

**Before the
FEDERAL TRADE COMMISSION**

Washington, D.C. 20580

In the Matter of)	
CAN-SPAM Rulemaking)	Project No. R411008
Definitions, Implementation and Reporting)	
Requirements Under the CAN-SPAM Act)	

Comments of AT&T Corp.

AT&T Corp. (“AT&T”) hereby submits these comments in response to the Advance Notice of Proposed Rulemaking and request for public comment (“ANPR”) issued by the Federal Trade Commission (the “FTC” or “Commission”) in the above captioned proceeding. The Commission seeks comment on its proposal pursuant to §§ 3(2)(c), 3(17)(B), 5(c)(1), 5(c)(2), and 13 of the Controlling The Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act” or “the Act”)¹ to enact regulations concerning the use of commercial electronic mail messages (“commercial e-mail”), and on certain reports to Congress required by additional provisions of the Act. AT&T believes that the FTC’s regulations implementing the CAN-SPAM Act should provide senders of commercial e-mail with sufficient latitude to market their products and services to willing recipients of commercial e-mail messages, while deterring and remedying illicit conduct.

I. INTRODUCTION

The CAN-SPAM Act, which took effect on January 1, 2004, imposes new requirements on commercial e-mail and gives federal civil and criminal enforcement agencies new tools to combat

¹ CAN-SPAM Act, P.L. 108-187, 117 Stat. 2699 (12/16/03).

unsolicited commercial e-mail, otherwise known as “spam.” The mandatory provisions of the CAN-SPAM Act direct the Commission to issue regulations, not later than 12 months following enactment of the Act, “defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message.”² In accordance with the CAN-SPAM Act, the term “commercial electronic mail message” encompasses “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.)”³

The CAN-SPAM Act gives the Commission additional, discretionary authority to issue regulations concerning a number of the Act’s remaining definitions and provisions. Specifically, the Commission is authorized to:

- modify the definition of the term “transactional or relationship message” under the Act “to the extent that such modification is necessary to accommodate changes in electronic mail technology or practices and accomplish the purposes of [the] Act;”⁴
- modify the 10-business-day period prescribed in the Act for honoring a recipient’s opt-out request;⁵
- specify activities or practices as aggravated violations (in addition to those set forth as such in § 5(b) of the CAN-SPAM Act) “if the Commission determines that those activities or practices are contributing substantially to the proliferation of commercial electronic mail messages that are unlawful under subsection [5(a) of the Act]”;⁶ and
- “issue regulations to implement the provisions of this Act.”⁷

² CAN-SPAM Act, § 3(2)(C).

³ CAN-SPAM Act, § 3(2)(A) (emphasis supplied). The term “the primary purpose” is incorporated in the Act’s definition of the term “commercial electronic mail message.”

⁴ CAN-SPAM Act, § 3(17)(B).

⁵ CAN-SPAM Act, § 5(c)(1)(A)-(C).

⁶ CAN-SPAM Act, § 5(c)(2).

⁷ CAN-SPAM Act, § 13(a). The CAN-SPAM Act authorizes the Commission to institute a notice and comment rulemaking pursuant to the Administrative Procedures Act, 5 U.S.C. 553. CAN-SPAM Act, § 13. The Act excludes from the scope of its general grant of rulemaking authority § 4 of the Act (relating to criminal offenses) and § 12 of the Act (expanding the scope of

In issuing the ANPR, the Commission initiates the mandatory “primary purpose” rulemaking proceeding by soliciting comment on issues relating to that term and its use in the Act, and seeks comment on the areas of discretionary regulation listed above.

II. DISCUSSION

A. The Commission’s “Primary Purpose” Test

The CAN-SPAM Act mandates that the FTC issue regulations “defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message.” This mandate is integral to the Act’s definition of “commercial electronic mail message.”⁸ Generally, the Act applies only to messages that fall within this definition.⁹ The FTC’s objective in issuing “primary purpose” regulations is to clarify how companies can determine whether a particular message constitutes a “commercial electronic mail message,” and is therefore subject to the CAN-SPAM Act’s requirements and prohibitions. Accordingly, the FTC seeks comment on how to determine an electronic mail message’s “primary purpose,” including comment on criteria that would facilitate this determination.

As the Commission suggests in the ANPR, Congress’s choice of the words “*the* primary purpose” should indicate that the relevant e-mail’s “primary purpose” is commercial advertisement or promotion only if advertisement or promotion “is more important than all of the e-mail’s other

the Communications Act of 1934).

⁸ CAN-SPAM Act, § 3(2)(C).

⁹ Only one of the Act’s provisions, § 5(a)(1), which prohibits the false or misleading transmission of information, applies equally to “commercial electronic mail messages” and “transactional or relationship messages.” Otherwise, the CAN-SPAM Act’s prohibitions and requirements apply only to “commercial electronic mail messages.”

purposes combined.”¹⁰ In addition, Congress’s choice of the term “purpose” would appear to require the Commission to apply a test of the sender’s intent.¹¹ In applying an intent test, the sender’s intent should be judged objectively, based whenever possible upon objective evidence regarding the message and its contents. AT&T urges the FTC to make certain that the test of “primary purpose” that it applies is objective and clear, so that senders of e-mail messages as well as law enforcement agents are clear as to the scope of the CAN-SPAM Act and the circumstances under which the Act will be enforced.

B. Discretionary Rulemaking Under the CAN-SPAM Act

The Commission also seeks comment on the four areas of discretionary rulemaking established in the Act. These areas include: 1) the Act’s definition of “transactional or relationship messages;” 2) the ten-business-day period for processing opt-out requests; 3) the Act’s enumeration of “aggravated violations;” and 4) implementation of the provisions of the CAN-SPAM Act generally.¹²

1. Transactional or Relationship Messages

The CAN-SPAM Act designates the five broad categories of messages listed below as

¹⁰ ANPR, p.16 (“The term ‘the primary purpose’ could be interpreted to mean that an email’s commercial advertisement or promotion is more important than all of the email’s other purposes combined.”) Congress could have chosen different language in this context, such as “a primary purpose” or “an *ancillary* purpose” to indicate a different intent, but did not do so.

¹¹ In other contexts, the FTC has stated that marketing material is to be judged by the “net impression” that the material as a whole makes upon the reasonable observer. The “net impression” standard takes into account the placement of disclosures within the marketing materials, the proximity of disclosures to the relevant claims, the prominence of disclosures, and whether other parts of the marketing material divert attention from the disclosures. ANPR, pp. 16-17. While the “net impression” standard has been used to assess the meaning of an advertisement and the adequacy of disclosures, its application in the context of the Commission’s determination of “primary purpose” is not required.

¹² ANPR, p. 6.

“transactional or relationship messages.”¹³ The Act excludes these messages from its definition of “commercial electronic mail message,” and in so doing, exempts them from the Act’s substantive requirements and prohibitions.¹⁴

“Transactional or relationship messages” are messages whose primary purpose is to:

- facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;
- 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;
- 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;¹⁵
- provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or
- 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.

The Act (at § 3(17)(B)) gives the Commission the authority to modify the definition of “transactional or relationship messages” (at § 3(17)(A)) to “expand or contract the categories of messages that are treated as ‘transactional or relationship messages’ for the purposes of this Act to the extent that such modification is necessary to accommodate changes in electronic mail technology or practices and accomplish the purposes of the Act.” The FTC thus seeks comment on the proper meaning to be given to “transactional or relationship messages.”¹⁶

Congress intended the categories of e-mail enumerated above to fall outside of the purview

¹³ The five categories of “transactional or relationship messages” appear in the CAN-SPAM Act at §3 (17).

¹⁴ CAN-SPAM Act, § 3(2)(B).

¹⁵ The specified types of information are: notification concerning a change in the terms or features; notification of a change in the recipient’s standing or status; or regular periodic account statement or balance information. CAN- SPAM Act, § 3(17)(A)(iii).

¹⁶ ANPR, p. 7.

of the Act and the Commission’s regulations. In light of Congress’s intent, the categories should be sufficiently broad to exempt activity that facilitates, completes or confirms a transaction or other business relationship, or provides supplementary information related to such a transaction or relationship, while providing clarity concerning the nature of these activities. In turn, the categories should be sufficiently narrow to ensure that the Act achieves its objective of deterring abusive activity, while providing a remedy for abusive activity that nevertheless occurs. AT&T believes that the five categories generally meet this objective, and that substantial modification of these categories is not required. However the Commission’s regulations should make it clear that e-mails to which a recipient has affirmatively consented are exempt from the application of the Act. In addition, the Commission should clarify that the exception for e-mails sent to “facilitate, complete or confirm a transaction” covers messages sent to recipients with whom the sender has an agreement or other ongoing business relationship, that address payment for a product or service, the introduction of new products or service, or product updates.¹⁷

2. Ten Business Day Period for Processing Opt-Out Requests

Section 5(a)(4) of the CAN-SPAM Act addresses the time within which a request to “opt-out” of receiving additional electronic mail messages must be honored. Section 5(a)(4)(A) prohibits senders and persons acting on their behalf from initiating the transmission of a commercial e-mail message to any recipient who has opted out of receiving the sender’s commercial e-mail messages. Senders have ten (10) business days after receiving recipients’ opt-out requests to process and put such requests into effect.

Section 5(c)(1) authorizes the Commission to issue regulations modifying the ten-day period for opt-out requests if the Commission determines that a different time period would be

¹⁷ CAN-SPAM Act, § (3) 17(A)(i). Section 3(17)(A)(i) of the Act provides an exception for e-mails sent to “facilitate, complete or confirm a transaction.”

more reasonable. The Commission may issue such regulations “after taking into account (A) the purposes of [subsection 5(a)]; (B) the interests of recipients of commercial electronic mail; and (C) the burdens imposed on senders of lawful commercial electronic mail.”¹⁸ In accordance with this provision of the Act, the FTC seeks comment on whether the ten-day period for processing opt-out requests is reasonable, or whether some other period of time should apply to such requests.¹⁹

AT&T believes that the ten-day period for processing recipients’ opt-out requests should be expanded. In the current environment, it is not unusual for a company to have several e-mail databases, each containing thousands of customer names. While some senders of e-mail may be able to process opt-out requests directly, in many instances senders use third party e-mail service providers for this purpose. In addition, companies may be involved in co-marketing arrangements involving two or more sponsors of commercial messages, adding to the complexity of the task. To accomplish the “scrubbing” of all relevant databases, senders and/or their co-marketing sponsors and third party e-mail services must obtain “opt-out” information, and incorporate the relevant information into their databases. Ten business days is an unrealistic time for companies that are dealing with multiple e-mail lists and or one or more co-marketing sponsors or third party e-mail service providers to process and effectuate such opt-out requests.

Under the “safe harbor” provisions of the Federal Communications Commission’s (“FCC”) telemarketing rules, telemarketers are allowed up to thirty calendar days to remove numbers from calling lists once telemarketers are notified that a customer does not wish to be called.²⁰ In light of

¹⁸ CAN-SPAM Act, § 5(c)(1).

¹⁹ ANPR, p. 8.

²⁰ See 47 C.F.R. § 64.1200(d)(3) (“Persons or entities making calls for telemarketing purposes (or on whose behalf such calls are made) must honor a residential subscriber’s do-not-call request within a reasonable time from the date such request is made. This period may not exceed

the current state of database technology, and the complexities involved in implementing opt out requests, thirty days should be considered the *minimum* amount of time needed to process requests. While database technologies for implementing opt-out requests may eventually improve, at present there is no reason to believe that compliance with the Commission’s “opt out” rules for e-mail can reasonably be achieved in less than thirty days.²¹ Until there are significant improvements in database technologies, or countervailing considerations come to light, the Commission should conform its opt-out rules to the current thirty day “safe harbor” provision of the FCC’s telemarketing rules.

3. Additional Aggravated Violations

Section 5(c)(2) of the Act grants the Commission discretionary rulemaking authority with respect to the list of “aggravated violations” set forth in § 5(b) of the Act. The Act’s enforcement provisions authorize increased statutory damages if the court finds a defendant has engaged in one of the practices specified in § 5(b) while also violating the “opt-out” provisions of § 5(a). Specifically, §§ 7(f)(3)(C) and (g)(3)(C) permit the court to increase a statutory damages award by up to three times the amount that would have been granted in the absence of an aggravated violation.²² Aggravated violations include such practices as e-mail “address harvesting” and

thirty days from the date such request is made.”)

²¹ Congress has mandated that the Commission amend the FTC’s Telemarketing Sales Rule (“TSR”), 16 C.F.R. Section 310(4)(b)(3)(iv), to require that telemarketers access the national Do Not Call (“DNC”) list, and purge numbers in the registry, every month. Accordingly, the FTC has initiated a rulemaking to amend the TSR in accordance with its statutory DNC obligations. See Telemarketing Sales Rule, RIN 3084-0098, Notice of Proposed Rulemaking, 69 F.R. 7330 (February 13, 2004) (“FTC NPRM”), and is proposing to adopt a requirement that telemarketers obtain the national DNC list thirty days prior to making any telemarketing call. See FTC NPRM, 69 F.R. at 7330.

²² Increased statutory damages may also apply when a court finds that the defendant’s violations of § 5(a) were committed “willfully and knowingly.” CAN-SPAM Act, §§ 7(f)(3)(C) and (g)(3)(C).

“dictionary attacks.”²³ AT&T believes that Section 5(b) of the Act properly addresses spamming activities that impose unwarranted and unwanted burdens on recipients and their networks.

4. Meaning of the Term “Sender”

Section 13 of the Act delineates the Commission’s fourth area of discretionary rulemaking under the CAN-SPAM Act, by providing that the Commission may issue regulations to implement the provisions of the Act.²⁴

In the ANPR, the FTC states that since the effective date of the CAN-SPAM Act, several issues have arisen that may warrant a rulemaking under §13, including whether one or more of several entities should be considered the “sender” of a commercial e-mail, the legal obligations of initiators and recipients who forward messages to “friends and acquaintances,” and the failure of e-mail initiators to include valid postal addresses in their messages.²⁵ In AT&T’s view, the most significant of these issues is whether several entities or persons simultaneously could be considered the “sender” of a particular electronic mail message under the terms of the Act. The Commission notes, as an example, that an e-mail message that promotes an upcoming conference, and also includes ads from the companies sponsoring the conference, may have more than one “sender”

²³ Section 5(b) of the Act prohibits harvesting of e-mail addresses, which deters users from posting their e-mail addresses in public locations; dictionary attacks, which impose unwarranted burdens on networks and unwanted burdens on consumers; automated e-mail account registration; and the use of open relays to “relay or retransmit” e-mail messages.

²⁴ CAN-SPAM Act, § 13(a). The Act also requires the Commission to prepare and submit to Congress separate reports within the next two years concerning the establishment of: 1) a nationwide marketing Do Not E-mail registry to be submitted by June 16, 2004, CAN-SPAM Act, § 9; 2) a system for rewarding those who supply information about CAN-SPAM violations by September 16, 2004; and 3) a plan requiring commercial e-mail to be identifiable from its subject line by June 16, 2005; and a report on the effectiveness of CAN-SPAM, to be submitted by December 16, 2005, CAN-SPAM Act, § 13.

²⁵ ANPR, p. 10.

within the meaning of the Act.²⁶ The Commission thus seeks comment on whether it should adopt rules that clarify the obligations of multiple senders under the Act.²⁷

AT&T believes that the Act has created a great deal of uncertainty surrounding the meaning of the term “sender” in the context of co-marketing arrangements. In today’s competitive markets, co-marketing arrangements between two or more sponsoring companies are common, as are commercial e-mail messages that promote one or more of the sponsoring companies’ products. In some cases, a third party marketing agent that is not advertising its products or services sends the e-mail containing the cross-marketing solicitations. In other cases, it is the principal company or one of the other sponsoring companies that sends the e-mail. The most common concern is that commercial e-mail may be sent to a recipient who had opted out of receiving messages from one of the sponsoring companies whose ad appears in the message.²⁸

AT&T believes that the FTC’s implementing regulations should reflect the fact that only one company controls the sending of e-mail. The party controlling the transmission of a message should bear the responsibility of a “sender” under the Act. Confusion concerning the identity of the sender can be avoided by requiring that e-mails identify the sender as the party responsible for sending the message, using a statement, such as “This e-mail is sent to you by Company A” or, in the case of a joint promotion, “This e-mail is sent to you by Company X and includes information

²⁶ Under Section 3(16)(A) of the Act, a “sender” means “a person who initiates a message and whose product or service or Internet Web site is advertised or promoted...” “Initiators” include entities that originate or transmit e-mail messages, or procure the origination or transmission of such messages. *Id.* at § 3(9) (7702(9)). In order to “procure” the sending of a message, an entity must intentionally pay or provide other consideration to, or induce another person to initiate an e-mail message “on one’s behalf.” *Id.* at § 3(12)(7702(12)). This is a test of whether the e-mail message is actually sent on behalf of an entity.

²⁷ ANPR, pp. 10-11.

²⁸ ANPR, p. 10.

about companies with whom Company X has co-marketing agreements.” Clarification of the meaning of the term “sender” in this fashion would further the purposes of the CAN-SPAM Act, and would provide clarity for companies seeking to comply with the Act.

The Commission may wish to hold more than one party accountable as a “sender” including any company that profits from the sending of e-mail. This approach creates unnecessarily complex legal obligations in co-marketing arrangements, under which parties who are not in control of e-mail messages, and are not the intended recipients of “opt-out” requests, are nevertheless forced to honor such requests. A definition of the term “sender” that could encompass co-sponsors of commercial e-mails would create enforcement obligations that are at best impractical and at worst impossible to implement. Moreover, as a practical matter, a definition of “sender” that potentially encompasses multiple parties will require more than one opt-out for consumers and will be more confusing and burdensome to consumers in the end. It will also create unnecessary and unwarranted interface and infrastructure development obligations for companies that engage in co-marketing.

6. Implications for “Tell-A-Friend” Programs.

Another common practice involves a “sender” of a commercial e-mail message who seeks to induce recipients to forward the message to friends and acquaintances that are urged to forward the message in turn. The FTC asks whether it would further the purposes of CAN-SPAM, or assist the efforts of companies and individuals seeking to comply with the Act, if the Commission were to adopt rule provisions clarifying the legal obligations of initiators and recipients who forward messages in these “tell-a-friend” scenarios.²⁹

AT&T believes that the “sender” of a “tell-a-friend” e-mail should be the consumer. The

²⁹ Id.

consumer who transmits such messages exercises complete control over whether the message is sent, to whom, and the content of the message. Unlike other messages sent by providers of “tell-a-friend” functions, the consumer typically transmits the message without the collection of e-mail addresses by the website that provides the “tell-a-friend” functionality. The alternative approach - treating the provider of the function or a sponsor of the message as the “sender” - would impose unwarranted costs on providers and sponsors, who would be required to route all such messages through their own e-mail systems in order to “scrub” their databases of opt-outs.

7. “Valid Physical Postal Address”

Pursuant to § 5(a)(5)(A)(iii) of the Act, initiators of commercial electronic mail must include in their messages, *inter alia*, “a valid physical postal address of the sender.” A valid physical postal address could include a Post Office box or a commercial mail drop. The Commission asks whether it would further the purposes of the CAN-SPAM Act, or assist the efforts of companies and individuals seeking to comply with the Act, if the Commission were to adopt rule provisions clarifying what constitutes a valid physical postal address of the sender.³⁰

AT&T believes that by choosing the adjective “physical,” Congress intended to authorize the Commission to require a more substantial presence than a mere Post Office box. Purveyors of spam who repeatedly engage in aggravated violations may falsify their addresses or provide post office boxes only in order to avoid service of process. In these circumstances, the Commission could reasonably conclude that the term “physical” postal address refers to a street address, a building, or some other location that constitutes a physical point of contact and facilitates the service of legal process.

³⁰ ANPR, pp. 10-11.

CONCLUSION

AT&T believes that the FTC's regulations implementing the CAN-SPAM Act should provide senders of commercial e-mail with sufficient latitude to market their products and services to willing recipients of commercial e-mail messages, while deterring and remedying illicit conduct. The Commission can achieve this objective by clarifying the meaning of the terms "primary purpose", "transactional or relationship" and "sender" as described above; by extending the ten-day deadline for honoring opt-out requests to thirty days; and by requiring senders of e-mail messages to provide a street address at which the sender may be contacted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Hagi Asfaw, hereby certify that on this 20th day of April 2004, a copy of the foregoing “Comments of AT&T Corp.” was served by electronic mail on the persons listed below:

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