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International Association of Association Management Companies

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Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: International Association of Association Management Companies/CAN-SPAM Act Rulemaking, Project No. R411008 addressing the definition and implementation of the Act as set forth in sections 3(2)c and 3(17)(B).

International Association of Association Management Companies, IAAMC's 175 association management company members (AMCs) work manage hundreds of nonprofit associations and societies. AMCs typically serve as headquarters and staff for these organizations. Currently our members work with over 2,000 associations with annual budgets exceeding \$1 billion (US). These organizations serve over 3 million members. AMCs employ over 1,500 association management professionals.

The tax-exempt nonprofit organizations we manage exist to serve their members and constituencies, who seek out membership and/or involvement in the organization. Organization membership and participation provide an important resource to individuals to achieve a variety of personal, professional, business, social, and educational goals. To assist individuals and others in achieving their goals, tax-exempt nonprofit organizations continuously strive to offer a variety of current communications, sophisticated educational courses and seminars, and related publications, such as books and periodicals. E-mail has become the preferred vehicle to deliver these messages.

Introduction. IAAMC believes that the Federal Trade Commission (FTC or Commission) needs to clarify the applicability of the commercial electronic mail message (CEM) definition as it relates to tax exempt nonprofit organizations. In particular, IAAMC requests that the Commission's rule-making expressly provide that email transmitted by a tax-exempt nonprofit organization primarily related to one or more of the organization's duly authorized tax exempt nonprofit purposes not be considered CEM under the Act and, therefore, be specifically exempt from regulation under the Act.

The language of the Act defines "commercial electronic mail messages" as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service" This definition is clearly directed only at regulating activity undertaken primarily to further the commercial endeavors of for-profit businesses. Interpreting the CEM definition to include email communications of organizations operating consistent with their tax exempt nonprofit purposes would be inconsistent with the plain language of the statute, as well as the intention of the Act.

In addition, IAAMC would like the Commission to specifically provide in the regulations that any email transmitted by a tax exempt nonprofit organization to a current member or donor, regardless of its commercial content, is not

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subject to the Act because such member communications are "transactional or relationship" messages as defined in Section 3(17)(A) and (B) of the Act.

The primary purpose of tax-exempt nonprofit email communication is to provide information and resources to their members, donors, and other constituencies consistent with their tax-exempt nonprofit purposes, rather than to carry on a trade or business, which is the chief objective of for-profit taxable entities. Often these resources are provided for a reasonable fee that covers the organization's costs of development, marketing, and distribution. As nonprofit organizations, however, all monies earned from activities undertaken consistent with an organization's tax exempt nonprofit purposes must be used to further the organization's tax-exempt nonprofit work. Therefore, such email communications should not be considered "commercial" even if they involve the marketing, promotion or sale of goods and services as long as the underlying communication is consistent with the organization's tax-exempt nonprofit purposes.

Clarification of the Term "Commercial Electronic Mail Message" The regulations implementing the Act need to specifically address the special role and circumstances of tax-exempt nonprofit organizations. If the Commission were to apply the "commercial electronic mail message" definition to tax exempt nonprofit organizations in the same manner it applies to the term to taxable for-profit entities, it will profoundly confuse, damage, and obstruct the good work of tax exempt nonprofit organizations of every kind- trade associations, professional societies, chambers of commerce, agricultural organizations, advocacy organizations, social welfare groups, charitable, educational, and scientific organizations, religious groups, and amateur sports organizations.¹

All tax-exempt nonprofit organizations have established, legitimate constituencies with whom the organizations routinely communicate through email. These constituents might be dues-paying members, present or former donors, or others who have voluntarily associated themselves with the special tax exempt nonprofit missions of these organizations and desire to receive communications from them. Members of the tax-exempt nonprofit community are deeply concerned and confused about the applicability of the Act to them. This uncertainty and confusion could be easily eliminated if the Commission simply clarifies the applicability of the definition of "commercial electronic mail messages." Therefore, IAAMC urges to the Commission to recognize that the regulations implementing the Act should distinguish between the activities of tax-exempt nonprofit organizations and the work of for-profit, commercial entities.

As stated above, the language of the Act defines "commercial electronic mail messages" as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service . . ." This definition is clearly directed only at regulating activity undertaken primarily to further commercial endeavors of for-profit businesses. Interpreting the CEM definition to include email communications of organizations operating consistent with their tax exempt nonprofit purposes would be inconsistent with the plain language of the statute, as well as the intention of the Act.

There simply is no reasonable basis for a broad application of the definition of regulated CEM to include tax exempt nonprofit organization email communications that are consistent with its tax exempt nonprofit purposes but may also involve the marketing, promotion, and/or sale of related goods and services. For example, such messages could include:

- A professional society's notice to dues-paying members reminding them to register for the society's annual meeting;
- A seniors' organization flyer offering subscriptions to publications addressing independent senior living;
- A trade association's release about a new book title or educational seminar on the latest business challenges to members;

¹ The American Society of Association Executives estimates that the number of all of these organizations is well over half a million.

The regulations should emphasize that only truly commercial email transmissions the "primary purpose of which is the commercial advertisement or promotion of a commercial product or service" (emphasis added.) are regulated under the Act.

Indeed if one interprets the Act to regulate email communications of any kind with the primary purpose of promoting, marketing, or selling a product or good, it begs the question: If Congress intended to regulate all such email communications, why then did Congress use the term "commercial" to describe the regulated email. Clearly, use by Congress of the adjective "commercial" must have meaning and is intended to qualify and narrow the universe of email messages regulated.

Congress plainly sought to narrow the CEM definition to limit regulation to genuinely commercial electronic mail messages. Review of the plain language of the statutory definition of "commercial electronic mail message" – leads to the conclusion that regulated email communications, by definition, must be motivated by an underlying commercial purpose or interest. Therefore, according to the Act's definition of "commercial electronic mail message" if goods or services were being promoted, marketed or sold via email by an organization consistent with its tax exempt and nonprofit purposes, then such email communications, by definition, should not be considered to have the requisite primary "commercial" purpose.

An analysis of whether an email communication has the required primary commercial purpose, and would therefore be prohibited, must examine the rationale for the activity, not simply whether the mechanics of the activity involve the purchase or sale of goods, or services or an exchange of consideration. In this regard, while the identity of the sender may be important, it is not necessarily determinative. The most relevant criterion in determining if the email communication is regulated CEM with the required primary commercial purpose is the rationale underlying the email communication, regardless of whether communication's content advertises or promotes a product or service. If the reason for the email communication is to further the legitimate tax-exempt nonprofit purposes of the organization then the communication should not be considered CEM.

Further, it is well established, indeed embedded, in both federal and state law that tax-exempt nonprofit organizations are organized and operated to conduct their activities in ways fundamentally different from the ways in which taxable for-profit businesses conduct their activities. For example, each state's statutory framework treats tax-exempt nonprofit organizations differently, if not entirely separately, from the treatment of for-profit, taxable businesses. Likewise, the Internal Revenue Code treats tax-exempt organizations differently from taxable entities and relies on an entirely separate and distinct section of the law to do so. Indeed, with one exception, the word *commercial* does not even appear in the federal statutory law regulating tax-exempt organizations.²

Moreover, the Internal Revenue Code and corresponding regulations provide separate treatment to commercial-type business activities of tax-exempt nonprofit organizations. When such an organization conducts business activities on a regular basis and those activities are not substantially related to the purposes for which the organization was granted tax exempt status (i.e., the unrelated business income tax or UBIT rules), the organization is subject to taxation on its net return and, if those activities are substantial, is at risk of losing tax exemption altogether. Application of the UBIT rules turn on whether the tax exempt nonprofit organization's activity is consistent with, or substantially related to, its tax exempt nonprofit purposes.

Therefore, the Commission should be comfortable drafting regulations clarifying that the definition of regulated email – "commercial electronic mail messages" – is not applicable to tax exempt nonprofit organizations when, and to the extent that, they are pursuing their tax-exempt nonprofit purposes regardless of the content of the email message. Particularly given the risk of litigation, which represents a disproportionate burden on nonprofit organizations, the Commission must exercise its authority to clarify and limit the application of commercial email by expressly incorporating into the regulations language that distinguishing emails from a tax exempt nonprofit organization that relate to one or more of the organization's duly authorized tax exempt nonprofit purposes.

Transactional and Relationship Messages. IAAMC recognizes, however, that the Act may apply to a certain class of tax-exempt nonprofit organization emails, even if the member or donor expects this information as part

² Internal Revenue Code, Section 501(m).

of their membership or relationship to the organization. If a nonprofit organization were to transmit emails to members or donors, either directly or through a for-profit taxable business subsidiary, relating to an activity that is not substantially related to the organization's tax exempt nonprofit purposes under federal tax exemption nonprofit requirements, then such email might fall within the jurisdiction of the Act.

Notwithstanding the Act's possible jurisdiction over such email communications, IAAMC urges the Commission to reflect in its regulations that such communications, as long as they are sent to current members and/or donors, should be excluded from the definition of "commercial electronic mail message" as transactional or relationship messages because they either provide information in connection with an organization or association membership and/or are intended to deliver goods and services under the terms of an existing transaction, *i.e.*, the email recipient's current member or donor relationship with the sending organization. Because purely commercial messages, such as offers to buy extended warranties or insurance protections, to one-time customers of commercial entities, qualify as transactional or relationship messages, it would be unjust if this same treatment were not extended to electronic mail messages of similar content sent to current members or donors of tax exempt nonprofit organizations.

Conclusion. IAAMC urges the Commission to clarify that the definition of "commercial electronic mail messages" is directed at regulating activity that primarily furthers the commercial endeavors of taxable for-profit businesses. In this regard, the regulations implementing the Act should specifically provide that the email communications of tax exempt nonprofit organizations that are consistent with their tax exempt nonprofit purpose are by definition not primarily commercial and therefore do not fall within the definition of regulated CEM.

Additionally, the regulations should clarify that even where email communications from tax exempt nonprofit organizations sent to current members and/or donors are primarily commercial and not related to the organization's tax exempt nonprofit purposes, they should be excluded from the CEM definition as transactional or relationship messages because such communications are primarily intended to provide information in connection with an organization or association membership and/or deliver goods and services under the terms of an existing member or donor relationship.

Sincerely,

Russell K. Snyder
President

Copy: IAAMC Board of Directors