



April 20, 2004

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

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

Dear Commissioners:

On behalf of our 24,000 members across the United States, I am pleased to present the comments of the Association of Fundraising Professionals (AFP) regarding the Federal Trade Commission's (FTC) advance notice of proposed rulemaking and request for public comments regarding the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act").

AFP's comments focus on the applicability of the CAN-SPAM Act to nonprofit, tax-exempt organizations. In our view, the FTC faces similar issues with the CAN-SPAM Act as it did when it proposed its Do-Not-Call List and attempted to apply the list and its requirements to charities and other nonprofit organizations.

Organizational Background

For more than forty years, AFP has provided guidance and standards to those engaged in the philanthropic process. AFP's considerable expertise in the legislative field is based upon the combined experience of its 26,000 members in 172 chapters across North America and around the world.

AFP members are required annually to sign our Code of Ethical Principles and Standards of Professional Practice, which were first developed in 1964. AFP instituted a credentialing process in 1981 – the CFRE, Certified Fund Raising Executive designation to aid in identifying for the giving public fundraisers who possess the demonstrated knowledge and skills necessary to perform their duties in an effective, conscientious, ethical, and professional manner. We also have a strong ethics enforcement policy that can result in the revocation of credentials and expulsion of members who engage in prohibited behavior.

Donor Privacy

This background is cited to emphasize the importance that AFP and its members place on ethical fundraising, especially in the context of donor privacy. AFP has championed donor rights for more than 40 years. AFP was the driving force behind the creation of the Donor Bill of Rights and provides information to potential donors about how to select and evaluate charities.

AFP is committed to protecting the privacy and confidentiality of all donor transactions. Ethical fundraising is by its very nature donor-centered – the wishes and well being of the donor must come first above all else. Consequently, donor privacy is an issue of extreme priority for AFP and the entire charitable fundraising profession.

AFP's Code of Ethics (www.afpnet.org/ethics) reflects this considerable regard for privacy. Several specific standards from our Code manifest this concern:

Standard 12: Members shall not disclose privileged or confidential information to unauthorized parties.

Standard 13: Members shall adhere to the principle that all donor and prospect information created by, or on behalf of, an organization is the property of that organization and shall not be transferred or utilized except on behalf of that organization.

Standard 14: Members shall give donors the opportunity to have their names removed from lists that are sold to, rented to, or exchanged with other organizations.

These standards concerning privacy are already in place in the charitable fundraising profession and go a long way to protect the same interests sought to be defended by the proposed rules. Again, AFP has a strong enforcement policy for fundraisers who fail to satisfy these standards.

Charities are not the organizations who are abusing email. To the contrary, charities know that the trust and confidence of their donors and the general public are critical to their long-term support. Distributing numerous unsolicited emails is detrimental to a charity's ability to raise funds. In addition, there are strong privacy standards already in place that help guide charities in their communications and protect donors from unwanted emails from charities. Rather than promulgating new bureaucratic limitations on the ability of a charity to contact the philanthropic donor, existing standards should be the starting point for the development of refined donor privacy safeguards.

AFP Comments

A. Criteria for Determining Whether “The Primary Message” of an Electronic Mail Message is Commercial.

6. 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.

It should be noted that while AFP addresses this particular question, our answer reflects the belief that tax-exempt, nonprofit organizations should be completely exempt from the FTC’s regulations under the CAN-SPAM Act. We provide our reasoning here because this question, whether or not the identity of an email’s sender can help determine an email’s primary purpose, provides a logical beginning for our argument.

AFP believes that for nonprofit-tax exempt organizations, the identity of the sender not only affects whether or not an email is considered commercial, but whether or not the sender is subject to the regulations at all. Nonprofit entities organized under 501(c) of the Internal Revenue Code are not under the jurisdiction of the FTC. Their primary purpose is not to conduct commercial activities or to create any profit for members, donors, staff, volunteers or any other individual or group of individuals. Accordingly, all emails sent by a nonprofit, tax-exempt entity should be exempt from any new regulations implementing the CAN-SPAM Act.

The reasoning of the FTC in this issue should parallel its thinking in the matter of the Do-Not-Call List. In fact, the FTC acknowledged that it did not have jurisdiction over nonprofit, tax-exempt organizations during discussion of the Do-Not-Call List. Even when the FTC considered applying the requirements of the Do-Not-Call List to for-profit fundraisers working on behalf of charities, it decided not to do so. AFP encourages the FTC to apply a similar reasoning to the implementation of the CAN-SPAM Act.

The FTC may be considering exempting only certain emails from tax-exempt organizations and applying the CAN-SPAM regulations to emails from nonprofits that are of a strong commercial nature. AFP would argue against this approach for two reasons.

First, creating distinct types of emails for charities – some exempt, some not – would create confusion among individuals who received the nonprofit’s email. Would the average member of the public be able to distinguish what was an acceptable and exempt email and one that was not? Members of the public, not aware of the different types of email that are exempt or non-exempt, might become annoyed with the charity, despite the charity following the regulation’s requirements to the letter.

Second, the diverse array of charity missions and causes will make creating criteria for exempt and non-exempt emails very difficult, if not impossible, especially with respect to what is commercial. For example, AFP's own mission is to advance the fundraising profession through education, training and advocacy. To further this aspect of its mission, AFP sends out emails to fundraisers about conferences and programs that provide education for a fee that defers the costs of such programs. These emails are distributed not only to members, but to non-members as well who are identified through a variety of means. These emails could be characterized as having a "commercial" primary purpose, but are very closely tied to AFP's nonprofit mission. Limiting these types of emails would be limiting the purpose for which AFP was founded.

Indeed, it is difficult to think of any type of email from a charity to the public that is not tied to its charitable cause or purpose. Because of this, AFP believes it impractical and provides little public value and benefit to create different classes of nonprofit email. In addition, we repeat our argument that the FTC does not have jurisdiction to regulate emails from nonprofit organizations anyway.

AFP recommends that the FTC exempt from the CAN-SPAM regulations all emails from nonprofit, tax-exempt organizations.

Closing

AFP appreciates this opportunity to comment on the FTC proposals related to the CAN-SPAM Act. However, as the FTC has previously stated, it does not have jurisdiction over nonprofit organizations. Accordingly, nonprofit organizations and their emails should be exempt from regulations related to the implementation of the CAN-SPAM Act.

AFP offers its resources and perspective if the FTC has additional questions or queries regarding these comments. Should you have any questions, please contact Walter Sczudlo, AFP General Counsel, at (703) 684-0410. Thank you for your consideration.

Sincerely,



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