implicitly recognizes, putting a notice at the bottom of an account bill or statement that announces the availability of a new features or service is far less intrusive than sending an unsolicited email the sole purpose of which is to advertise.

B. The "Primary Purpose" Of A "Commercial" Message Should Be Defined In Common Sense Terms As The Overriding Focus Of A Communication And Should Take Into Account The Relationship Between The Sender And Recipient.

The CAN-SPAM Act defines "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 …." CAN-SPAM Act, § 3(2)(A). The Commission asks a number of questions regarding appropriate criteria for determining "primary purpose" of a commercial message, ranging from relatively narrow (commercial advertisement or purpose is more important than all other purposes combined) to quite broad (commercial advertisement or promotion is more than incidental or financially supports other aspects of the e-mail). Notice, 69 Fed. Reg. at 11779-11780.

The first definition of "primary purpose" suggested by the Commission – that "an e-mail's commercial advertisement or promotion is more important than all of the e-mail's other purposes combined" – is most consistent with Congress's intent and best reflects the nature of the relationship between the sender and recipient.

Congress sought to put an end to annoying and misleading e-mails, but not to impinge upon normal communications between a business and its customers. As Senator McCain, one of the main sponsors of the CAN-SPAM Act, cautioned:

> We must be mindful that in our quest to stop spam, we may impose e-mail restrictions that go too far and actually prohibit or effectively prevent e-mail that customers want to receive and that legitimate businesses depend on to service their customers. Statement of Sen. McCain, 149 Cong. Rec. S13020 (Oct. 22, 2003).

Similarly, Senator Wyden confirmed that Congress did not intend for the CAN-SPAM Act to interfere with legitimate online business communications:

> Our goal here is not to discourage legitimate online communications between businesses and their customers. Senator Burns and I have no intention of interfering with a company's ability to use e-mail to inform customers of warranty information, provide account holders with monthly account statements, and so forth. Rather, we want to go after those unscrupulous individuals who use e-mail in an annoying and misleading fashion. Statement of Sen. Wyden, 149 Cong. Rec. S5208 (April 10, 2003).

Indeed, the Congressional findings set forth in Act itself state an intention to protect consumers' ability to receive "commercial" e-mail messages that are "wanted." CAN-SPAM Act, § 2(a)(4).

In light of this legislative history, the determination of "primary purpose" should take into consideration not just the content of the e-mail, but whether there is a pre-existing relationship between the sender and the recipient. If the recipient is an existing customer of the sender, there is a very good chance that an e-mail has a primary purpose that is not commercial, even if it also includes a promotion or advertisement.

Any broader definition of "primary purpose" would unduly infringe on legitimate communications between a business and its customers. For example, considering any e-mail with an advertisement or promotion that is "more than incidental" to have a primary commercial purpose, *see* Notice, 69 Fed. Reg. at 11779, could bar communications that include an offer of new or upgraded service along with a customer's account statement. This is a widely used marketing technique that customers not only expect, but also often appreciate because it informs them of ways to make better use of a company's services. Moreover, such messages are "transactional or relationship," and are in a category of e-mails that Congress intended to exempt from the Act's requirements. *See* CAN-SPAM Act, § §3(17)(A).

Similarly, Verizon's customer service personnel regularly send individual (non-bulk) e-mails to particular customers discussing operational or billing matters. These often include suggestions about new products or services that the customer may wish to consider or inform the customer of an upcoming promotion. Such e-mails are a part of normal interactions between a business and its customers, and they benefit both parties. These are not the type of "bulk unsolicited" messages that Congress intended to target. *Id*. § 2(a)(10).

Basing the primary purpose determination on whether the advertisement or promotion "financially supports" other aspects of an e-mail, *see* Notice, 69 Fed. Reg. at 11779, would unnecessarily sweep too many e-mail into the definition. Such a definition would be patently over-inclusive; presumably any advertisement or promotion, no matter how incidental to the overall communications, helps financially support the other aspects of the e-mail. Moreover, this definition could prevent customers from receiving on-line newsletters containing valuable non-commercial information, just because the newsletter also includes ads for new products. There is no indication that customers have any concerns with such newsletters, which fall well outside the ambit of "annoying and misleading communications" that Congress sought to prohibit. For the same reason, the commercial e-mail category should not include news releases sent to stakeholders, such as new product or pricing announcements sent to analysts. Such news releases seek to provide information, not to sell specific products or services to particular customers.

II. THE COMMISSION SHOULD DEFINE THE "SENDER" OF A COMMERCIAL E-MAIL AS THE ENTITY THAT CAUSES THE TRANSMISSION OF THE MESSAGE, WHICH NORMALLY SHOULD BE ONLY ONE ENTITY.

The Act defines the term "sender" as a "person who initiates such a [commercial electronic mail] message and whose product, service, or Internet web site is advertised or prompted by the message." *See* CAN-SPAM Act, § 3(16)(A). To "initiate" a message means

"to originate or transmit such message or to procure the origination or transmission of such message …." *Id.* § 3(9). To "procure" means "intentionally to pay or provide other consideration to, or induce, another person to initiate such message on one's behalf." *Id.* § 3(12). Ordinarily, only one entity can be the "sender" of an e-mail.

The Notice asks whether there would be more than one "sender" if an e-mail contains "ads for four different companies." *See* Notice, 69 Fed. Reg. at 11781. Under normal business practices, the Act contemplates that there is only one sender of an e-mail. Under the language of the Act, an entity is not deemed the "sender" of a commercial e-mail message unless it *both* "initiates" the message and is the person whose product or service is being advertised. *See* CAN-SPAM Act § 3(16)(A). Thus, in the Commission's example, none of the four companies would be the sender, unless it also was the initiator of the e-mail. This bright-line definition will not only ensure that third party vendors are not considered "senders," but will also protect commercial speech by enabling legitimate businesses to place advertisements in the commercial e-mails of other senders.

The plain language of the Act supports defining the sender as a single entity. Indeed, Congress expressly defined "sender" as "a person." *See* CAN-SPAM Act, § 3(16)(A). If Congress intended for the "sender" of an individual e-mail to be multiple entities, then it would have defined "sender" as "any person" or "persons" who initiate a commercial electronic mail message.

A contrary interpretation would be nonsensical because it would cripple common (and entirely permissible) forms of advertising. For example, if all advertisers included in an e-mail were considered "senders," and a newspaper transmits an e-mail that contains an advertisement for Verizon, Verizon would be considered a "sender" of this e-mail. Yet, it would be virtually

impossible for Verizon to determine to whom the newspaper, or any other advertiser with which Verizon does business, will send such e-mails. Consequently, Verizon would have to discontinue such advertising in order ensure that it did not inadvertently violate the Act's prohibition on sending commercial e-mails to customers who have opted out from receiving such communications from Verizon. For example, the Commission should not draft the rules in such a way that online news services offering updates to readers who ask to be notified of breaking news would be unable to include advertising messages in those updates, as those advertisements subsidize the cost of the service, and thus allow the customers to get the service for free. Congress did not intend such a result.[5] Moreover, interpreting "sender" to include all advertisers in an e-mail would raise First Amendment concerns as well.

The Act creates a separate definition of sender for purposes of an entity with multiple lines of business. In this regard, the Act states that "[i]f an entity operates though separate lines of business or divisions and holds itself out to the recipient throughout the message as that particular line or business or division …, then the line of business or division shall be treated as the sender of such message for purpose of this Act." *See* CAN-SPAM Act, § 3(16)(B). Consistent with the plain language of the Act, the Commission should confirm that, in the context of a bundled service offering, only the line of business that transmits the commercial e-mail is considered the "sender."

Of course, the Commission should not allow outlaw spammers to use misleading practices to avoid penalties under the Act by claiming they are not the true "senders" of the message. However, this is best accomplished by making clear rules that prohibit false and misleading headers or "sham" senders designed to evade the Act's requirements.

[5] *See e.g. supra*, Section I, quoting Senators McCain and Wyden.

III. IT IS PREMATURE TO IDENTIFY ADDITIONAL AGGRAVATED VIOLATIONS.

Congress gave the Commission the authority to add factors that are subject to the aggravated violations provisions of the CAN-SPAM Act. *See* CAN-SPAM Act, § 5(c)(2). The Commission solicited comments to determine if any additional activities, practices, or technologies should be added to the aggravated violations contained in Section 5(b), which includes address harvesting and dictionary attacks, automated creation of multiple electronic mail accounts, and relay or retransmission through unauthorized access. *See* Notice, 69 F.R., at 11781. At this time, it is premature for the Commission to "specify additional activities or practices to which subsection (b) applies." Until the Commission has time to monitor and review compliance with the CAN-SPAM Act, there is no evidence that the existing regulations are insufficient.

IV. CONCLUSION

For the foregoing reasons, the FTC should exercise its discretionary authority to clarify aspects of the CAN-SPAM Act to assure that the Act's purpose of deterring and punishing spam is met, while preserving the viability of legitimate on-line communications between businesses and their customers and respecting First Amendment commercial speech rights.

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