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April 20, 2004

VIA COURIER

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

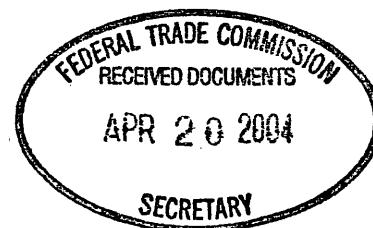
Re: "CAN-SPAM Rulemaking, Project No. R411008"

Ladies and Gentlemen:

On behalf of the American Bar Association ("ABA") and its more than 400,000 members throughout the country, I write in response to the Commission's request for comments on the above-referenced Advance Notice of Proposed Rulemaking concerning "Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act" (the "ANPR").

The ABA supports many of the key provisions of the Act, including those provisions that prohibit the sending of false, misleading, predatory or abusive commercial e-mail messages and that create a single, national, uniform standard for the regulation of other commercial e-mail that is not otherwise prohibited. While the ABA supports federal legislation and regulations to curb improper commercial e-mails, we also believe that such measures should be crafted so as to protect the ability of associations and other tax-exempt nonprofit organizations to communicate effectively with their members and the public. Attached to this comment letter is the relevant policy statement adopted by the ABA Board of Governors on November 15, 2003.

Now that the Act has become law, the ABA urges the Commission to adopt rules that would effectively implement the new statute by (1) clarifying the definition of "primary [commercial] purpose" under Section 3(2)(A); (2) modifying the definition of "transactional or relationship message" under Sections 3(2)(B) and 3(17); and (3) clarifying the definition of "person" under Section 6(a) of the Act, so as to exclude from the Act e-mail communications sent by associations and other tax-exempt nonprofit organizations in pursuit of their tax-exempt nonprofit purposes.



Clarifying the definition of “primary [commercial] purpose”

Section 3(2) of the Act defines the term “commercial electronic mail message” to mean “any electronic mail message the *primary purpose* of which is the commercial advertisement or promotion of a commercial product or service...” (emphasis added). By limiting coverage of most provisions in the new legislation to just those e-mail messages that are primarily commercial in nature¹—instead of to the much broader universe of e-mail messages that also contain reference to a commercial product or service—this definition helps to strike a more reasonable balance between the need to establish minimum standards for electronic commerce and the importance of not interfering with the ability of associations and other tax-exempt nonprofit organizations to communicate effectively with their members and the public.

While the Act limits the coverage of most provisions in the new statute to e-mails that are primarily commercial in nature, Section 3(2)(C) directs the Commission to issue regulations “defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message.” Accordingly, the Commission in its ANPR has sought general public comment on the appropriate criteria to be used, as well as on a number of specific questions outlined in the ANPR. See ANPR at pages 5 and 16-18. Among the specific questions posed by the Commission are “Should the identity of an email’s sender affect whether or not the primary purpose of the sender’s email is a commercial advertisement or promotion? Why or why not?” See ANPR at page 17. The ABA believes that the identity of the sender should be considered a key criteria.

Although the ABA generally supports the “primary purpose” language contained in the bill’s definition of “commercial electronic mail message,” we believe that the Commission could more effectively implement the purpose of the Act by clarifying the term “primary purpose” to exclude all e-mail communications, whether commercial or informational, that are sent by associations and other tax-exempt nonprofit organizations in pursuit of one or more of their tax-exempt nonprofit purposes. Although the Act was intended to apply primarily to unsolicited electronic advertisements sent by for-profit businesses, the ABA is concerned about the unintended consequences that the broad and ambiguous language of the statute could have on the nonprofit community. In particular, the ABA is concerned that in the absence of such a clarification, many e-mail communications sent by associations and other tax-exempt nonprofit organizations to their members and/or to the public, such as notices of membership, renewals, seminars and conferences, though largely not commercial in nature, could be construed to be “commercial” within the meaning of Section 3(2). As a result, many of these activities could inadvertently come under the coverage of the legislation, even though this clearly was not the drafters’ intent.

The ABA’s members and the general legal community have come to expect e-mail communications from the Association informing them of the availability of such useful and valued services as continuing legal education programs, books, and publications. In order to encourage the continued free flow of valuable information and services that the ABA and countless other tax-exempt nonprofit organizations provide to their members and to the public,

¹ Although most of the Act’s provisions apply only to “commercial electronic mail” and not “transactional or relationship messages,” Section 5(a)(1) applies to both types of messages.

the ABA urges the Commission to adopt a rule clarifying the term “primary purpose” so as to specifically exclude from the definition of “commercial electronic mail message” all e-mail communications sent by associations and other tax-exempt nonprofit organizations in pursuit of one or more of their tax-exempt purposes.

Modifying the definition of “transactional or relationship message”

Section 3 of the Act further defines the term commercial electronic mail message to exclude so-called “transactional or relationship” messages. *See* Section 3(2)(B). In addition, the Act further defines “transactional or relationship message” to mean an e-mail message the primary purpose of which is to accomplish one of the five specific types of benefits for the recipient listed in the statute. *See id.* at Section 3(17)(A)(i)-(v). E-mail messages that are deemed to be “transactional or relationship” in nature are excluded from most of the Act’s requirements.²

Although the CAN-SPAM Act provides an initial definition of which e-mail messages will be considered “transactional or relationship” in nature, the Act also specifically authorizes the Commission to adopt regulations modifying the definition “...to the extent that such modification is necessary to accommodate changes in electronic mail technology or practices and accomplish the purposes of [the] Act.” *See* Section 3(17)(B). In its ANPR, the Commission has specifically sought comments on additional categories of messages that should be excluded from the definition of “commercial electronic messages” by designating them as “transactional or relationship messages.” *See* ANPR at pages 7 and 18-20.

Just as the ABA believes that the term “primary purpose” should be clarified to exclude all e-mail communications, whether commercial or informational, that are sent by associations and other tax-exempt nonprofit organizations in pursuit of their tax-exempt nonprofit purposes, we also believe that the definition of the term “transactional or relationship message” should be modified to include all e-mail messages from these organizations to their own members, for all the reasons cited above. The ABA, like many other associations and other tax-exempt nonprofit organizations, sends a large volume of e-mail communications to its members on a regular basis, including notices of membership, renewals, seminars, conferences, and the availability of legal books and other materials. Our members have come to expect—and value—the receipt of such information, and the continued free flow of this type of information is essential to preserving and strengthening the ongoing relationship between the association and its members.

As noted above, the Act was intended to apply primarily to unsolicited communications sent by for-profit businesses, not to e-mail communications between associations and other tax-exempt nonprofit organizations and their respective members. Therefore, in order to accomplish the purposes of the Act, the ABA urges the Commission to exercise its express authority under Section 3(17)(B) of the Act and adopt a rule expanding the definition of “transactional or relationship messages” to include all e-mail communications, whether commercial or informational, that are sent by associations and other tax-exempt nonprofit organizations to their own members.

² See footnote 1, *supra*.

Implementation of Section 6(a) of the Act

The Act also specifically authorizes the Commission to issue regulations "to implement the provisions of [the] Act (not including the amendments made by sections 4 and 12)." *See* CAN-SPAM Act, Section 13(a). Accordingly, in addition to seeking comment on various specific subjects described in the ANPR, the Commission has also sought comment on "the implementation of the provisions of the CAN-SPAM Act generally." *See* ANPR at p. 6.

The ABA has serious concerns regarding the ambiguity of language contained in Section 6(a) of the CAN-SPAM Act that could be construed to impose a new duty not just on businesses, but also on tax-exempt nonprofit organizations and all other "persons" sending commercial e-mails, to police the misconduct of third parties. In particular, Section 6(a) provides that even if a sender's commercial e-mail message is proper in every way, the sender still could be punished if it is shown that the sender "knows or should have known" that a third party has promoted the lawful e-mail message in a false or misleading way and the sender "took no reasonable action to prevent the transmission or to detect the transmission and report it to the [Federal Trade] Commission." In addition, because neither that Section nor the remainder of the Act defines the term "person," it could be construed to include both for-profit businesses sending unwanted commercial e-mail solicitations and associations and other tax-exempt nonprofit organizations sending e-mails to their members and the public.

Although well-intentioned, the language of Section 6(a) is ambiguous and could have unintended adverse consequences for many tax-exempt nonprofit entities sending legitimate commercial e-mail messages. For example, if an association or another tax-exempt nonprofit organization sends a lawful commercial e-mail to hundreds or thousands of its own members and one of those members then, unbeknownst to the entity, forwards the e-mail to another person in a false or deceptive way, the law-abiding nonprofit entity could be punished. It is neither practical nor reasonable to require those nonprofit entities to police the subsequent actions of those members who receive the e-mail.

For these reasons, and to accomplish the purposes of the Act, the ABA urges the Commission to adopt a rule which defines the term "person" in Section 6 to specifically exclude associations and other tax-exempt nonprofit organizations when those organizations are communicating with their members or otherwise acting in pursuit of one or more of their tax-exempt nonprofit purposes.

Thank you for your consideration of our comments. If you would like to discuss the ABA's views on these important matters in greater detail, please contact our legislative counsel for business and administrative law issues, Larson Frisby, at (202) 662-1098.

Sincerely,



Robert D. Evans

enclosure

**RESOLUTION ADOPTED BY THE
BOARD OF GOVERNORS
OF THE
AMERICAN BAR ASSOCIATION**

NOVEMBER 15, 2003

RESOLVED, that the American Bar Association supports federal legislation and regulations that would prohibit the sending of false, misleading, predatory or abusive commercial e-mail messages but opposes measures, such as Section 106(a) of S. 877, the "CAN-SPAM Act of 2003," that would impose on law-abiding entities a duty to prevent third parties from promoting the entities' products or services in an improper way.

FURTHER RESOLVED, that the ABA supports federal legislation, regulations, and other measures that would protect and strengthen the ability of associations and other tax-exempt nonprofit organizations to communicate with, or otherwise serve, their members and the public, including the sending of commercial and non-commercial e-mail messages.

FURTHER RESOLVED, that the ABA opposes any legislation, regulations, or other measures prohibiting or regulating commercial or non-commercial e-mail messages to the extent that such measures could interfere with the ability of associations and other tax-exempt nonprofit organizations to communicate with, or otherwise serve, their members and the public.