

**BEFORE THE FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580**

In the Matter of)	RIN 3084-AA96
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Notice of Proposed Rulemaking)	Project No. R411008
CAN-SPAM Act Rulemaking)	
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**COMMENTS OF THE INDEPENDENT INSURANCE AGENTS
& BROKERS OF AMERICA, INC.**

The Independent Insurance Agents & Brokers of America, Inc. (“IIABA”) submits these comments in response to the Advance Notice of Proposed Rulemaking (“ANPR”), published on March 11, 2004, regarding the definitions, implementation, and reporting requirements of the “Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003,” (hereinafter “CAN-SPAM Act” or “Act”).

IIABA represents over 300,000 independent insurance agents and brokers and their employees across the United States. It is the largest trade association representing insurance agents and brokers in the nation. Members belong to 51 state associations, including the District of Columbia, and IIABA is the national umbrella organization for the 51 independent state affiliates. Membership in the state affiliates by independent agents and brokers is voluntary.

I. Transactional or Relationship Messages

The Commission has asked for comment on whether it should “modify or elaborate on” the definition of “transactional or relationship messages” in the Act. We believe it should address the definition in the following two ways.

(A) Interpretation of the Existing “Transactional or Relationship Messages” Categories.

The Act designates five broad categories of messages as “transactional or relationship messages.”¹ Certain e-mails trade associations send to their members are included clearly within these categories and therefore are exempt. These include messages relating to the members’ “standing or status”, “account balance” and other information relating to their “ongoing commercial relationship.”

(1) Including Messages from Nonprofit Trade Associations

One of the categories of transactional or relationship messages sets forth as its primary purpose “to deliver goods and 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.” 15 U.S.C. § 7702(17)(A)(v). By joining and paying membership dues to a trade association, the member is receiving services from or engaged in a transaction with the organization. When individuals or businesses join and pay dues to a trade association, they expect, on a regular basis, to be kept informed about the organization’s activities, events, products, and services relating to their business and/or their industry. Members of trade associations expect these communications to be handled cost-effectively and in a timely way, making e-mail an excellent and often preferred approach. Since, the primary purpose of e-mails sent by trade associations to their members is to “deliver goods and services” to members available as a result of the membership transaction, those e-mails constitute “transactional or relationship” messages.

This interpretation is consistent with a significant number of state anti-spam laws, which, in various ways, expressly exempt messages sent by an organization to its members from the scope of all or a portion of their anti-spam laws or regulations, regardless of the primary purpose

¹ 1. To facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender; 2. To provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient; 3. To provide specified types of information with respect to a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender; 4. To provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or 5. To 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. 15 USC 7702 (17)(A)(i-v)

of the message.² We are not aware of any state that expressly includes messages sent by organizations to their members within the scope of their anti-spam laws.

We therefore request that the Commission clarify that e-mail messages sent by trade associations to their members are “transactional or relationship messages” and not “commercial electronic mail messages.”

(2) Including Messages from Affiliates and Subsidiaries of Nonprofit Trade Associations

There are two aspects of trade association organizational structure that are foundational to understanding communications between trade associations and their members. First, many trade associations are organized so that joining a local, state or regional trade association results in membership in the national association, and membership in the national association is not available without first joining at the local, state or regional level.

Second, many trade associations offer certain goods and services to their members through subsidiaries or affiliates due to licensing, tax or for other legal or regulatory reasons. This is common in industries where the association benefits being provided are difficult or impossible to obtain in the open marketplace, or prohibitively priced for individual purchase. In essence, the affiliate or subsidiary is serving the primary purpose of informing members about and providing access to benefits (goods and services) the trade association offers its members. E-mails about such benefits are “transactional or relationship” messages, regardless if the e-mail is sent by the association or an affiliate or subsidiary because the identity of the sender does not change the character or “primary purpose” of the message. For example, many professional trade associations offer members errors and omission insurance with preferred rates and terms, but do so through a subsidiary in order to comply with laws restricting entities licensed to promote the product from engaging in any business other than insurance.

Thus, e-mail messages from subsidiaries or affiliates of a trade association to members of that association should be recognized as “transactional or relationship messages” and not be treated as commercial spam under the Act.

² See LA. REV. STAT. ANN. § 51:1741(14)(a) (West 2004); OKLA. STAT. ANN. tit. 15 § 776.5(4)(a) (West 2004); TEX. BUS. & COM. CODE ANN. § 46.001(9) (Vernon 2004); ARIZ. REV. STAT. ANN. § 44-1372.04(A)(1)(a) (West 2004); COLO. REV. STAT. Ann. § 6-2.5-103(4)(a) (West 2004); DEL. CODE ANN. tit. 11 § 937(1); IND. CODE ANN. § 24-5-22-8(1)(B) (West 2004); IOWA CODE ANN. § 714E.1(3)(b)(2) (West 2004); MINN. STAT. ANN. § 325F.694(3)(2) (West 2004); N.D. CENT. CODE § 51-27-04(2) (2004).

(B) Modification of “Transactional or Relationship Messages” Categories

Although we believe that the existing categories of “transactional or relationship messages,” when properly interpreted consistent with the intent of the Act, exclude messages sent by trade associations to their members, we request that the Commission use its rulemaking powers under 15 U.S.C. § 7702(17)(B), to modify the categories of transactional or relationship messages in the manner suggested below.

(1) Add Messages Sent by Trade Associations to Members to “Transactional or Relationship Message” Categories

Based on practical considerations and the intent of the Act, the Commission should create another category of transactional or relationship messages for e-mail messages of which the primary purpose is:

“to provide a member of a trade association or tax exempt non-profit organization, or affiliates or subsidiaries thereof (collectively referred to as “Organization”), with information related to the Organization, including membership, activities, products, goods, services or the industry of which the Organization is a part.”

(2) This is Consistent with the Intent of the Act.

A recent and rapidly expanding trend within trade associations is that the members expect and prefer to receive communications from their association and its affiliates and subsidiaries via e-mail rather than through other methods. E-mail communications keep members apprised of association information and resources faster and more efficiently than is possible through U.S. mail.

As noted above, a number of states have recognized this trend by excluding from the scope of all or a part of their anti-spam laws e-mail messages sent by an organization to its members. See note 2, p. 3. Although states have accomplished this in different ways, several have done it by excluding such messages from the scope of the term “commercial e-mail messages” or other similar term describing messages to which the state law is applied.³ Including e-mail messages from trade associations and their subsidiaries and affiliates in the

³ See ARIZ. REV. STAT. ANN. § 44-1372.04(A)(1)(a) (West 2004); COLO. REV. STAT. ANN. § 6-2.5-103(4)(a) (West 2004); DEL. CODE ANN. tit. 11 § 937(1); IND. CODE ANN. § 24-5-22-8(1)(B) (West 2004); IOWA CODE ANN. § 714E.1(3)(b)(2) (West 2004); MINN. STAT. ANN. § 325F.694(3)(2) (West 2004); N.D. CENT. CODE § 51-27-04(2) (2004).

definition of transactional or relationship messages would accomplish the same purpose under the Act and be consistent with its intent of distinguishing expected e-mails that promote frictionless commerce from commercial e-mail messages that are unsolicited, inconvenient, costly and burdensome. If trade associations or other subsidiaries or affiliates are required to review all e-mail communications to members to assess the potential commercial character of the messages, then communications by trade associations with their members will be delayed or chilled, frustrating a primary purpose behind members joining the organization.

CAN-SPAM was enacted to prohibit predatory commercial e-mails taking the form of solicitations for or following a commercial transaction. The Congressional findings repeatedly make reference to “unwanted” or “unsolicited” commercial electronic e-mail and the damage in loss of time, costs, and aggravation that is suffered by unwitting consumers. See 15 U.S.C. § 7701(a)(4), (6), (7), (8) and (10). CAN-SPAM was never intended to regulate or impose its limitations on long-term affiliations and relationships such as those enjoyed by members with the trade associations they choose to join. Trade association members join their organizations to access the benefits of the organizations’ collective resources, including information about membership activities, products, goods and services. The Act was never intended to impede the relationship members’ have with their trade association or the flow of information between them.

Congress determined that e-mail’s “low cost and global reach make it extremely convenient and efficient.” 15 U.S.C. § 7701(a)(1). Congress also found that “[t]he receipt of a large number of unwanted electronic mail messages, both commercial and noncommercial, will be lost, overlooked, or discarded amidst the larger volume of unwanted messages, thus reducing the reliability and usefulness of e-mail to the recipient.” 15 U.S.C. § 7701(4). Therefore, Congress was concerned with the convenience and efficiency of the delivery of *wanted* e-mail being threatened by *unwanted* e-mail advertising.

To exclude e-mails sent by trade associations to their members from the definition of transactional or relationship messages (and risk including such messages in the definition of commercial e-mail messages) would frustrate the purpose of the Act. As noted above, members of trade associations, by virtue of paying dues to the association, expect e-mails from their trade association, and its affiliates. Members would rather receive their information from the association by e-mail instead of regular U.S. mail, so they stay informed of upcoming events and business products faster and more efficiently.

II. Defining “Primary Purpose” and Other Concerns of IIABA Members

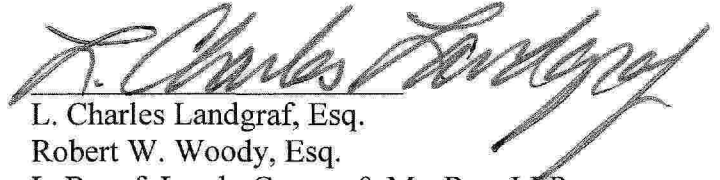
The Commission has asked for comment on the criteria for determining the “primary purpose” of e-mail messages. The statute provides that “commercial electronic mail message” and “transactional or relationship message” are both defined by reference to their “primary purpose.” Transactional or relationship messages that also advertise or promote a commercial product or service will remain transactional or relationship messages as long as the commercial aspect of the message is not its primary purpose. Since the “primary purpose” of a member joining a trade association is to receive communications about membership, activities, products, goods and services of the organization, e-mails fulfilling that purpose should not be restricted by the Act. That should be the result whether or not the e-mail message includes only commercial advertisements and promotions or information as well.

The Commission has asked whether commercial e-mail messages should be required to have an “ADV label” in the subject line. While IIABA recognizes that commercial e-mail messages may be easier for some recipients to sort and handle when labeled in the subject line, such a label can have greater negative consequences for trade associations’ messages to members. Trade associations regularly cover a broad array of topics in each communication with members. Such communications can cover everything from legislative alerts to updates about information available on the organization’s website to industry news. If the inclusion of commercial information in the message resulted in a requirement that the subject line be labeled to show the inclusion of an advertisement, members of the trade association easily could be misled into thinking that the message included only advertisements. Thus, labeling the e-mail to reflect commercial content is best handled in the body of the e-mail so the recipient does not unintentionally discard messages with other important informational content.

We appreciate the Commission's consideration of IIABA's comments.

Respectfully submitted,

On behalf of
Independent Insurance Agents
& Brokers of America, Inc.

A handwritten signature in black ink, appearing to read "L. Charles Landgraf". The signature is written in a cursive style and is positioned above the typed name.

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