NetCoalition.com

Before the
Federal Trade Commission
Washington, D.C.

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

COMMENTS OF
NetCoalition
April 20, 2004*

Pursuant to the Federal Trade Commission's Advanced Notice of Proposed Rulemaking[1] ("ANPR") dated March 11, 2004, regarding the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN SPAM Act" or "Act"), NetCoalition submits the following comments.

NetCoalition represents serves as the public policy voice for some of the world's most innovative Internet companies on the key legislative and administrative proposals affecting the online world.[2]

NetCoalition and leading Internet companies worked closely with Congress on the CAN-SPAM Act, and we support the law. We appreciate this opportunity to provide the Federal Trade Commission, which has primary enforcement authority over the Act, with comments on this ANPR.

I. Mandatory "Primary Purpose" Rulemaking.

The CAN-SPAM Act primarily applies to any "commercial electronic mail message," which is defined as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet web site operated for a commercial purpose)."[3] The Act mandates

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* Filed Electronically

[1] Definitions, Implementation, and Reporting Requirements under the CAN-SPAM Act, 69 Fed. Reg. 11776 (Proposed March 11, 2004) (to be codified at 16 C.F.R. pt 316)

[2] Current membership of NetCoalition includes Bloomberg LP, CNET Networks, Google, Yahoo!, California ISP Association, North Carolina Consortium of ISPs, Ohio ISP Association, Virginia ISP Association, Wyoming ISP Association, and a number of small and local ISPs.

[3] Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. No. 108-187, § 3(2)(A) (2003)

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that the FTC issue regulations "defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message."[4] Because the Act generally applies to email that falls within the definition of "commercial electronic mail message," the FTC's rulemaking over "primary purpose" is a key element to ensure proper compliance with the Act.

The FTC should develop a definition of this term that eliminates interpretations that could impair routine business communications. At the same time, however, the Commission's definition should guard against spammers that would mix their solicitations with noncommercial material and argue, on that basis, that the primary purpose of the email is not to advertise or promote a product or service.

Generally, we support the first option ("Option 1") listed by the Commission in the ANPR. This interpretation would clarify that the term "the primary purpose" means that an e-mail's commercial advertisement or promotion is more important than all of the e-mail's other purposes combined. We feel that this definition is more appropriate than the second option ("Option 2"), which would define primary purpose to mean that the e-mail's commercial advertisement or promotion is more important than any other single purpose of the email, but not necessarily more important than all other purposes combined. And, we believe it will provide greater certainty than the third option ("Option 3"), which would judge the email based on the "net impression" of the content as a whole.

Between Option 1 and Option 2, the former is truer to the plain statutory language of the Act. The Act directs the Commission to define criteria to determine the primary purpose of "an electronic mail message." Option 1 balances the clearly commercial aspects of an electronic mail message (*i.e*, the advertisement or promotion) against other content as a whole to determine the primary purpose of "an electronic mail message." The Act does not direct the Commission to balance the commercial aspects of the email against individual content within the message. If the commercial content of the email is not more important than all of the other content of the email as a whole, then the electronic mail message would not be primarily commercial. In this latter case, the commercial content would only "trump" individual content, which of course, is not being sent apart from the balance of the e-mail's content.

We urge that Option 1 be amended, however, to include a "but for" test. For example, an email that contains a news story, which contains ads among the text, should not be considered commercial simply because the advertisement might be more prominent or more noteworthy than the content of the news story. The primary purpose of the email was to send news, and it would have been sent regardless of whether the advertising content was included or not. In other words, apart from looking at the *quantity* and *quality* of the content, the regulation should take into consideration the *nature* of the email. In the preceding example, the news story would have been sent regardless of whether it contained advertisements or not. Sharing the story was the primary purpose of the email even if the

[4] *Id.*, § 3(2)(C)

size of the story is not as big as the advertisement, or the newsworthiness does not seem as interesting as the uniqueness of the particular ad accompanying the story.

Another example under this modified approach to Option 1 is an email from an employee of a company whose message contains boilerplate contact information with the company's logo and tagline from its current television advertising campaign. The logo is several times larger than the surrounding font size and the tagline says, "Acme Incorporated, Equipment for Discriminating Customers." The message is to an occasional customer of the employee's company, and the email is sent to congratulate the initiator's occasional customer on the birth of a new baby. Under the modified approach to Option 1, this email would not be a commercial email. The note would have been sent even if the boilerplate and tagline were not included.

With regard to company logos and taglines, the Senate Committee on Commerce, Science, and Transportation made it clear that the definition of commercial electronic mail message was not intended to cover these items: "[T]he definition [of commercial electronic 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."[5]

We believe that Option #3, which would judge an email based on the "net impression" of the content as a whole, is inconsistent with the intent of the Act. A "net impression" test by its terms would necessarily require the FTC to determine what the recipient of the email thought was the purpose of the message. The CAN-SPAM Act, however, requires the Commission to examine the intent of the sender through a "primary purpose" test. Option #3 simply would not provide industry with a realistic compliance standard since it would be very difficult to create compliance guidelines to account for the impression of recipients of emails sent from a company or its employees.

We oppose the fourth option in the ANPR ("Option #4), which would define "primary purpose" to mean that a commercial advertisement or promotion in an email is more than incidental to the email. This interpretation does not follow the plain, statutory meaning of "primary purpose. "Primary" is defined as "something that stands first in rank, importance, or value."[6] It does not mean something that is simply "more than incidental."

We oppose the fifth option in the ANPR ("Option #5), which would define "primary purpose" based on an analysis of whether the commercial aspect of the email financially supports the other aspects of the email. NetCoalition has been a strong advocate for the proposition that legislation and regulatory frameworks should not punish advertisement-based business models. Indeed, most widely used and popular Internet technologies are available to the public for free or at minimal cost because of advertising. Today, there are email services that are provided to consumers free of charge because the emails contain

[5] S. Rep. No. 108-102, at 14 (2003).
[6] Merriam-Webster's Collegiate Dictionary 925 (10th ed. 1996).

advertisements that support the free email business model. Any regulatory rulemaking should not impede the ability of companies to include advertisements that are included in order to provide unrelated content to consumers free of charge.

We are concerned about the sixth option in the ANPR ("Option #6), which would look at the e-mail's sender as a factor in determining whether or not the primary purpose of the sender's email is a commercial advertisement or promotion. The fact that an email comes from a commercial entity may have no bearing on whether the nature of the email is primarily for commercial purposes or not. The Commission should judge the nature of the email based on its content and not based on the identity of the sender.

II. Modifying What Is a "Transactional or Relationship Message."

A.. *Email messages that 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 are considered transactional or relationship messages under the Act. Should the Commission modify or elaborate on this definition?*

Comment: As noted in the ANPR, email messages that deliver goods or 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 are considered transactional or relationship messages under the Act. The Commission should elaborate on the Act's application to the types of prior transactions that qualify when the goods or services that are delivered consist entirely of emailed discounts, offers, or promotions. For example, under the language of the statute, it seems clear that if the terms of a purchase for discount books through an online store would entitle the recipient to a monthly electronic mailing containing coupons for discounts on future purchases, such emails could be delivered pursuant to the transactional and relationship category. However, the Commission also should make clear that the initial transaction that providers for the subsequent transmission of messages under the transactional and relationship category can be the agreement to receive electronic mailings or newsletters or the agreement for the use of online services, provided that the terms of the transactions providing for the delivery of additional electronic mailings are clear and conspicuous, and the consumer has the opportunity to terminate the transaction at any time.

B. *Some transactional or relationship messages may also advertise or promote a commercial product or service. In such a case, is "the primary purpose" of the message relevant? If so, what criteria should determine what is "the primary*

purpose?" Should such messages be deemed to be commercial email messages? Should they be deemed transactional or relationship messages?

Comment: The "primary purpose" test should not apply to transactional or relationship messages as these are not commercial messages as defined under the Act. Section 3(2)(B) clearly states that the term "commercial electronic mail message" does not include a transactional or relationship message.

III. Modifying the 10-Business-Day Time Period for Processing Opt-Out Requests.

We believe that ten (10) business days is an adequate and appropriate amount of time to process an opt-out request. We would strongly object to any efforts to shorten the time frame. In most situations, opt-out requests can be complied with immediately. Many initiators control the opt-out list and requests for removal are effectuated instantly. In some cases, however, the initiator does not control the opt-out list and relies on the sender or another party to forward opt-out requests. Ten business days should be an adequate amount of time to ensure adequate communication in these situations.

If, however, the Commission determines that an email delivered by one sender that includes advertisements from several different companies constitutes an email from "multiple senders," the ten-business day time period for processing opt-out requests would be unduly burdensome. In this event, the 10 day period should be extended to 31 days. We do believe that Congress's selection of the 10-day time period recognizes that a single sender opt-out system was contemplated.

IV. Identifying Additional "Aggravated Violations."

The Commission has asked which additional activities or practices, if any, should be treated as "aggravated violations" under the Act. It is important to note that "aggravated violations" are relevant only when the underlying commercial email is in violation of the requirements of the Act. Thus, the Commission is charged with further defining the malicious tactics used to deliver violative emails.

The Commission should treat the intentional alteration of messages for the purpose of circumventing spam filters as an aggravated violation. Specific examples of such alteration include inserting non-related, effectively random content into the message. This technique – sometimes called "hashbusting" – involves the placement of randomized characters or clips of passages from books, magazines or news articles to create the impression that a bulk message is individualized. In one sense this is, indeed, the case. However, when a violative commercial message is not the same simply because of this added text, it should be considered an effort to circumvent filters for the purpose of delivering illegal email.

Similarly, invisible text is often inserted into a message through the use of zero (or near zero) point font or fonts with the same (or nearly the same) color as the background color. Such techniques have no commercial speech benefit, especially as they are largely

imperceptible by the reader, but are designed to attempt to get around pattern matching, keyword matching, or Bayesian filters used by consumers and ISPs to filter out unsolicited commercial email.

Another deceptive method—encoding URLs in non-human readable form—can prevent a recipient or spam filter from determining where a URL will lead them. For example, the following URLs resolve to yahoo.com in Internet Explorer:

http%3A%2F%2F%79%61hoo%2Ecom (url/hex encoded)
http://216.109.118.74 (IP)
http://3631052362/ (dword)
http://7926019658 (dword + n*(256^4) _ platform/browser specific)
http://random:random@yahoo.com/ (username:password@)
http://0330.0155.0166.0112/ (octal IP)
http://0xd86d764a/ (hexadecimal)

This practice is particularly associated with the practice of "phishing," or attempting to extract sensitive information such as usernames, passwords, or credit card numbers from consumers through deceptive means. The Commission has taken action in this area.[7] Therefore, the list of aggravated violations should be expanded to include purposefully misleading URLs when associated with illegal commercial email.

Currently, technology designed to detect and block spam can be very effective, but, because of the nature of computer-based filtering, such technology can occasionally also be defeated by carefully analyzing the characteristics of earlier email. In fact, in the recent anti-spam cases filed by AOL, Yahoo!, Microsoft and Earthlink, at least one ISP plaintiff alleged that the defendants' emails had been intentionally designed to circumvent anti-spam filtering to deliver high volumes of mail. Although the transmission of hundreds of thousands or millions of messages over a short period does not necessarily violate the Act, where the underlying emails do violate the Act, the circumvention of spam filters designed to protect ISP customers demonstrates both a malicious and willful intent to violate the law by delivering unsolicited commercial email, notwithstanding the prohibitions contained in the Act and the best efforts of ISPs to use technology to protect their customers. This type of willful misconduct is most similar to the use of deceptive subject headings as it deceives and misleads the ISP into delivering mail to consumers that it would otherwise have blocked or filtered. Accordingly, the intentional alteration of bulk messages with the intent to circumvent spam filters should be identified as an aggravated violation under the Act.

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[7] For example, in the recent case of Zachary Keith Hill, the FTC obtained an order from a U.S. District Court requiring Mr. Hill to halt an ongoing "phishing" scam. Shortly thereafter, the Justice Department successfully prosecuted Mr. Hill criminally. *See* Press Release, Federal Trade Commission, "FTC, Justice Department Halt Identity Theft Scam" (March 22, 2004) (*available at* http://www.ftc.gov/opa/2004/03/phishinghilljoint.htm). Christopher Wray of the Criminal Division of the U.S. Department of Justice commented that "[t]he Department of Justice remains committed to working closely with the FTC to shut down these phishing operations and protect Internet users from thieves who seek to steal their valuable identity and financial information." *See id.* An FTC Consumer Alert about phishing is located at http://www.ftc.gov/opa/2003/07/phishing.htm.

V. Issuing Regulations Implementing the Act.

A. *Section 3(16) of the Act defines when a person is a "sender" of commercial email. The definition appears to contemplate that more than one person can be a "sender" of commercial email; for example, an email containing ads for four different companies. In such a case, who is the "sender" of the email? 2. Should the Commission use its authority in § 13 to issue regulations clarifying who meets the definition of "sender" under the Act?*

Comment: The Commission should clarify this area. We disagree with the comment that the Act appears to contemplate more than one "sender" of commercial email. Although the definition of "sender" in the Act would lead to the conclusion that there can be multiple "senders" of a single commercial email, the Act as a whole appears not to have recognized this possibility.

As a practical matter, some entities run businesses where users ask them to send them information that contain marketing information about a variety of products and services. Sometimes these emails promote third party products. The initiator of the email should not be required to include an opt-out link and physical address for every advertiser promoted in that email. This obligation would be extremely burdensome on the company that has the relationship with the recipient of the email, as well as the advertisers.

Further, a company that has received the consent from users to receive an email should not be required to check its list of customers against the opt-out lists of all its advertisers. Not only would this requirement be burdensome, it would raise privacy concerns by requiring entities to share customer information with third parties.

Consequently, in the instance where an entity has the affirmative consent of the customer to receive emails, and the emails are sent pursuant to such affirmative consent, the primary sender (and not the advertiser of a product included in the email) should be considered the "sender" for purposes of complying with the Act.

This clarification would provide recipients with an ability to opt-out of future emails from the primary sender without requiring the primary sender to customize email to potentially millions of their customers. In addition, this clarification would allow for the continued development of new technologies related to online advertising.

For example, a growing number of email advertisements feature "dynamic advertising," which varies the identities of the multiple advertisers contained in a newsletter each time a consumers opens an email. It would be impossible to provide for multiple opt-outs for dynamic message content.

The Commission also has asked for comments on how a multiple sender setting should be analyzed when a consumer who has opted out of Company A's emails receives an email with multiple ads from Company B and others, including an advertisement from Company A. In this scenario, §5(a)(4) of the Act should not be deemed to have been violated. Company B has not violated the Act because it was not aware of the consumer's opt-out from Company A's mailing list. Similarly, even if Company A compensated Company B for inclusion in a broad mailing with multiple advertisers, Company A should not be deemed to have violated the Act.

The Act would be unworkable if a company were forced to cross-reference its opt-out list with the opt-out lists of every advertiser whose content will be included in an email. And, such a system would disproportionately impact online publications over their offline counterparts. For example, a magazine distributed offline as well as through email would have to edit its electronic publication to remove certain advertisements depending on the various opt-out lists of its advertisers.

To avoid this result, the Commission should develop rules under § 13 of the Act to clarify that the term "sender" should not apply to the mere purchaser of advertising space in an electronic publication containing other content, or in which multiple advertisements for different commercial products or services have been combined.

B. *The Act defines "initiate" to mean originate or transmit, or procure the origination or transmission of, a message. In turn, the term "procure" means to pay, provide consideration, or "induce" a person to initiate a message on one's behalf.*

1. Do "forward-to-a-friend" and similar marketing campaigns that rely on customers to refer or forward commercial emails to someone else fall within the parameters of "inducing" a person to initiate a message on behalf of someone else?

Comment: The FTC should clarify that the mere payment for advertising generally does not amount to "inducing" a person to initiate a message unless the payment was specifically tied to the transmission of the email. For example, where a company purchases advertising on a website, or purchases a sponsored search result through a search engine, the inclusion of such content in an email should not be sufficient to hold the advertiser responsible for inducing the email.

Because the definition of "sender" under the Act is the person who initiates a commercial email or procures the initiation of the email and whose products are being promoted, there is no "sender" in the forward-to-a-friend email. In this case, the obligations to include the opt-out and physical address of the "sender" should not apply. As a practical matter, if the users were considered to be "senders," ordinary consumers would be required to create, manage and comply with opt-out lists designed to be used by commercial entities. This would create an unworkable system. Similarly, the publisher or advertiser responsible for the content of the email should not be required to preclude the forwarding of the email to anyone of their opt-out list.

The Senate Committee report implies that procuring another to transmit an email is something more than simply a "forward-to-a-friend" campaign. The example provided by the Committee is where one company hires another company "to handle the tasks of composing, addressing, and coordinating the sending of a marketing appeal."[8]

C. *Do the Act's requirements and prohibitions reach email messages containing advertisements sent by using a web site that urges or enables individuals to email articles or other materials to friends or acquaintances? How, if at all, does the Act apply to this situation when recipients have previously "opted out" of receiving emails from the advertised entities?*

Comment: The Act's requirements and prohibitions should not cover email messages containing advertisements sent by consumers using a website that urges or enables individuals to email articles or other materials to friends or acquaintances. The Act does not cover this situation, even if the recipient has previously "opted-out" from receiving

[8] S. Rep. No. 108-102, at 15 (2003).

messages from the website publisher because the website publisher is not the sender of the message.

Providing a mechanism to forward a story, opportunity or advertisement to a friend is merely enabling technology—just like providing a web email account. Accordingly, a website providing a forwarding tool function is acting as an electronic communications service provider. Therefore, the Act should not apply to content forwarded by user A, to user B at the express direction of user A, even if an advertisement is included as part of the forwarded message.

Similarly, operators of email distribution lists or groups that essentially forward emails sent by user A to other users who have voluntarily joined that group should be permitted to include advertisements in the forwarded messages without running afoul of the Act because in such circumstances the list operator is merely employing technology to effectuate the transmissions between users and the addition of an advertisement is merely incidental.

D. *Section 5(a)(5)(A)(iii) requires the disclosure of "a valid physical postal address of the sender" in each commercial electronic mail message. How should this be interpreted? Should a PO Box or commercial mail drop be considered a "valid physical postal address?"*

Comment: The purpose of the Act's requirement that a physical postal address be required is to allow, among other things, for enforcement of the Act by ensuring that a sender can be physically located. Consequently, the FTC should require that a physical street address be contained in all commercial messages.

E. *Section 5(a)(1), regarding false or misleading transmission information, addresses information displayed in a message's "from" line. Is the Act sufficiently clear on what information may or may not be disclosed in the "from" line? What "from" line information should be considered acceptable under the Act. If a sender's e-mail address does not, on its face, identify the sender by name, does the email address comply with § 5(a)(1)?*

Comment: The Act prohibits materially "false or misleading" routing information. It does not affirmatively require anything beyond information that is not materially false and misleading. All persons subject to the Act should be considered in compliance if emails accurately indicate the email account from which the message was initiated even if the initiator's full legal name is not part of that email address.

> The Act further states in § 5(a)(1)(B) that a "from" line that "accurately identifies any person who initiated the message shall not be considered materially false or materially misleading." An accurate "from" line might include a user ID name or screen name, which does not necessarily have to be a full legal name.
>
> For example, a lawful "from" line might read: bookreader@Internetcompany.com. As long as the email emanates from Internetcompany.com, a commercial email from that email address would not be materially false or materially misleading. To interpret the Act in any way that would disallow or discourage the use of user IDs or screen names—which have become a foundation of web-based email accounts—would severely impact ISPs and meet public opposition.

VI. System for Rewarding Those Who Supply Information About CAN-SPAM Violations.

As suggested by the Commission, the evolution of technology and on-line integrated marketing render comments on this matter premature at present. The possibility of using this system to threaten companies with potential reporting is significant. It would be in the Commission's best interest to request public comment after all affected parties have had a reasonable period of time to adjust their practices and procedures to evaluate the practical effects of the Act.

VII. Study of the Effects of the CAN-SPAM Act.

This report must be submitted to Congress on or before December 16, 2005. As suggested by the Commission, the evolution of technology and on-line integrated marketing render comments on this matter premature at present. It would be in the Commission's best interest to request public comment after all affected parties have had a reasonable period of time to adjust their practices and procedures to evaluate the practical effects of the Act.

VIII. Study of Subject Line Labeling.

This report must be submitted to Congress on or before June 15, 2005. For reasons outlined above, comment should be delayed for a reasonable period of time.