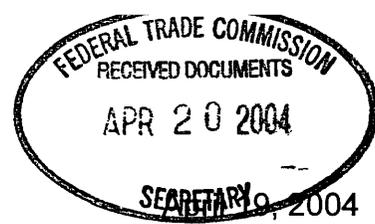




001031



Federal Trade Commission
CAN-SPAM Act
P.O. Box 1030
Merrifield, VA 22116-1030

RE: CAN-SPAM Act Rulemaking, 16 CFR 316, Project No. R411008

To Whom It May Concern:

On behalf of the members and Board of the AOC-The Electronic Warfare & Information Operations Association, I would like to submit these comments regarding rulemaking for the CAN-SPAM Act (the Act). Depending on the final ruling from the Federal Trade Commission (the Commission), several of the definitions and their application have the potential to restrict or damage the ability for this and other nonprofit associations to effectively and efficiently communicate with our membership and other interested parties. We believe that the Act should be clarified to specifically exempt communications between nonprofit associations and their members. Such an exemption is not clearly expressed in the Act and the Commission should use their authority to clarify this exemption while upholding the intent and very worthwhile function of the Act.

Sincerely,

Austin K. "Pepper" Thomas, Jr.
President

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**Comments of the
AOC –
The Electronic Warfare & Information Operations
Association
To The
Federal Trade Commission
CAN-SPAM Act Rulemaking
Project No. R411008**

16 CFR Part 316

The AOC is an international trade association representing over 14,000 individuals and 113 industry members. These members are located in over 60 nations spread around the globe. Because of the geographic disparity found in our membership base, we have come to use – and our members have come to expect – electronic mail (“email”) as an effective, efficient and cost-saving means of communicating on any subject related to the information, goods and services offered by the Association. Communication with our members has been significantly improved with the advent of email and we frequently make use of email to provide information to our membership on planned events, conventions, conferences, symposia and educational opportunities, to offer them opportunities to purchase goods and services, as well as keeping them informed of the status and evolution of issues in the public policy arena.

“Commercial Electronic Mail Message”

A central distinction to be made in the interpretation of the Act by the Federal Trade Commission (the Commission) should be use of the term “commercial.” Inherent in the definition of “commercial” – and in its application under the Act – is the clear intent that there should be a business endeavor undertaken to make a profit on items that are offered for sale. The target of the CAN-SPAM Act is unsolicited predatory commercial email that offers goods or services for a profit. Conversely, the AOC, like other trade associations, is a tax-exempt nonprofit corporation organized under Section 501(c)(6) of the Internal Revenue Code. The basis for this status is the AOC’s service of its membership base – not its profit from them. A communication related to one or more of the purposes for which tax-exempt status is granted is by definition not commercial and should be recognized by the Commission as exempt from regulation under the Act.

“Transactional or Relationship Messages”

There have been indications that communications between organizations and their members are covered under the provisions related to “transactional or relationship messages.” *But currently, there is no specific allowance under the definition of “transactional or relationship message” that provides for the type of email communication described above between a nonprofit organization and its’ members related to the goods and services provided as part of the membership transaction.* Section 3(17)(A) of the Act provides five broad categories of messages identified as “transactional or relationship messages.” Two of these broad categories, as listed in Section III(A) of the Federal Register, can be interpreted to restrictively cover communications with members of a nonprofit organization. They are: # 3, “To provide specified types of information with respect to a...membership...or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender,” and #5 “To deliver 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.” The problem with category #3 is that the Act strictly limits the messages to specified types of information regarding notifications on account status, change in status or terms or balance

information. Category #5 is less exclusive, but requires that all communications be conducted under a previous agreement.

Such a short-coming in the definition of “transactional or relationship message” should be addressed by the Commission using the authority granted by the Act to modify the definition. We recommend expanding this category or creating a new one. This change in the definition should provide for email communications between a nonprofit and its’ members as part of the membership transaction. The act of procuring membership in an organization has long provided explicit and implicit consent to communication from that organization regarding that membership, especially when the individual voluntarily provides his/her email address fully anticipating receipt of email communications from the nonprofit association they joined and are paying dues. As technology has evolved and been adopted, the means used to communicate have also evolved from postal mail to telephonic communications to electronic mail. Email is simply the latest tool used by organizations to communicate with their membership in the most efficient and effective way.

“Implementation Generally”

Section (D) of the “Subjects for Discretionary Rulemaking Under the CAN-SPAM Act” addresses the “forward-to-a-friend” and the multiple “sender” scenarios, both of which could unwittingly snare a nonprofit organization using email to communicate with its’ membership. Many of the opportunities created by this Association are not limited in participation to members-only. Additionally, corporate industry membership is offered in varying levels, each of which allows the designation of a specified number of employees as members. It is a foreseeable possibility that an email notifying members of an opportunity could be forwarded without the knowledge of the Association. Such an email could be generated by a member who wishes to share the information with a colleague or friend with similar interests. Another scenario could involve employees included as part of the corporate industry membership in a company sharing the information with employees that are not included as part of the corporate industry membership. In both cases, the Association would have no knowledge that the email had been forwarded and cannot be held accountable or liable for such an action.

This Association also accepts corporate participation in specific events and opportunities and makes that participation known as part of the information and materials provided to members. This corporate participation – and the acknowledgement of that participation – cannot make an organization or its’ members liable or accountable as a “sender” as described in the scenario. Instead the Commission should again employ that latitude provided in the law to clarify that “transactional or relationship messages” fully cover communications between associations and their members.

Individuals voluntarily join organizations for information and the opportunities that organizations can create to further ones knowledge on a particular subject or subjects. This information flow now relies upon email as the most effective and cost beneficial means of communication between members and associations and members voluntarily provide email address information to the Association, for the exclusive use of the Association, to facilitate the desired information flow. Association members have the right to "opt out" of email communications in favor of regular mail or direct web site access at any time. The terms of membership specify that email addresses provided to the association will not be sold or shared outside of the organization. The lack of clarity in the five broad categories of exemption for "transactional or relationship messages" do not adequately address this explicit and implicit agreement for information flow between organizations and the individuals that join them. More importantly for the consideration here, tax exempt nonprofit organizations do not by definition meet the criteria of the term "commercial," where there is intent to make a profit off of the sale of goods or services.

The Commission should use their authority under the Act to clarify the definition of "relationship or transactional message" to explicitly exempt the association/member relationship and the communications inherent in that relationship. Equally as important, the Commission should exclude tax exempt nonprofit organizations from the definition of the term "commercial," thereby removing from regulation under the Act communications between organizations and their members. Only such action will ensure that this Association will be able to continue to provide our members with the information they desire using the best means available – email.