



April 20, 2004

Via Electronic Filing

Hon. 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:

The International Franchise Association (IFA) appreciates having this opportunity to provide its comments to the Commission concerning the Rulemaking proceeding that is underway.

Background. The IFA was organized in 1960 and is the oldest and largest association representing the franchising community. Our membership includes in excess of 6,200 franchisee members and 900 franchisor members that collectively represent a "who's-who" of American industry. Our members conduct business in over 75 different industry areas – from hotels to quick service restaurants to lawn care and personnel services. The pervasive economic impact and vitality of the franchise method of doing business in the United States is extensive. In March 2004, the International Franchise Association Educational Foundation released a study that was conducted by PricewaterhouseCoopers, entitled "The Economic Impact of Franchised Businesses." Among other things, this study found that:

- Franchised businesses directly employ 9,797,000 people in the U.S., about the same number as the U.S. durable-goods manufacturing sector. Franchising employment is almost as large as that of the information and construction sectors combined. Taking into account both direct and indirect job activity, franchising generates one out of every seven jobs in the private sector in the United States.
- Franchised businesses in turn generate jobs for more than 18 million Americans and account for 9.5 percent of the private-sector economic output in the U.S.

- More than 760,000 franchised businesses operate in the U.S., and generate a total economic output of more than \$1.53 trillion – representing nearly 10 percent of the U.S. private-sector economy.

The IFA and its members strongly support the initiative represented by passage of the CAN-SPAM Act. In the Commission’s Advance Notice of Proposed Rulemaking and Request for Public Comment, 69 Fed. Reg. 11776 (Mar. 11, 2004) (the “ANPR”), several questions were identified for public comment. The IFA wishes to focus its attention specifically on the questions posed in Part VI.B of the ANPR, requesting comments on the definition of “Transactional or Relationship Messages,” as well as the questions raised in Part VI.E of ANPR, relating to who is actually the “sender” of an e-mail.

Definition of Transactional or Relationship Messages.

1. Many franchisors and franchisees have shifted their communication to an entirely electronic format in order to facilitate faster, less expensive, and more effective back-and-forth exchange of information. In those franchise systems, e-mails are used as the principal means of passing along information to franchisees as to matters relating to the ongoing commercial relationship, such as reporting sales and royalty payment information, providing information about training opportunities, conventions, passing along marketing materials and suggestions, links to new training or product information on the franchisor’s extranet, information about system policies, system press releases and other news, etc. In addition, one of the many functions franchisors perform is to provide to their franchisees information about new products or services available for franchisees to buy and use in their business operations or to resell to their customers. This information is also often conveyed in the form of an e-mail. And, of course, in some franchise systems as well as other businesses, e-mail is permitted as a means for sending notices relating to contractual matters (*e.g.*, invoking rights, notifying the other party of an action, or even terminating rights and exercising post-termination rights and remedies).

The IFA proposes that the Commission make clear that all e-mail messages in connection with a franchise agreement, contractual rights, or otherwise relating to a franchise system sent by a franchisor to the franchisees in that same network, or by franchisees in that network to the franchisor and/or to the other franchisees in that same network are, by definition, deemed “transactional or relationship messages.”

2. The IFA also notes that many franchisees are not individuals, but rather are juridical entities such as corporations, limited liability companies, and partnerships. As a result, when a franchisor sends an e-mail to a “franchisee” in furtherance of the commercial relationship between the franchisor and that franchisee – that typically means

that the franchisor actually sends an e-mail to an individual representing that franchisee. Typically, that e-mail is directed to a principal of the franchisee, but just as often it may be an employee of the franchisee to whom the franchisee directs that such messages be sent. Moreover, some franchise business employ the services of independent contractors to represent them to potential customers (e.g., in the real estate brokerage industry).

The IFA asks that the FTC make clear that e-mails sent to an individual in the capacity of his or her employment by, or by virtue of his or her role as an agent or representative of, a business with which the sender has an ongoing commercial relationship would also be covered as “transactional or relationship messages.”

3. Some franchise systems have moved their supply chain management system to an electronic platform, meaning that franchisees order products and supplies either from the franchisor or from approved third party vendors by e-mail. In some such systems, the efficiencies of transacting among the parties (e.g., the franchisor, the franchisees, as well as vendors) is a factor that goes into how products and services are priced. Allowing some franchisees to opt out of receiving e-mails from such a vendor would not only impede the flow of information, but it would also increase the administrative cost of communicating among the parties.

The IFA asks that the FTC make clear that e-mails sent to a franchisee (as well as individuals employed by or representing the franchisee) by a vendor that has an ongoing commercial relationship with the franchisor or with the franchise network of which the franchisee is a member would also be covered as “transactional or relationship messages.”

4. Finally, the IFA – as a membership organization – frequently communicates with its members concerning various educational programs, participation in programs, business, legal and legislative matters, and general issues relating to membership. Like other businesses, IFA believes that in furtherance of this ongoing relationship, using e-mail may be the most efficient and productive way to communicate.

IFA would like to suggest that the FTC make clear that e-mails sent by a membership association to its members (and to their employees or representatives designated to receive those e-mails) are covered as “transactional or relationship messages.”

Who is the Sender?

Franchise networks typically consist of a franchisor and a number of independent franchisees who operate businesses under the same name. While some networks have already adopted marketing techniques that rely upon e-mail, many have not.

Although franchisors and franchisees are independent businesses that utilize the same trademark or service mark, that distinction sometimes may not be clearly perceived by a consumer. Therefore, a consumer who believes that he or she opted out of receiving e-mail from a "system" may in fact have opted out of receiving e-mail only from only one player in that franchise system.

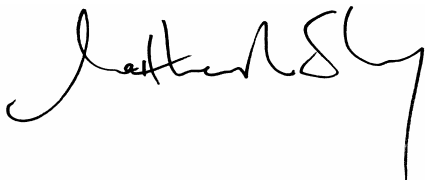
While some franchise networks have systems and procedures to help facilitate the sharing of information as to individuals who have opted out of receiving messages from one actor in a franchise system, not all franchise systems have such a mechanism in place nor will all franchise systems develop those procedures given the independent nature of the businesses involved. In practical terms, not every franchisee will have the time or resources to check a systemwide opt-out list before sending e-mails to prospective customers. Moreover, not every franchisee will be willing to share its opt-out list with other franchisees in the same system or even with its franchisor. As a result, franchisors and their franchisees may inadvertently send an e-mail to a customer who asked to opt out of receiving e-mails from another player in the same brand system. While this may present a challenge from the standpoint of maintaining a good relationship with one's customers, the IFA believes it would be impractical to treat a franchise system made up of independent businesses as one for the purpose of determining who is the "sender" of an e-mail.

The IFA asks that the FTC make clear that a franchisor and its franchisees are different senders.

The IFA and its staff remain available to answer any questions or provide additional information if that would be helpful to the Commission and its staff. Please contact me at 202.628.8000 if we can be of assistance in this regard.

Sincerely,

International Franchise Association

A handwritten signature in black ink, appearing to read "Matthew R. Shay". The signature is fluid and cursive, with a long vertical stroke at the end.

Matthew R. Shay
Vice President and Chief Counsel