BEFORE THE
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act	)	FTC Project No. R411008
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	)	

COMMENTS OF THE NEWSLETTER & ELECTRONIC PUBLISHERS ASSOCIATION

The Newsletter & Electronic Publishers Association ("NEPA") submits these comments in response to the Advance Notice of Proposed Rulemaking recently issued by the Federal Trade Commission ("FTC" or "Commission").[1] Specifically, the FTC seeks comment on a variety of regulatory issues associated with the newly enacted Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("Can-Spam Act" or "Act").[2]

I. INTRODUCTION & SUMMARY

As discussed more fully in its March 31, 2004 comments in opposition to a national Do-Not-E-Mail Registry, NEPA is a trade association representing publishers of approximately 3,000 newsletters and other specialized information services. The typical newsletter customer depends upon a given newsletter for accurate and up-to-the-minute information and analysis in a focused area. Newsletter publishers regularly use e-mail messages to communicate with their customers for a variety of purposes, including to report on breaking news in the newsletter's subject area, facilitate subscription renewals, announce trade conferences, update business

[1] Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act: Advance Notice of Proposed Rulemaking, 69 Fed. Reg. 11776 (March 11, 2004).

[2] Can-Spam Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699.

directory listings, and introduce new products. In addition, publishers increasingly deliver their products electronically, most notably, for example, in the form of e-mail newsletters.

NEPA welcomes the Commission's examination of its regulatory authority pursuant to the Can-Spam Act. While NEPA of course recognizes the need for the FTC to regulate certain e-mail marketing practices, we offer these comments to help the Commission develop rules that will not interfere with the right of newsletter publishers to communicate legitimately and effectively with customers and potential customers about their publications and services.

To that end, NEPA respectfully urges the FTC to define the "primary purpose" of an e-mail message so as to exclude from this definition (and, thus, the reach of the Can-Spam Act) those e-mail messages that contain advertising content ancillary to news reporting and other content fully protected by the First Amendment. Furthermore, the FTC should clarify that any e-mail solicitation sent from a business to an existing customer of that business falls within the definition of a "transactional" or "relationship" message under the Act. This will permit publishers to freely communicate with their current customers via e-mail. In addition, the FTC should not require mandatory subject-line labeling of commercial messages, nor should the FTC expand the definition of an e-mail "sender" to encompass any and all entities whose products may be referenced in a particular commercial e-mail message.

II. THE MERE INCLUSION OF SOME ADVERTISING CONTENT SHOULD NOT MAKE THE "PRIMARY PURPOSE" OF AN E-MAIL COMMERCIAL

The Can-Spam Act mandates that the FTC issue regulations "defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message." Can-Spam Act, § 3(2)(C). As the Commission has recognized, this mandate is "integral" to the practical application of the Act because the statute generally applies only to that class of e-mail messages the "primary purpose" of which is the advertisement or promotion of a commercial

product or service. 69 Fed. Reg. at 11777. NEPA urges the Commission to adopt a definition of primary purpose that would *not* include within the Act's scope those e-mail messages that merely contain some ancillary advertising content. Accordingly, as among the various specific definitions that the FTC has proposed, NEPA recommends that the primary purpose of an e-mail be considered commercial in nature only where "an e-mail's commercial advertisement or promotion is more important than all of the e-mail's other purposes combined." *Id.* at 11799. A broader definition than this threatens to interfere with news publishers' ability to communicate effectively with customers and potential customers.

Furthermore, an unduly broad definition of the "primary purpose" of an e-mail that would place within the Act's reach those e-mails that include some marketing content would be contrary to the intent of Congress in adopting the Act. Congress emphasized that the purpose of the Can-Spam Act was to target a particular subset of commercial e-mail utilizing deceptive tactics to defraud consumers. Congress drew a sharp distinction between such unsavory practices and the use of e-mail advertising by legitimate marketers to reach existing and potential customers. *See* S. Rep. No. 108-102, at 2 (2003) ("37 percent of consumers [in one survey reported having] bought something as a result of receiving unsolicited e-mail from [legitimate] marketers. However, in addition to legitimate businesses . . . spam has become a favored mechanism of those who seek to defraud consumers and make a living by preying on unsuspecting e-mail users"); *see also* Can-Spam Act, § 2(a)(4) (finding that fraudulent e-mail solicitations "create[] a risk that wanted electronic mail messages, both *commercial and noncommercial*, will be lost, overlooked, or discarded amidst the larger volume of unwanted messages") (emphasis added).

Congress determined that the types of e-mail messages abhorred by consumers were not those that merely contained some modest marketing content, but instead were e-mail messages of an unmistakably commercial nature, often crude and hyperbolic in tone. *See* Can-Spam Act, § 2(a)(5), (7)-(9) (discussing trend toward vulgar and fraudulent bulk e-mail messages). Thus, Congress specifically instructed that "the definition [of a commercial e-mail 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." S. Rep. No. 108-102, at 14. Indeed, in the language of the statute itself, with specific regard to the definition of a "transactional" e-mail message, the Act states that the "inclusion of a reference to a commercial entity or a link to the website of a commercial entity in an electronic mail message does not, by itself, cause such message to be treated as a commercial electronic mail message." Can-Spam Act, § 3(2)(D).

At bottom, the language and legislative history of the Can-Spam Act strongly suggest that e-mail messages that include some marketing content, such as an e-mail newsletter that also contains some marketing content related to the publisher's or a third-party advertiser's products, should not fall within that category of e-mail messages whose primary purpose is considered by the FTC to be commercial in nature. *See* 149 Cong. Rec. H12186-02, H12193 (2003) (the Can-Spam Act "concerns only commercial and sexually explicit e-mail and is not intended to intrude on the burgeoning use of e-mail to communicate for political, news, personal and charitable purposes").

Absent such a properly limited definition of the "primary purpose" of an e-mail message under the Act, the FTC risks enacting a regulatory scheme unconstitutional on its face and as applied to newsletter publishers. More specifically, if a sample newsletter, consisting principally

of news reports, sent through e-mail to potential customers, were to fall within the definition of a commercial message under the Act because the e-mail message also contained some advertising content, such a newsletter would be subject to the Act's restrictions even though it otherwise is afforded the full protection of the First Amendment. As one appellate court recently reiterated, the "Supreme Court has made clear that 'the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away.'" *Rossignol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003) (citation omitted).[3]

Indeed, the FTC indicated in the Advance Notice of Proposed Rulemaking that "an electronic newsletter may be funded by advertising within the newsletter," and that "[s]uch advertising *arguably* would not constitute the primary purpose of the newsletter." 69 Fed. Reg. at 11780 (emphasis added). This language raises the suggestion that, if an e-mail newsletter did include advertising, it could be considered a commercial message under the Act, depending upon the definition of an e-mail's "primary purpose" that the FTC ultimately adopts. NEPA urges that, whatever definition it ultimately adopts, the Commission emphasize that an e-mail message containing news material subject to First Amendment protection does not fall within the reach of the Can-Spam Act as a "commercial message," regardless of the presence of ancillary advertising.

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[3] *See also, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment."); *Pacific Gas and Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 8 (1986) (plurality) (utility newsletter inserted in billing envelope "receives the full protection of the First Amendment").

III. E-MAIL MESSAGES TO EXISTING CUSTOMERS SHOULD FALL WITHIN THE DEFINITION OF A "TRANSACTIONAL" MESSAGE UNDER THE ACT

Pursuant to its authority to define the scope of a "transactional" message within the meaning of the Act, the FTC should clarify that e-mail messages sent by businesses to their existing customers are not "commercial," but, rather, "transactional" messages. *See* 69 Fed. Reg. 11780. The current definition of a transactional message as adopted by Congress already reflects the recognition that e-mail messages sent by businesses to their existing customers are of a less intrusive quality than those commercial messages sent by companies to individuals with whom they have no pre-existing business relationship. *See* Can-Spam Act, § 3(17)(A), (i)-(v) (delineating variety of e-mail communications initiated by businesses to their own customers, including provision of account balance information, as "transactional" as distinct from "commercial" messages under Act). NEPA submits that all e-mail messages sent by businesses to their existing customers, including messages whose primary purpose might otherwise be deemed commercial, should fall within the definition of a transactional message under the Act.

In the marketing context more generally, Congress and agencies such as the FTC and the Federal Communications Commission that are charged with enforcing advertising law traditionally have recognized that commercial solicitations made where the foundation of a business relationship already exists are considered by consumers to be far less intrusive. For example, in enacting the Telephone Consumer Protection Act, 47 U.S.C. § 227, which generally regulates commercial solicitations via telephone and facsimile, Congress observed that, where an existing business relationship exists, "consumers would be less annoyed and surprised by [an] unsolicited call since the consumer would have a recently established interest in the specific products or services." H.R. Rep. No. 102-317, at 14 (1991). Accordingly, where a business relationship has already been established voluntarily by the consumer, fewer restrictions have

been placed on solicitations via facsimile or telephone. *See generally* Rules and Regulations Implementing the Telephone Consumer Protection Act, 68 Fed. Reg. 44144 (July 25, 2003). The same principle should be applied equally in the realm of e-mail advertising. Moreover, recognizing that e-mail communications between businesses and their existing customers are transactional in nature would have little, if any, adverse impact on consumer privacy because businesses would be targeting those individuals most likely to be interested in their products or services, *i.e.*, those individuals who have affirmatively expressed an interest by purchasing in the past. This is especially so with respect to business-to-business publishers – as are many of NEPA's members – because customers are accustomed to receiving product and service information by e-mail at their places of business.

Similarly, the FTC should clarify that an e-mail solicitation requested by a non-customer is transactional, even if such a request is not made in the context of a commercial interaction as specifically set forth in the Act. *See* Can-Spam Act, § 3(17)(A), (i)-(v). Although the Act appears to contemplate that e-mail solicitations requested by any consumer are transactional, *see, e.g., id.* at § 3(17)(A)(v), the FTC should make plain that such e-mails are not, by their very nature, the type of "unsolicited" advertising that the Act was intended to combat.

Finally, it should be noted that, if the FTC were to clarify that e-mail messages sent by companies to existing customers or sent upon request to non-customers, are not commercial e-mails within the meaning of the Act, all consumers would still have significant protection. First, the Act's central prohibitions against false and deceptive e-mail solicitations apply to both commercial and to transactional messages. *See* Can-Spam Act, § 5(a)(1). Second, if a customer makes a request directly to a business not to e-mail, the FTC retains the authority to require companies to honor such requests even where a business relationship exists. *See* 68 Fed. Reg. at

44158 (recognizing "established business relationship" exception telemarketing for Do Not Call Registry, but nonetheless requiring companies to honor "opt out" requests made by current customers).

III. USE OF "ADV" IN EMAIL SUBJECT LINES SHOULD NOT BE MANDATED

The FTC should not require that all commercial e-mail messages contain the term "ADV" in the e-mail's subject line. *See* 69 Fed. Reg. at 11782. NEPA submits that the existing requirement under the Act that commercial e-mail messages contain "clear and conspicuous identification that the message is an advertisement or solicitation" is more than adequate to ensure that commercial messages are appropriately identified as such. *Id.* at 11776. Mandating the use of "ADV" in the subject line, however, risks the automatic filtering out of e-mail messages that consumers do in fact wish to receive.

Significantly, for the serial, fraudulent "spammers" of most concern to the public, who mask their identities and already violate the Can-Spam Act provisions, mandatory subject line labeling would provide no additional protection. As the FTC itself has observed, labeling is not likely to be effective in reducing the volume of e-mail from those individuals engaging in fraudulent or deceptive practices. *See False Claims in Spam,* A Report by the FTC's Division of Marketing Practices, April 30, 2003, at 12 (only about two percent of commercial e-mail complied with state law labeling requirements then in effect, including mandatory use of "ADV" in the subject line of commercial e-mail). Unscrupulous spammers are likely to ignore such a labeling requirement – as they have in the past – and so their unwanted e-mail messages would continue to bombard consumers. On the other hand, legitimate businesses would of course adhere to an "ADV" labeling requirement if the Commission were to enact such a requirement. As a result, the solicitations of legitimate marketers might never reach consumers because e-mail

account holders are likely to employ filtering software to block all e-mails with "ADV" in the subject line in the vain hope that it would block pitches for pornography and financial scams, not realizing that, in so doing, they will no longer receive information about legitimate products – including newsletters reporting on matters of concern to them. Thus, a one-label-fits-all approach as contemplated by the FTC could achieve the perverse result of failing to deter the true problem of abusive e-mails while preventing consumers from receiving e-mails they in fact want.[4]

Finally, it bears emphasis that targeted communications – such as by e-mailing free, sample copies of newsletters – are among the most cost-effective means for newsletter publishers to seek renewal requests from, or to market new publications and products to, their current and former customers. And, as discussed more fully in NEPA's previously filed comments in this proceeding, for many publishers, e-mail represents one of the few remaining affordable and effective avenues to share their editorial content with potential customers. *See also* Can-Spam Act, § 2(a)(1) (e-mail's "low cost and global reach make it extremely convenient and efficient, and offer unique opportunities for the development and growth of frictionless commerce").

IV. THE DEFINITION OF AN E-MAIL SENDER SHOULD NOT BE EXPANDED

The FTC should not expand the definition of an e-mail "sender" under the Act to include any and all commercial advertisers mentioned within an e-mail message. *See* 69 Fed. Reg. at 11781. In this regard, NEPA endorses the comments that it understands have been filed

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[4] Furthermore, as the Direct Marketing Association explained in its March 31, 2004 comments in this proceeding, consumers are already having significant success using various software programs that filter out unwanted spam and thus mandatory labeling is technologically unnecessary. In addition, the FTC has indicated that it will soon require sexually explicit e-mails to be labeled as such, which means the category of commercial e-mail that consumers tend to find most objectionable will now be unmistakable from its subject line. *See* Label For E-Mail Messages Containing Sexually Oriented Materials, 16 C.F.R. Part 316 (Jan. 28, 2004).

separately by the Newspaper Association of America ("NAA") on this issue. As the NAA correctly points out, it would be a particularly onerous burden on publishers if each advertiser mentioned in a newsletter were considered a "sender" within the meaning of the Act, as distinct from the sender being limited to the entity which in fact transmitted the message. The effect of such a requirement would be that, if a consumer had previously made a request to an advertiser to opt out of that advertiser's solicitations, the publisher of a newsletter would have to delete any advertisement from that specific company from the newsletter. Newsletter advertising, however, is not customized for individual customers and to mandate such a requirement would be particularly burdensome on smaller publishers with limited staff and financial resources.

Not only would such a requirement create an unmanageable burden, it also is unnecessary. There is nothing to suggest that businesses are using the existing definition of an e-mail sender under the Act to evade its regulatory strictures. The Act has only been in effect for approximately ninety days, during which time newsletter publishers and other responsible marketers are making good-faith efforts to rigorously comply with the various provisions of the Act. Compliance is likely to increase in coming months, as remaining uncertainties in the Act's application are resolved through this rulemaking process. In the absence of evidence that the Can-Spam Act's current framework somehow fails to protect consumers from unwanted e-mail sent by the many "law-abiding businesses" described by the Act, *see* Can-Spam Act, § 2(a)(11), it is simply unwarranted to expand the definition of an e-mail sender under the Act.[5]

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[5] For similar reasons, NEPA submits that shortening the ten-day period for complying with an opt-out request from an e-mail recipient, expanding the list of activities constituting an aggravated violation under the Act and eliminating the option of using a valid post office box as a designated company address are not presently warranted. *See* 69 Fed. Reg. at 11780-82.

Respectfully submitted,

Newsletter & Electronic Publishers Association

By: /s/

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W. Thomas Hagy

Chairman, Government & Legal Affairs Committee
Newsletter & Electronic Publishers Association
1501 Wilson Boulevard, Suite 509
Arlington, Virginia 22209
(703) 527-2333