

FTC CAN-SPAM Act “Primary Purpose” Final Rule

On December 16, 2004, the Federal Trade Commission issued its final rule (“Rule”) governing how to evaluate the “primary purpose” of an e-mail message for purposes of determining whether it is subject to the core requirements of the CAN-SPAM Act, 15 U.S.C. §§ 7702 *et seq.* This Rule will take effect on February 18, 2005. E-mail that has a “commercial” primary purpose is subject to the CAN-SPAM Act requirements to provide an opt-out and notice that the message is an advertisement or solicitation, and to include a valid physical postal address.

The Rule focuses principally on how a reasonable recipient would perceive the purpose of an e-mail message based upon its subject line and the content located at the beginning of the message. E-mail messages that are “transactional or relationship” in nature are not subject to these requirements, and the Rule sets forth specific criteria that should enable businesses to identify such messages. However, businesses that send many messages with content consisting of both transactional and promotional messages may need to implement processes for evaluating each message prior to sending to determine what statutory and regulatory requirements may apply.

This memo summarizes the changes made by the Rule to the draft rule proposed by the Commission in August 2004, discusses the Commission’s final criteria governing how to determine the primary purpose of a message, and summarizes other issues addressed by the Rule.¹

I. Summary of Changes from the Proposed Rule

For the most part, the Rule follows the means of determining the primary purpose of a message set forth in the Commission’s August proposed rule on this issue. Among others, the Commission made the following changes from that proposal:

- Addition of a fourth category of messages that contain purely transactional or relationship content in the body of the message.
- Modification of the criteria for evaluating commercial content from content that “advertises or promotes a product or service” to “the commercial or promotional advertisement of a commercial product or service.” This clarification has the effect of excluding one-to-one consumer e-mail from being deemed to have a commercial primary purpose.
- Modification of the criteria for evaluating messages with both commercial and transactional or relationship content. Such messages will have a commercial primary purpose **if the transactional or relationship content does not “appear, in whole or in substantial part, at the beginning of the message.”** The Commission had proposed that a message be deemed to have a commercial primary purpose if the transactional or relationship content “does not appear at or near the beginning of the message” (emphasis in original).
- Treatment of *bona fide* e-mail newsletters and periodicals that contain advertising as transactional or relationship messages, rather than as messages whose primary purpose is commercial.

The Commission in this Rule declined to address other areas relating to its discretionary rulemaking authority under the CAN-SPAM Act as requested by numerous commenters. The Commission has indicated that it is reserving action on these issues for a later time. Specifically, the Commission indicates that it is evaluating issues including: (1) the definition of the term “sender” to clarify the multiple-

¹ Citations are to pages in the Order published on the FTC’s website <<http://www.ftc.gov/os/2004/12/041216canspamfrn.pdf>>.

sender issue; (2) the definition of “affirmative consent”; (3) the scope of the definition of “transactional or relationship” message; and (4) single (not bulk) business-to-business e-mail messages (fn 45).

The following section discusses the Rule’s criteria for determining the primary purpose of a message.

II. Four Categories to Determine the Primary Purpose of an Electronic Mail Message

The Rule will determine the primary purpose of an electronic mail message by evaluating the content of the message using four categories:

- content that is purely commercial advertisement or promotion of a commercial product or service;
- content that is exclusively transactional or relationship in nature;
- content that is both commercial advertisement or promotion of a commercial product or service **and** transactional or relationship in nature²; and
- content that is both commercial advertisement or promotion of a commercial product or services **and** other content that is not transactional or relationship in nature.

These four criteria are discussed in more detail below.

A. Content that is purely commercial advertisement or promotion of a commercial product or service

Predictably, e-mail messages with content that is solely the commercial advertisement or promotion of a commercial product or service will be deemed to have a commercial primary purpose.

B. Content that is exclusively transactional or relationship in nature

Also predictably, e-mail messages with content in the body of the message that is exclusively “transactional or relationship” will be deemed to be transactional or relationship in nature.

² A transactional or relationship message is defined in the statute as an electronic mail message the primary purpose of which is:

“(i) to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;

(ii) 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;

(iii) to provide—

(I) notification concerning a change in the terms or features of;

(II) notification of a change in the recipient’s standing or status with respect to; or

(III) at regular periodic intervals, account balance information or other type of account statement 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;

(iv) to provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or

(v) 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.”

C. Content that is both commercial advertisement or promotion of a commercial product or service *and* transactional or relationship in nature

For e-mail messages with these two types of content, the “primary purpose” of the message will be deemed to be commercial if:

- (i) a recipient reasonably interpreting **the subject line** of the electronic mail message likely would conclude that the message contains the commercial advertisement or promotion of a commercial product or service; or
- (ii) the electronic mail message’s **transactional or relationship content does *not* appear, in whole or in substantial part, at the beginning of the body of the message.**

This means that an e-mail message is not considered to be commercial if it does not refer to the commercial content in its subject line and the transactional or relationship content is located in the beginning of the body of the message.

E-mail senders are not required to complete the presentation of **all** of the transactional or relationship content before setting out the commercial content in order for the message to be a transactional or relationship message (p. 30). After some clearly recognizable transactional or relationship content is set forth, then commercial content may be included without the message being considered to have a commercial primary purpose. The Commission explains in the commentary to its Rule that the use of the term “substantial” under item (ii) above does not refer to the “volume” or quantity of transactional content at the beginning of the message, but rather the “nature” of the content—content that must be clearly recognizable as transactional or relationship content. For example, the Commission has indicated that if a financial statement includes account balance information and sets forth current balance at the beginning of the body of the message, that would be sufficient to satisfy the requirement of transactional or relationship content at the beginning of the body of the message.

Conversely, for example, solely stating “your account” prior to setting forth commercial content would not prevent a message from being deemed to have a primary purpose that is commercial. In addition, the Commission indicates that setting out the commercial and transactional or relationship content side by side could satisfy the criteria for having a substantial part of the transactional or relationship content at the beginning of the body of the message (fn 84).

Finally, the Commission also indicates that multiple purpose e-mail messages with content that is (1) commercial, (2) transactional or relationship, **and** (3) content that is neither commercial nor transactional or relationship will be evaluated under the criteria in this category (fn 38, 51).

D. Content that is both commercial advertisement or promotion of a commercial product or services *and* other content that is not transactional or relationship in nature (e.g., a customer satisfaction survey)

The “primary purpose” of e-mail messages in this category will be “commercial” if:

- (i) a recipient reasonably interpreting **the subject line** of the electronic mail message likely would conclude that the message contains the commercial advertisement or promotion of a commercial product or service; or
- (ii) a recipient reasonably interpreting **the body of the message** likely would conclude that the primary purpose of the message is the commercial advertisement or promotion of a commercial product or service. Factors illustrative of those relevant to this interpretation include the **placement** of content that is the commercial advertisement or promotion of a commercial product or service, **in whole or in substantial part, at the beginning of the**

body of the message; the **proportion** of the message dedicated to such content; and **how color, graphics, type size, and style are used to highlight** commercial content.

Therefore, under these criteria, a message will be treated as commercial if either the subject line indicates that the message is commercial or the “net impression” of the body of the message is commercial.

Under this net impression test, in evaluating the body of the message in this category, the proportion of the message devoted to commercial content as contrasted with “other” content is a relevant factor in determining the primary purpose of a message. The greater the proportion of the content that is commercial, the more likely the e-mail will be considered to have a commercial primary purpose (p. 48). The color, graphics, type size, and style will be considered as a whole, rather than independently. These factors are illustrative of those to be included in evaluating the net impression of the content of the body of the message. Thus, other factors may be relevant. For example, the Commission indicates that the identity of the sender may also be a factor that is considered (p. 50).

III. Other Elements of the Rule

A. Hyperlink in an e-mail to the address of a website that is operated for a commercial purpose is treated as commercial content

A hyperlink in an e-mail to the address of a website that is operated for commercial purpose is commercial content. Thus, even if the only content in the e-mail is a link to a commercial website, such a message would be deemed to have a commercial primary purpose.

B. Subject lines that do or do not include commercial content

The subject line criterion in categories B & C described in part II above does not require senders to use a subject line that refers to the message’s commercial content. However, a message that contains primarily commercial content and does not refer to such content in the subject line could be treated as deceptive under Section 5 of the FTC Act. Moreover, if a sender deliberately structures a message to create a false impression that the message does not have a commercial primary purpose, the Commission will treat such a message as having a commercial primary purpose.

The Commission indicated that whether the subject line must refer to the commercial content in order not to be deceptive is a fact-specific issue and that a dual-purpose message may use a subject line that is not deceptive and yet does not refer to commercial content. The Commission has indicated that the Rule’s treatment of subject lines that misrepresent the content of a message is consistent with case law developed under Section 5 with respect to deceptive “door openers.” Under this body of law, when the first contact between a buyer and a seller occurs through a deceptive practice, the law may be violated even if the truth is subsequently made known to the purchaser. Thus, the Commission’s Rule would treat as deceptive, under Section 5, a deceptive subject line used as a means to get the attention of the recipient or encourage the recipient of the message to open it even though the content in the body of the message is truthful (p. 22).

The Commission also has indicated that if a subject line includes both commercial content and transactional or relationship content, then such a message will be treated as having a primary purpose that is commercial (fn 67, 75). However, by not referring to the commercial content in the subject line and placing the transactional or relationship content at or near the beginning of a message, the message will be treated as a transactional or relationship message.

C. Nonprofits are not necessarily exempt from the Rule

The Commission did not specifically create an “across the board” exemption for e-mail messages from nonprofits, indicating that it is possible that a message from a nonprofit could meet the definition of a “commercial” electronic mail message (p. 11). However, the Commission did indicate that it is

“possible—or even likely” that messages between a nonprofit and its members could be transactional or relationship messages.

D. Individuals sending one e-mail message one time to a single recipient to sell a personal item are exempt

The Commission concluded that the CAN-SPAM regulatory scheme would **not** reach isolated e-mail messages sent by individuals not acting in a business capacity “who are not engaged in commerce, but nevertheless seek to sell something to a friend, acquaintance, or other personal contact.” As support for its position, the Commission cites to the *Random House Dictionary*’s definition of “commerce” as “an interchange of goods or commodities, especially on a large scale; trade; business.” This is an important clarification as it keeps outside of the scope of the CAN-SPAM Act one-to-one consumer e-mail messages that advertise or promote a commercial product or service.

The Commission has yet to reach a conclusion regarding one-to-one e-mail sent in the business-to-business context; however, the same rationale applied in that context would be a very useful clarification for such messages. If the Commission follows this logic in its subsequent rulemaking, one-to-one business e-mail, such as a sales representative’s individual e-mail communications with a customer, would not be deemed to have a commercial primary purpose. This would avoid the impractical requirement to “scrub” all such e-mail messages against a company’s opt-out list.

E. Trade association e-mail to members is not exempt

The CAN-SPAM Act may apply to a trade association’s e-mail messages promoting a seminar because a seminar may be considered a “commercial product or service” if attendees must pay an admission charge (p. 14).

A trade association’s e-mail messages to its members or donors, however, likely are “transactional or relationship messages” under the Rule even if the messages consist primarily of the commercial advertisement or promotion of a commercial product or service (p. 16).

F. Exemption for periodicals delivered via e-mail (newsletters and catalogs)

Newsletters, catalogs, and similar periodicals that are sent pursuant to a subscription are “transactional or relationship” messages. Specifically, the Commission indicates that they constitute the delivery of “goods or services...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” (p. 33). This determination will be based on “the recipient’s understanding of what he or she is entitled to receive under the terms of the agreed-to transaction” (fn 90). The sender is not required to give an exhaustive description of the types of content that will be included in a periodical that the recipient has requested to receive. The Commission stated that “recipients reasonably expect—without having to be told—that a newsletter will contain advertising along with informational content” (*id*). The Commission also states that “a *bona fide* periodical delivered via e-mail consisting of informational content sponsored by commercial content likely will not have a commercial primary purpose.”

However, the Commission indicates that if “an e-mail message consists exclusively of commercial content (such as a catalog or other content that is purely advertisement or promotion), then the e-mail message would be a single-purpose commercial message” (fn 91). The stated rationale for this position is that “the delivery of such advertising or promotional content would not constitute the ‘delivery of goods or services 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’” (emphasis in original) (fn 90). This conclusion appears at odds with the CAN-SPAM Act, as well as the other commentary in this Rule. If the recipient has agreed to a service to receive e-mail that is solely advertisement or promotion under the terms of a transaction, then such message should be entirely transactional or relationship and fall within the category of messages with solely transactional or relationship content and thus have a primary purpose that is transactional or relationship in nature.

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We expect that in the coming months the Commission will issue another proposed rule addressing many of the outstanding interpretive questions regarding the CAN-SPAM Act. Please feel free to contact us with any questions. This document was prepared for The DMA by DLA Piper Rudnick Gray Carey.