



Securities Industry Association

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September 13, 2004

Via Electronic Mail

Federal Trade Commission
Office of the Secretary
Room H-159
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

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

Ladies and Gentlemen:

The Securities Industry Association (“SIA”)¹ appreciates the opportunity to comment to the Federal Trade Commission (the “Commission”) on the Commission’s notice of proposed rulemaking under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the “CAN-SPAM Act” or “Act”). 69 *Fed. Reg.* 50091 (August 13, 2004). The proposal requests public comment on proposed rules to implement the CAN-SPAM Act, including the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message.

Although SIA supports the Act’s goal of providing consumers with the opportunity to control the receipt of commercial electronic mail messages, we have significant concerns with the proposed rule. The securities industry has long recognized the importance of respecting the privacy of customers’ electronic mail facilities, and our member-firms are working diligently to effectively implement the CAN-SPAM Act. SIA submitted a comment letter on the FTC’s advanced notice of proposed rulemaking under the CAN-SPAM Act (comment letter dated April 20, 2004), and we are pleased to provide the following comments to the Commission.

¹ The Securities Industry Association, established in 1972 through the merger of the Association of Stock Exchange Firms and the Investment Banker’s Association, brings together the shared interests of nearly 600 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs 790,600 individuals. Industry personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2003, the industry generated \$213 billion in domestic revenue and an estimated \$283 billion in global revenues. (More information about SIA is available on its home page: www.sia.com.)

Our primary concern with the Commission's proposed rule is with the definition of the term "commercial electronic mail message." We suggest that the definition the Commission proposes is not consistent with the CAN-SPAM Act and should be revised to reflect the language of the Act and the intent of Congress. SIA believes that the proposed definition will have an adverse effect on bona fide electronic commerce and will interfere with the ability of legitimate businesses to deliver products and services electronically to their customers.

Accordingly, SIA recommends that: 1) the primary purpose of an electronic mail message should be regarded as "commercial" only if the message would not have been sent but for the commercial advertising or promotional portion of the electronic message; and 2) an electronic mail message should be regarded as serving a transactional or relationship function if a) it meets the operational exceptions recognized by the Gramm-Leach-Bliley Act, and b) provides billing and account information, or c) is sent to a person with a pre-existing business relationship with the sender.

I. PROPOSED DEFINITION OF "PRIMARY PURPOSE" IS INCONSISTENT WITH THE STATUTORY LANGUAGE OF THE CAN-SPAM ACT

COMMERCIAL AND TRANSACTIONAL ELECTRONIC MAIL MESSAGES

The CAN-SPAM Act provides that the Commission may define the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message. Furthermore, the Act provides that a "commercial electronic mail message" is 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 website operated for a commercial purpose). CAN-SPAM Act § 3(2)(A). The term "commercial electronic mail message" does not include a "transactional or relationship message." CAN-SPAM Act § 3(2)(B). A "transactional or relationship message" is an electronic mail message the primary purpose of which is to facilitate, complete or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender, as well as for other operational purposes specified in the Act. CAN-SPAM Act § 3(17).

The Commission's proposed rule states that the primary purpose of an electronic mail message will be commercial based upon three criteria described below relating to: 1) content that only advertises or promotes; 2) commercial and transactional messages; and 3) commercial and nontransactional messages. SIA believes that these criteria are inconsistent with the terms of the CAN-SPAM Act and should not be adopted.

1) Content that Only Advertises or Promotes

Under the proposed rule, if the electronic message contains only content that advertises or promotes a product or service, the primary purpose will be deemed commercial. § 316.3(a)(1). This criterion, however, is inconsistent with the language of the CAN-SPAM Act. Section 3(2)(A) of the Act provides that a commercial electronic mail message is an electronic mail message, the primary purpose of which is the

commercial advertisement or promotion of a commercial product or service. The Commission's proposed rule, however, does not include the term commercial before the words "advertisement or promotion" and "product or service." We believe that the omission of the term "commercial" from this criterion as well as the others proposed by the Commission are inconsistent with the language of the statute. Moreover, the omission inappropriately brings within the scope of the Act's coverage, electronic mail messages that do not promote commercial products and services. For example, trade groups such as SIA promote seminars or other gatherings through electronic mailings. Such messages are not necessarily commercial advertisements nor the promotion of a commercial product or service and therefore may not be subject to the Act. Nonetheless, the Commission's proposed rule may be interpreted as covering such messages.

The language proposed by the Commission should therefore be modified to accurately reflect the language of the CAN-SPAM Act.

2) Commercial and Transactional Messages

The proposed rule also would regard the primary purpose of an electronic mail message as commercial if 1) the message advertises or promotes a product or service and pertains to a transactional or relationship function (as specified in the proposed rule) and 2) a recipient reasonably interpreting the subject line of the message would likely conclude that the message advertises or promotes a product or service. In addition, the primary purpose of an electronic mail message will be regarded as commercial 1) if the message advertises or promotes a product or service and pertains to a transactional or relationship function and 2) the transactional or relationship function does not appear at or near the beginning of the message.

SIA believes that this proposed criterion is inconsistent with the CAN-SPAM Act. Section 3(2)(B) of the Act provides that the term "commercial electronic mail message" does not include a "transactional or relationship message." Accordingly, if the primary purpose of the electronic mail message is to facilitate, complete or confirm a commercial transaction that the recipient has previously agreed to with the sender, or the other functions set forth in § 3(17)(A) of the Act, the message cannot be treated as a commercial electronic mail message, even if the primary purpose of the message is the commercial advertisement or promotion of a commercial product or service.

The Commission's proposed rule ignores the fact that if an electronic mail message is a transactional or relationship message, it cannot be a commercial electronic mail message. Accordingly, the notion that the primary purpose of an electronic mail message is commercial if the transactional or relationship functions do not appear at or near the beginning of the message does not, and cannot, override the fact that the message is, in fact, a transactional or relationship message if it has as its primary purpose a function specified in § 3(17)(A) of the Act. Based upon the language of the statute, it appears that an electronic mail message could have two primary purposes – the commercial advertisement or promotion of a commercial product or service and the

transaction or relationship functions specified in § 3(17)(A).² Accordingly, SIA believes that the Commission should delete the criterion set forth in § 316.3(a)(2).

The Commission could fashion the criterion in a manner that covers electronic mail messages that would not have been sent but for the transactional or relationship. This approach avoids the need to apply a standard that relies upon the uncertain and unpredictable interpretation of the recipient or the arbitrary placement of the transactional portion of the message. Moreover, the approach we suggest provides a predictable standard for companies in determining whether or not the CAN-SPAM Act applies to electronic mail messages they send.

3) Commercial and Nontransactional Messages

The Commission also proposes that the primary purpose of a message will be commercial if 1) the message advertises or promotes a product or service and does not relate to a transactional or relationship function and 2) a recipient reasonably interpreting the subject line of the message would likely conclude that the message advertises or promotes a product or service. In addition, the primary purpose of an electronic mail message will be regarded as commercial if 1) the message advertises or promotes a product or service and does not pertain to a transactional or relationship function and 2) a recipient reasonably interpreting the body of the message would likely conclude that the primary purpose of the message is to advertise or promote a product or service.

SIA believes that this criterion is misguided and should not be adopted. The approach shifts the ultimate determination of whether or not an electronic mail message will be regarded as a commercial mail message to the recipient rather than leaving it with the sender. Reliance upon the recipient's perception provides senders with little guidance and may likely have a chilling effect upon the growth of legitimate electronic commerce. Companies cannot take the risk that they will be exposed to potential liability if recipients interpret the subject line or body of the message as advertising or promoting a product or service. SIA, therefore, urges the Commission not to adopt this criterion.

II. RECOMMENDED ALTERNATIVE APPROACH

PRIMARY PURPOSE STANDARD MUST BE SIMPLER

SIA believes that the primary purpose of an electronic mail message should be commercial only if the message would not have been sent but for the commercial advertising or promotional portion of the electronic message. If the message would not have been sent with only the commercial advertisement or promotional message, then the primary purpose should not be "commercial." Similarly, electronic mail messages that would not have been sent but for the transactional or relationship component would not have a primary purpose that is commercial. This approach avoids the unnecessary and difficult review of the content within a message that the proposed rule requires, and

² The U.S. Supreme Court has held that the term "primary" does not necessarily mean "first." According to the Court, an activity or function may be primary if it is substantial. Board of Governors of the Federal Reserve System v. Agnew, 329 U.S. 441, 446 (1947).

provides a predictable standard in determining whether or not the CAN-SPAM Act applies. SIA believes that the approach it recommends will ensure that the CAN-SPAM Act's provisions deter spammers without interfering with the normal flow of legitimate electronic commerce.

SIA also urges the Commission to clarify that certain informational electronic messages such as newsletters, reports, and other material that provide information to customers concerning such topics as investments or advice, do not have a primary purpose that is commercial in nature because they do not promote commercial products and services.

TRANSACTIONAL OR RELATIONSHIP DEFINITION MUST BE EXPANDED

Under the CAN-SPAM Act, a message whose primary purpose serves a transactional or relationship function is a "transactional or relationship message" and is not a "commercial electronic mail message." Transactional or relationship messages are not subject to most of the requirements applicable to commercial electronic mail messages. However, the definition does not take into account certain aspects of transactions and relationships between companies and their customers that are critical to the smooth functioning of the securities industry and the financial and securities markets. Accordingly, we believe the Commission should modify the definition of transactional or relationship message to include a message that is necessary 1) to protect against or prevent actual or potential fraud, unauthorized transactions or other violations of law; or 2) to comply with federal, state or local laws, rules or other legal requirements. These additional provisions are set forth in § 502(e) of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6802(e), and in the Commission's rules implementing the Gramm-Leach-Bliley Act, 16 C.F.R. §§ 313.14, 313.15.

We also urge the Commission to include within transactional or relationship functions certain notices that are required by law to be provided by securities firms to customers. Messages providing information concerning investments and advice to customers should be regarded as transactional or relationship messages, or as not having a commercial primary purpose. In addition, electronic mail messages that provide account balance information or other types of account statements should not have to be provided "at regular periodic intervals" to be regarded as transactional or relationship messages. Such information is often provided at irregular intervals pursuant to the customer's request, due to the occurrence of a triggering event or as required by law. There is no logical reason why such messages should not be regarded as having as their primary purpose a transactional or relationship function simply because they are not sent at regular intervals.

We also request that the Commission clarify that an electronic mail message that is sent in response to a request for products, services or information (e.g., a prospectus) may be regarded as a transactional or relationship message. Further, the Commission should treat a negotiation of a commercial transaction as a transactional or relationship message.

Finally, SIA believes that the Commission should define transactional and relationship messages as including electronic mail messages sent to persons with whom the sender has a pre-existing business relationship. Such an exception would facilitate the distribution of information by a company to customers and provide valuable information to customers about products and services from companies with which they do business. SIA suggests that the Commission consider adopting the definition of “pre-existing business relationship” which Congress enacted in § 214 of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act)(Pub.L. 108-159), 15 U.S.C. § 1681s-3(d)(1).

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SIA appreciates the Commission’s consideration of our views. If we can provide additional information, please contact the undersigned at (202) 216-2000.

Sincerely,

Alan E. Sorcher
Vice President and
Associate General Counsel