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Via Electronic Filing

Mr. Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: CAN-SPAM Act Rulemaking, Project No. R411008

Secretary Clark:

The American Bankers Association applauds the Federal Trade Commission's ("Commission") efforts to implement the CAN-SPAM Act ("the Act") in a manner that diminishes the amount of spam individuals receive. We believe that, with the inclusion of the recommended changes contained in this comment letter, the proposed rules accomplish this goal without unduly impeding the positive effects of legitimate email communications and e-commerce.

The American Bankers Association ("ABA") brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership - which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks - makes ABA the largest banking trade association in the country.

Our recommendations fall into the following areas:

Determination of the Primary Purpose of an Electronic Message

The Act directs the Commission to issue regulations "defining the relevant criteria to facilitate the determination of the primary purpose of an electronic message." This definition is central to the implementation of the Act, in that the Act applies only to messages whose primary purpose is commercial in nature, by virtue of being defined as a commercial electronic mail message.[1]

The ABA believes that the most appropriate standard for the determination of primary purpose, as articulated by the Commission in the Advance Notice of Proposed Rulemaking, is whether the email in question would have been sent "but for" the commercial purposes of the email. If the email would have been sent regardless of the other content in the email, then the primary purpose of that email should NOT be considered commercial. In such cases, any commercial content contained within the email should be considered incidental, and not primary, to the email's purpose.

[1] CAN-SPAM Act § 3(2)(A) and (C).

Defining "primary purpose" under a "but for" standard, allows the Commission to establish an objective test requiring minimal additional clarification. There are several specific types of emails that naturally and legitimately do not have a commercial primary purpose under such a test, including:

- Email messages that would not be sent if not for the transactional or relationship component of the message;
- Those messages that provide legitimate editorial content, such as newsletters; and
- An email whose purpose is to transmit billing and account information that may also include an advertisement or promotion.

Designation of Transactional or Relationship Messages

In our view, one of the more important components of the proposed regulation is the Commission's designation of five broad categories of transactional or relationship messages. The Act excludes such messages from its definition of "commercial electronic mail message," and thus excludes them from most of the Act's substantive requirements and prohibitions.[2] As a result, the proper designation of such messages is vital to ensuring that the net capturing commercial electronic mail messages is not too small or too large.

The ABA recommends that a number of additional categories be included as transactional or relationship messages:

- **Pre-existing business relationships.** The ABA recommends the Commission specify that email messages sent to recipients with whom the sender has a pre-existing business relationship are transactional and relationship messages. The recommendation would allow companies to meet reasonable business relationship expectations by providing information such as a prospectus, research, seminars, and related offerings to existing customers.
- **Messages sent to consumers who have consented to receive email.** While it would appear obvious that messages sent to consumers who have consented to receive emails from the sender fit within the definitions of transactional and relationship messages, for clarification purposes we would recommend that the Commission specify that such messages are in fact included in the definition.
- **Messages sent upon request.** If a consumer requests a product or a service, or even information about a product or service, and the business sends the consumer an email responding to that request, the email should be a transactional or relationship email within the meaning of the Act.
- **Messages in which a transaction is being negotiated.** The ABA recommends that messages that the parties send when negotiating the terms and conditions of a transaction be considered transactional. As negotiating a transaction does not fit into the definition of "facilitating," it would be useful if the Commission made that explicit in its regulation.
- **Messages sent pursuant to the terms and conditions of an agreement.** Under the proposed rules, email messages that provide notification of a change in the ongoing commercial relationship with a recipient are considered transactional or relationship messages. In the case of consumer financial services, certain documents, such as the account opening agreement, will detail the manner in which communications between parties will occur, including email. To

[2] CAN-SPAM Act, §3(2)(B).

ensure that such communications do not fall under the Act, the ABA recommends that messages sent pursuant to the terms and conditions of an agreement be considered transactional or relationship messages.

- **Messages sent to comply with the law, to prevent fraud, or to prevent unauthorized transactions.** Financial institutions have an obligation to comply with a variety of statutes and regulations. Should compliance require a business to send a communication to a consumer, the business should be permitted to send it electronically and have it be considered a relationship message.

Criteria for Determining Who is a "Sender"

ABA recommends that the Commission specify that in instances where there are multiple advertisers in an email message each advertiser is not a "sender" under the Act. Potential interpretations of the Act have been considered that could result in treating each advertiser in an email message that contains multiple advertisers as a sender. We do not believe that Congress intended this result. We also believe that where there may be multiple senders the consumer would be better served by a single source.

These difficulties come from the definition in the Act of the term "procure." A sender of a message includes entities that "procure" messages for another entity. The term "procure" means "intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one's behalf." The intent of the "procure" definition is to prevent spammers from evading the statutory opt-out requirement by encouraging others to send messages that the spammer would be prohibited from sending because they have received opt-outs. We agree with that goal. However, Congress did not intend for legitimate businesses that are not attempting to avoid the law and who honor consumer opt-outs to become "senders" for any email in which the advertiser's product or service is advertised or promoted. Treating each advertiser in an email as a "sender" would create significant problems, including:

- **Requiring multiple suppression.** Treating each advertiser as a sender could result in the email recipient having to be scrubbed against the "suppression" list—the list of individuals who have opted out of receiving further messages—of every advertiser. This would be extremely burdensome and costly for business. Additionally, multiple suppression takes a significant amount of time, delaying the sending of the message. In many instances, suppression would have to be done by independent third parties, further increasing costs and time delays. It would also result in a possible privacy issue if multiple senders have to exchange opt out lists.

- **Requiring each message to contain multiple opt-outs and physical postal addresses.** Many emails would contain a long list of opt-out notices and physical address listings. This result would create consumer confusion and crowd emails with unnecessary information.

- **Undermining rather than enhancing privacy.** Many companies in their privacy policies have indicated that they would not transfer email addresses to third parties. Transferring addresses for scrubbing purposes would violate such promises.

The Commission can avoid any legal uncertainty, unnecessary litigation and potential interpretations of the Act that would have these unintended consequences by clarifying what initiating a message "on one's behalf" means. ABA recommends the Commission should set forth criteria that businesses can use to determine when a message is sent on one's behalf. We suggest that such criteria include the following:

- **"But for" test.** If an email message would have been sent irrespective of the inclusion of a particular advertisement, then the advertiser is not a sender. Advertisers would not be "senders" in email that is sent regularly that has different advertisers. This is the simplest and easiest test to apply. However, an email that would not have been sent irrespective of an advertisement would not necessarily make the advertiser a sender.

- **Advertiser provision of recipient email addresses.** If the advertiser does not provide the sender with a list of email recipients, then the message is not necessarily sent on behalf of the advertiser. Such a result is consistent with the intent of the Act to prohibit entities from having others "front" for them and send messages to individuals who have opted out of receiving messages directly from the entity. In instances when an advertiser provides the "sender" with the email addresses of recipients for such a message, then such a list should not include any email address that has opted out of receiving messages directly from the advertiser. Provision of email addresses, would not, by itself, result in an advertiser becoming a sender.

- **Indication of who the message is from.** If it is clear to the recipient who the message is from, then each of many entities that may provide advertising to a message should not be treated as a "sender." For example, if the email is an electronic version of a magazine where it is clear that the publisher of the magazine is transmitting the message, then each advertiser that may exist in the magazine should not be subject to the requirements placed on senders.

Using these and other criteria, however, should not result in a scenario where there is not a sender. Consumers should always be able to opt-out of receiving communications from at least one party.

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

Currently the Commission's proposal would permit senders 10 business days during which they must process the request from a recipient to remove his or her name from the company's email lists. In many cases the complexity of the organizations or the development of the technology supporting the businesses cannot guarantee removal within that time period. We would urge the Commission to utilize the authority given it under the Act to extend the time period to 31 calendar days.

A 31-day timeframe is consistent with the Commission's rules under the Telemarketing Sales Rule as amended by Congress for complying with the do-not-call registry. Such a time frame would appear reasonable for all parties. It would not inconvenience consumers and at the same time would provide companies with the sufficient time that they are used to implementing in other contexts.

However, the reasonableness of a 31-day period cannot be ascertained without the resolution of a number of other factors. For instance, if multiple senders are required under the regulations to provide an opt-out, even a 31-day period for processing may not be sufficient time to meet the requirement. The relationship independent agents have regarding their own lists and those of the companies they are affiliated with must also be taken into account. The ABA would recommend that each independent agent be treated individually, and that an opt-out to one agent does not bind all other agents that are truly operating independently.

Post Office Boxes and Mail Drops as Valid Physical Postal Addresses of the Sender

The ABA recommends that, for initiators of commercial electronic mail, a post office box or commercial mail drop constitute a valid physical post address of the sender for purposes of the Act. There are some practical reasons why a post office box or mail drop should be acceptable.

Companies typically use a post office box to ensure that the mail received by the company gets to the correct area or division. Only certain people in the company have access to the box, and it is easier to control where the mail received in the box is directed.

For example, a company may decide to have a box dedicated exclusively to the "please remove my name function." If a street address is used, there is no control over the receipt of the mail and where it ultimately may end up. As a result, if a consumer responds to an email by sending a letter to the physical address, there may be considerable uncertainty as to whether or not it was ever received by the company, or if received, it may end up in the wrong area of the company and never be followed up.

If the concern is trying to locate the company for compliance or enforcement purposes, in view of the fact that the Postal Service keeps a record of the physical street address of the box holder, the consumer or the Commission would always be able to locate the company. Having both a street address and a post office box does not alleviate the confusion, in that a significant portion of the public will undoubtedly choose to send mail to the street address. Moreover, the Act states "valid physical postal address," which would technically include a post office box. It does not say "valid physical street address."

Issues Specific to Tax Exempt, Nonprofit Organizations

The ABA would also like to take this opportunity to make observations and recommendations regarding the impact of the Act and the proposed rules on tax exempt, nonprofit organizations such as itself.

We recommend that the Commission provide that email transmitted by a tax exempt, nonprofit organization, primarily related to one or more of the organization's duly authorized tax exempt nonprofit purposes, not be considered commercial electronic mail under the Act and, therefore, be specifically exempt from regulation under the Act.

Nonprofit corporation status is granted by states under their nonprofit corporation laws to organizations that generally do not issue equity stock and do not seek commercial profit on behalf of shareholders. Federal income tax exempt status is granted by the Internal Revenue Service to organizations that are organized on a nonprofit basis, do not share revenues with individuals, and meet extensive IRS requirements in numerous categories.

The language of the Act defines "commercial electronic mail messages" as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service . . ." This definition is clearly directed only at regulating activity undertaken primarily to further the commercial endeavors of for-profit businesses. Interpreting the commercial electronic message definition to include email communications of organizations operating consistent with their tax exempt nonprofit purposes would be inconsistent with the plain language of the statute, as well as the intention of the Act.

In addition, the ABA recommends that the Commission specifically provide in the regulations that any email transmitted by a tax exempt nonprofit organization to a current member or donor, regardless of its commercial content, is not subject to the Act because such member communications are "transactional or relationship" messages as defined in Section 3(17)(A) and (B) of the Act.

The primary purpose of tax-exempt nonprofit email communication is to provide information and resources to their members, donors, and other constituencies consistent with their tax-exempt nonprofit purposes, rather than to carry on a trade or business, which is the chief objective of for-profit taxable entities. Often these resources are provided for a reasonable fee that covers the organization's costs of development, marketing, and distribution. As nonprofit organizations, however, all monies earned from activities undertaken consistent with an organization's tax exempt nonprofit purposes must be used to further the organization's tax-exempt nonprofit work. Therefore, such email communications should not be considered "commercial" even if they involve the marketing, promotion or sale of goods and services as long as the underlying communication is consistent with the organization's tax-exempt nonprofit purposes.

However, the Act may apply to a certain class of tax-exempt nonprofit organization emails, even if the member or donor expects this information as part of their membership or relationship to the organization. If a nonprofit organization were to transmit emails to members or donors, either directly or through a for-profit taxable business subsidiary, relating to an activity that is not substantially related to the organization's tax exempt nonprofit purposes under federal tax exemption nonprofit requirements, then ABA recognizes that such email might fall within the jurisdiction of the Act.

Notwithstanding the Act's possible jurisdiction over such email communications, we urge the Commission to reflect in its regulations that such communications, as long as they are sent to current members and/or donors, should be excluded from the definition of "commercial electronic mail message" as transactional or relationship messages because they either provide information in connection with an organization or association membership and/or are intended to deliver goods and services under the terms of an existing transaction, i.e., the email recipient's current member or donor relationship with the sending organization. In that purely commercial messages, such as offers to buy extended warranties or insurance protections, to one-time customers of commercial entities, qualify as transactional or relationship messages, it would be unjust if this same treatment were not extended to electronic mail messages of similar content sent to current members or donors of tax exempt nonprofit organizations.

We appreciate this opportunity to comment on the implementation of the Act. If you have any questions, please contact Doug Johnson, Senior Policy Analyst, at djohnson@aba.com or 202-663-5059.

Sincerely,

C. Dawn Causey
General Counsel