

April 20, 2004

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room 159-H
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

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

Dear Secretary Clark:

Courthouse News Service ("Courthouse News") is pleased to submit this letter in response to the Federal Trade Commission's request for public comments on regulations to be issued under the CAN-SPAM Act.

Courthouse News Service, which was started in 1991, is a legal news service that provides its subscribers -- which include major newspapers as well as many of the nation's law firms -- with daily e-mailed reports of new court filings, from new complaints to appellate opinions. Subscribers receive prompt notice of new appellate filings, including U.S. Supreme Court opinions and all U.S. Circuit Court of Appeals rulings, with links to full text, as well as notice of new complaints. Law firm subscribers have come to view this service as a necessary and critical part of their business. Similarly, for media clients, whose resources are often stretched and cannot regularly send reporters to courthouses in remote locations, the service tips them off to newsworthy new filings. Courthouse News has grown substantially over the last 13 years, and now offers reports from more than 45 cities in 23 states, representing the creation of many new jobs.

Business-to-business e-mail communications have been essential to Courthouse News' growth in recent years. Although Courthouse News recognizes the need for regulation of spam, it knows that the Commission is also mindful of the benefits of allowing legitimate businesses to continue to engage in electronic communications free of unnecessary burden and expense. To that end, Courthouse News respectfully suggests:

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- (1) That the Commission's regulations defining the relevant criteria for determining the primary purpose of an electronic message clarify that e-mail messages primarily consisting of news content -- such as electronic newspapers, newsletters, news wire reports or other news alerts -- do not constitute e-mails having commercial advertisement or promotion as their primary purpose.
- (2) That the Commission issue regulations expanding the definition of a "transactional or relationship message" to make it clear that e-mails between parties with an existing business relationship are exempt from the Act's requirements for commercial electronic messages; and
- (3) That the Commission recommend against requiring that commercial electronic messages be required to carry an "ADV" or other subject matter line label.

1. "Primary Purpose" Criteria

The mere inclusion of advertisements and subscription information has been held insufficient to transform traditional newspapers and magazines into commercial speech. *See, e.g., Commodity Trend Service, Inc. v. Commodity Futures Trading Commission*, 149 F.3d 679, 685 (7th Cir. 1998) ("A speaker's publication does not lose its status as protected speech simply because the speaker advertises the publication. ... If the result were otherwise, then even an editorial in *The New York Times* would constitute commercial speech because the newspaper seeks subscribers through advertisements."); *Ad World, Inc. v. Township of Doylestown*, 672 F.2d 1136, 1139 (3d Cir. 1982) ("The fact that a publication carries advertisements or that it is for profit does not render its speech commercial for first amendment purposes."). It therefore follows that the inclusion of similar information in e-mail messages that consist primarily of editorial content, such as e-mailed newspapers, newsletters, news wire reports, or similar e-mailed news alerts, should not be deemed to have a primary purpose that is commercial in nature. Accordingly, Courthouse News urges the Commission to make clear, in its regulations defining the relevant criteria to facilitate the determination of the primary purpose of an electronic message, that e-mails consisting primarily of editorial content are not commercial electronic mail messages for the purpose of the Act.

Courthouse News appreciates that to accomplish this goal, the Commission will need to develop criteria limiting this exemption to e-mails that are truly editorial in nature. To that end, the Commission could make clear that this carve-out only applies to e-mails that consist of a bona fide newspaper, newsletter, news report, or

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news alert, and/or to e-mails that, taken as a whole, consist primarily of editorial or news content. Any such criteria should include not only e-mailed newspapers and newsletters, but also news alerts, such as those distributed by Courthouse News and numerous other publishers across the country. Indeed, it is the widespread adoption of e-mail, which allows instantaneous delivery of news content, that has made such alerts so useful and relevant to their recipients.

In particular, Courthouse News urges the Commission to ensure, in adopting primary purpose criteria, that e-mailed editorial publications are not transformed into “commercial electronic mail messages” by the mere inclusion of subscription information. For example, in Courthouse News’ case, it sends a free trial subscription of its reports to small numbers of lawyers (no more than 20 at a time), and at the end of the trial period, recipients are asked whether they wish to subscribe. These e-mailed reports are similar to a free issue of a magazine, or trial subscription to a newspaper sent to a person’s physical address, and just as the inclusion of information about how to subscribe in a newspaper or a magazine does not alter the predominantly editorial nature of those products, such information in an e-mailed news report should not be deemed to alter the primarily editorial purpose of that e-mail, either.

2. Transactional Or Relationship Messages

Courthouse News Service believes the definition of a “transactional or relationship” message should be expanded to make it clear that this category includes e-mails where there is a preexisting or current business relationship between the sender and the recipient. Where such a relationship exists, it is reasonable to assume that the recipient of the goods or services pursuant to that relationship would want to receive information about available upgrades, similar products, and the like, and requiring businesses to abide by the requirements of § 5 of the CAN-SPAM Act and the Act’s other applicable requirements is not only unwarranted, but would impose additional costs on business communications. For example, Courthouse News Service sometimes wishes to alert its existing subscribers to new reports or services, and because its reports are sent to subscribers via e-mail, information about these new reports or services are also most appropriately sent by e-mail. Although such messages may already fall within one of the enumerated categories of messages within the statute’s definition of a “transactional or relationship” message, the statute should be clarified to eliminate any confusion on this point.

Courthouse News appreciates that the Commission may want to limit the circumstances under which a preexisting or current business relationship is deemed to

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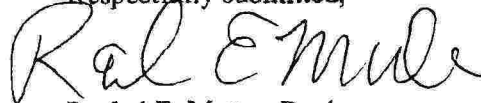
exist, and suggests that such relationships be limited to those that involve a prior monetary payment by the recipient to the sender.

3. Labeling Requirements

Courthouse News Service strongly opposes any requirement that commercial electronic mail be identified in the subject matter line by "ADV" or another similar designation, and urges the Commission to recommend against such a requirement. Given the widespread use by businesses and officials of filtering technology, such a requirement would mean that legitimate, business-to-business e-mails would never make it to their intended recipient. In effect, such a requirement would function as an outright ban on e-mail, impeding the growth of Courthouse News and other responsible users of e-mail while doing nothing to prevent bulk spammers, who would be unlikely to abide by labeling requirements. Labeling requirements would also hurt the would-be recipients of e-mails, who will no longer receive information that may be useful to them and/or their businesses. For example, if Courthouse News is prevented from sending its sample e-mail reports to lawyers and law firms on the registry, those lawyers and law firms will not find out about a service that their competitors are using and that can help them serve their clients more effectively.

Courthouse News Service appreciates the Commission's consideration of its views on the CAN-SPAM Act Rulemaking, and hopes it will find these comments to be helpful. Should there be any questions regarding these comments, do not hesitate to contact our offices.

Respectfully submitted,



Rachel E. Matteo-Boehm

cc: Bill Girdner, Editor, Courthouse News Service