PMA

PROMOTION MARKETING ASSOCIATION, INC

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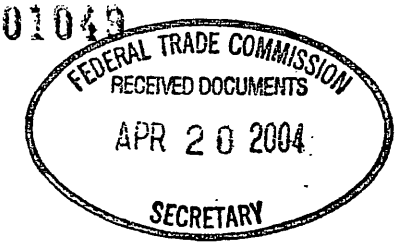

VIA HAND DELIVERY

April 20, 2004

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

Dear Secretary Clark:

By Federal Register Notice dated Thursday March 11, 2004 (FR/Vol. 69/No.48/pages 11776-11782), the Federal Trade Commission ("Commission") requested public comment in Advance Notice of Proposed Rule ("ANPR") in the above referenced project. As part of that ANPR, the Commission requested comments pursuant to the authority of the "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003", or the CAN-SPAM Act of 2003 ("Act").

The Promotion Marketing Association, Inc. ("PMA") appreciates the opportunity to respond to that request and accordingly files the comments below.

Introduction

The PMA has been the leading non-profit association representing the promotion marketing industry since 1911. PMA has approximately 700 members representing diverse aspects of the industry, including Fortune 500 consumer goods and services companies, advertising and promotion agencies, and university faculty who educate about promotional activities as part of a business curriculum. The PMA's mission is to encourage the highest standards of excellence in promotion marketing. The objectives of the PMA are to educate its members on the laws that govern promotions and to act as a resource to state legislatures, state attorneys general, and federal regulatory agencies in drafting appropriate and focused legislation and rules to combat deceptive marketing and promotion practices.

Many PMA members currently follow an "integrated marketing" approach, which involves the use of a combination of different media and marketing tools to execute an overall marketing plan. E-tailing and other forms of marketing play an increasingly important role in such integrated marketing programs for many such members. The PMA has a keen interest in ensuring both that e-mail marketing remains free of abuses and that this channel not become subject to unnecessarily burdensome regulation.

Summary

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PMA supports efforts to combat spam. As a trade association representing the companies leading consumer product and service companies in connection with their promotional marketing activities, PMA and its members have a keen interest in the future viability of electronic commerce and the existence of a smoothly functioning legitimate e-mail medium. PMA recognizes that there have been abuses created by unwanted e-mails. However, e-tailing is also an important and increasingly vital part of good business in the U.S. Accordingly, PMA strongly supports interpretations and clarification of the Act, which will create better understanding among industry and consumers alike regarding the requirements of the Act.

PMA requests that in its Notice of Proposed Rulemaking ("NPRM") implementing the Act, the Commission:

- provide objective standards for businesses to use to determine the primary purpose of an e-mail;
- clarify that, in instances of multiple advertisers in an e-mail, each advertiser is not a "sender" under the Act;
- clarify that "forward to a friend" e-mails should not be deemed "commercial e-mail messages";
- expand the categories of "transactional and relationship" messages to include e-mail sent with consent;
- lengthen the time frame for honoring opt-outs from 10 business days to 31 calendar days;
- establish a maximum time period of no more than three years for maintaining individual opt-out requests;
- recommend against "ADV" or other identifier and a reward system;
- clarify that, insofar as PMA is a non-profit or charitable tax-exempt entity, its messages will not constitute "commercial e-mail" absent very special circumstances.

These issues are discussed in more detail below.

1. Primary Purpose of a Message

As only commercial messages are subject to the provisions of the Act, the Commission must ascertain the primary purpose of any message that contains content

both commercial and non-commercial in nature. We believe the purpose of the Act and the industry as a whole would be best served if the Commission promulgates, to the extent possible, clear standards on which to base the primary purpose determination. PMA also believes that any criteria used to determine the "primary purpose " of the e-mail communication should more properly focus on the intent of the sender rather than on the net impression of the message, which is based on the perspective of the recipient. In establishing the "primary purpose" test as the relevant standard for determining whether an e-mail solicitation falls within the ambit of the Act, Congress has evidenced a clear intent to establish a standard which evaluates the status of the e-mail based on the sender's objective and motivation. Accordingly, PMA respectfully suggests that a "net impression" standard may not be the correct standard to apply in this instance.

As an alternative, PMA would suggest that the Commission consider a "but for" standard based on the intent of the sender. Under this standard, an e-mail message would be deemed to be primarily commercial in nature if the e-mail would not have been sent " but for" the advertising or commercial content. Under this scenario, the mere fact that an e-mail message contains advertising content designed to help defray the cost of the message would not necessarily result in that message being deemed to have a primary purpose. For example, under this analysis, an e-mail message that might otherwise be considered a transactional or relationship message will not lose that status simply because the message also contains advertising materials. Similarly;

- Those messages that provide legitimate editorial content, such as newsletters and electronic magazines; would not be deemed to be primarily commercial in nature simply because there are advertisements embedded in the publication.

- As the Commission is aware, the Internet is replete with sites that offer consumers the opportunity to play games primarily for entertainment value. Such sites are often advertiser sponsored; however, there are no products or services offered for sale on the site and the primary purpose of the site is to provide an entertainment vehicle to the consumer. PMA believes that an e-mail message that invites a consumer to participate in such entertainment oriented but does not contain an offer to sell any goods or services, should not be considered to have a primarily commercial purpose.

There likely are additional categories of messages that should be enumerated in the types of messages that are not commercial messages. PMA welcomes the opportunity to explore such additional categories as the rulemaking proceeding progresses but urges the Commission not to adopt an overly rigid approach to this issue.

2. Criteria for Determining Who is a "Sender"

PMA requests that the Commission provide a clarification as to which entity will be considered the "sender" in instances where several advertisers are included in a single email message. The Act as written could be read so that each advertiser could be deemed a sender, a conclusion, we submit, that was not intended by Congress. In our view, the

consumer would be better served and much confusion would be avoided if the Commission promulgates an objective standard on which to determine the single "sender" where multi-parties are involved.

Treating each advertiser in an e-mail as a "sender" would create significant problems, including:

- requiring multiple suppression. Treating each advertiser as a sender could result in the e-mail recipient having to be scrubbed against the "suppression" list—those individuals who have opted out of receiving further messages—of each 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.

- requiring each message to contain multiple opt-outs and physical postal addresses. Such a result would create consumer confusion and crowd the e-mail with unnecessary information.

- adversely affecting privacy issues. Many companies in their privacy policies have indicated that they would not transfer e-mail addresses to third parties. Transferring addresses for scrubbing purposes would violate such promises and could jeopardize consumer privacy.

The effect of all this would be to impose significant business costs upon an industry that has moved into e-tailing in part precisely to minimize the imposition of such costs, and without a corresponding benefit to the consumer where legitimate marketers are concerned.

The Commission can avoid any potential interpretation of the Act that would have these unintended consequences by clarifying what initiating a message "on one's behalf" means. The Commission should set forth criteria that businesses can use to determine when a message is sent on one's behalf. PMA suggest that such criteria include the following:

- *"But for" test.* If an e-mail 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 e-mail that is sent regularly that has different advertisers.

- *Control Over List Selection.* If the advertiser does not provide the sender with a list of e-mail recipients, then the advertiser is not the appropriate recipient of that opt-out request. 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.

- *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 sending the message then each advertiser that may exist in the magazine should not be subject to the requirements placed on senders.

- *Control and authority over the e-mail message.* In determining who is the sender of an e-mail message containing multiple advertisers, the Commission should also consider who has control over the communication. Often advertisements are placed or embedded within e-mail messages; however, the advertiser has little to no control over the content of the message or the recipients to whom the message is being sent. Such advertisers should not be subject to the requirements imposed upon "senders" under the Act. While it is possible that there may be instances, such as in the case of a true joint promotion, where two or more entities may legitimately be deemed the "senders" in most instances it will be more efficient for industry and less confusing to consumers if criteria are established for determining a single, primary sender, who shall be deemed the "sender" under the Act.

3. Forward to a Friend E-Mails

The Forward to a Friend email (hereafter the "Friend Message") is a technique commonly employed by online marketers who provide incentives to the original email recipient to forward the message to another person ("A Friend") who the marketer reasonably believes may be interested in the marketer's products or services. The incentive could take the form of a discount on a future purchase, a premium item or even an additional entry into a sweepstakes. For the reasons set forth below, the PMA believes that the Friend Message should not be deemed a commercial message within the meaning of the Act.

Primary support for this position can be found in the definition of a commercial email, which is defined as an email message whose "primary purpose . . . is the commercial advertisement or promotion of a commercial product or service . . ." (emphasis added). While it is clear that the marketer's primary purpose is to send a commercial message, the recipient's motivation and main purpose for sending the Friend Message is entirely different. In PMA's view, the recipient's intent is two fold: (1) to alert the Friend of a product offer in which he/she may be interested and (2) to take advantage of the incentive offered by the marketer. As such, the Friend Message does not meet the primary purpose standard for commercial email and differs little from a conventional personal email in which the sender attaches a website or link. Unless that personal email satisfied the primary purpose standard, it cannot be deemed a commercial email even when commercial information has been attached.

To include the Friend Message would also shift the statute's emphasis from the marketer to the recipient. If the Friend Message fell within the scope of coverage simply because it included the marketer's commercial information, the marketer would be obligated to include therein a physical postal address, an opt-out-from-future-email feature and an advertising designation to comply with the law. The marketer, however, has no control over the Friend Message and has no practical method to fulfill its obligation, short of importuning the recipient to include the necessary information. Moreover, even if the recipient complied and the friend opted-out, the marketer would be presumably bound even without knowledge of the friend's request, unless the recipient provided the marketer with notice. Clearly, the Act does contemplate that the marketer must seek the aid of the recipient to guarantee its compliance with the Act. Moreover, if the Friend has already opted-out from receiving the marketer's email, and the Friend Message were deemed to have been sent by the marketer itself, the marketer would be in technical violation of the Act even though it was unaware that the Friend Message was sent.

To characterize the Friend Message as a commercial email would also fail to further the primary purpose of CAN-SPAM—to protect consumers from unwanted commercial email messages. A Friend's Message actually increases the likelihood that the Friend will receive information about products of services in which he/she has an interest. Based on what we believe to be current practice in business, there is a reasonable likelihood that the recipient will know the tastes of his/her friend and will only forward messages that contain subject matter of some concern. In addition, the marketer will benefit when its messages are sent to persons who may be reasonably inclined to buy. Clearly, an exemption for Friend Messages will not, in our view, undermine the stated purpose of the Act.

Finally, as in all consumer protection laws, the equities must be balanced and the desire to shield consumers from unwanted commercial emails must be weighed against the legitimate needs of the marketer. Friend Messages provide the marketer with an important sales tool to reach potential customers in a highly targeted and efficient manner, while at the same time fulfilling the CAN SPAM aim of reducing the level of fraudulent or deceptive emails in the marketplace. It follows that friends are unlikely to knowingly forward to other friend emails that contain false or deceptive information. If the Commission has a continuing concern in this regard, it can address the problem by identifying a Friend Message as a "transaction or relationship message," categories that are already subject to the statutory prohibitions against sending fraudulent or deceptive header or subject information.

4. Transactional and Relationship Messages

The Commission has asked for comment on whether the categories of messages that are "transactional or relationship" in nature should be expanded or contracted. PMA believes that this list should not be contracted. Each of the enumerated items in the Act are critical business practices that should not fall within the scope of commercial e-mail.

The PMA also believes that the Commission should create an additional category of "transactional and relationship" messages where the recipient has asked to receive the e-mail. While some messages where consent exists already fall within one of the categories of "transactional and relationship" in the statute, there are others that may not. If a consumer asks to receive the message, it should not be subject to the requirements of the Act. For this reason, the Commission should clarify that where the individual has requested the information contained in the e-mail, the message is not commercial e-mail.

An example of a category of messages that the Commission should classify as transactional is where the recipient has consented to receive the e-mail. While some messages where consent exists already fall within one of the categories of "transactional or relationship" in the statute, there are others that may not. If a consumer asks to receive the message, it should not be subject to the requirements of the Act. Another example is of e-mail that should be categorized as "transactional or relationship" is e-mail related to a transaction occurring such as an application to complete for a good or service or a membership or subscription renewal.

PMA also notes that the definition of a transactional or relationship message is currently limited to the provision of certain enumerated information specific in the Act. PMA believes that any e-mail relating to the goods or services which formed the basis of the transaction or relationship between the sender and the consumer should be considered a transactional or relationship message.

5. Ten Business Days to Honor Opt-Out Requests

The Act requires that a sender, or any person acting on behalf of the sender, not initiate the transmission to recipients that have requested not to receive further commercial e-mail more than 10 business days after receipt of such a request. The Act further provides the Commission with the authority to alter the time frame. The PMA believes that this time frame should be lengthened 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. Our experience in implementing the Act demonstrates that 10 business days is an insufficient amount of time to honor such requests. In many instances, there are multiple parties involved in sending commercial e-mail; coordinating the opt-outs among these parties takes time. The greater the number of parties, the longer the amount of time necessary to logistically manage the opt-outs. The PMA believes that 31 calendar days is a more reasonable and cost effective time frame to meet this obligation.

6. Duration of Time to Maintain Opt-Out Requests

The Act does not specify the amount of time that an individual's opt-out request must be honored. The PMA recommends a time frame of no more than three years. Over time, the list of e-mail opt-outs that a company would need to suppress will grow; and many of these e-mail addresses will become non-functional, thus requiring the

expense of scrubbing the list against such addresses. Limiting the duration to a maximum of three years will reduce this expense.

7. Clarification of the Term "Commercial Electronic Mail Message" ("CEM") and its Application To Tax-Exempt Entities

The regulations implementing the Act need to specifically address the special role and circumstances of tax-exempt nonprofit organizations. If the Commission were to apply the "commercial electronic mail message" definition to tax exempt nonprofit organizations in the same manner it applies to the term to taxable for-profit entities, it would adversely affect and obstruct the good work of tax exempt nonprofit organizations of every kind - trade associations, professional societies, chambers of commerce, agricultural organizations, advocacy organizations, social welfare groups, charitable, educational, scientific organizations, religious groups, and amateur sports organizations.

A tax exempt organization normally uses e-mail to dues-paying members present or former donors or others who have voluntarily associated with the entity and wish to receive communications therefrom. PMA urges to the Commission to recognize that the regulations implementing the Act should distinguish between the activities of tax exempt nonprofit organizations and the work of for-profit, commercial entities.

As stated above, 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 seems clearly directed only at regulating activity undertaken primarily to further commercial endeavors of for-profit businesses. Interpreting the CEM definition to include e-mail communications of organizations operating consistent with their tax exempt nonprofit purposes seems inconsistent with the plain language of the statute, as well as the intention of the Act.

PMA does not believe that there is any reasonable basis for a broad application of the definition of regulated CEM to include tax exempt nonprofit organization e-mail communications that are consistent with its tax exempt nonprofit purposes but may also involve the marketing, promotion, and/or sale of related goods and services. For example, such messages could include:

- A notice to dues-paying members reminding them to register for the association annual meeting;

- A release about a new book title or educational seminar on the latest business challenges to members.

Further, it is well established, in both federal and state law that tax exempt nonprofit organizations are organized and operated to conduct their activities in ways fundamentally different from the ways in which taxable for-profit businesses conduct their activities. For example, each state's statutory framework treats tax exempt nonprofit

organizations differently, if not entirely separately, from the treatment of for-profit, taxable businesses. Likewise, the Internal Revenue Code treats tax exempt organizations differently from taxable entities and relies on an entirely separate and distinct section of the law to do so. Indeed, with one exception, the word *commercial* does not even appear in the federal statutory law regulating tax exempt organizations.

Moreover, the Internal Revenue Code and corresponding regulations provide separate treatment to commercial-type business activities of tax exempt nonprofit organizations. When such an organization conducts business activities on a regular basis and those activities are not substantially related to the purposes for which the organization was granted tax exempt status (i.e., the unrelated business income tax or "UBIT" rules), the organization is subject to taxation on its net return and, if those activities are substantial, is at risk of losing tax exemption altogether. Application of the UBIT rules turn on whether the tax exempt nonprofit organization's activity is consistent with, or substantially related to, its tax exempt nonprofit purposes.

Therefore, the Commission should be comfortable drafting regulations clarifying that the definition of regulated e-mail - "commercial electronic mail messages" - is not applicable to tax exempt nonprofit organizations when, and to the extent that, they are pursuing their tax exempt nonprofit purposes regardless of the content of the e-mail message. Particularly given the risk of litigation, which represents a disproportionate burden on nonprofit organizations, the Commission should exercise its authority to clarify and limit the application of commercial e-mail by expressly incorporating into the regulations language that distinguishing e-mails from a tax exempt nonprofit organization that relate to one or more the organization's duly authorized tax exempt nonprofit purposes.

8. "ADV" or Similar Identifier

PMA believes that the Commission should recommend against the use of "ADV" or a comparable identifier in the subject line in its required report to Congress. Such labeling is unnecessary. The Act already requires that messages include a clear and conspicuous identification that the message is an advertisement or solicitation. An "ADV" identifier would not be followed by bad actors, those responsible for spam. This fact was demonstrated in the Commission's survey last year that showed that only 2% of spam included an "ADV" label, even though such a labeling requirement existed in several state laws.

9. Reward System

PMA also believes that the Commission should recommend against a reward system for those who supply information to the Commission about violations of the Act in its report to Congress. Such a system would divert significant resources needed to combat spam to determining who should receive the award. ISP's and law enforcement are best suited to engage in the sometimes complicated task of identifying and locating spammers.

The PMA appreciates the opportunity to comment on this proceeding and looks forward to continuing discussions of these important issues with the Commission.

For additional information, please contact Edward Kabak, Esq., Director of Legal Affairs, Promotion Marketing Association, Inc., at 212-420-1100; Fax: 212-533-7622.

Sincerely,

PROMOTION MARKETING ASSOCIATION, INC

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