



INDEPENDENT SECTOR

*The national leadership forum
fostering private initiative
for the public good*

April 20, 2004

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

Dear Sir or Madam:

INDEPENDENT SECTOR, a coalition of over 600 charitable nonprofit organizations, philanthropic foundations, and corporate giving programs, welcomes this opportunity to comment on the Advanced Notice of Proposed Rulemaking with respect to the CAN-SPAM Act (Project No. R411008).

INDEPENDENT SECTOR’s members include many of the nation’s leading foundations, prominent and far-reaching nonprofits of all sizes, and corporations with strong commitments to philanthropy and community involvement, which represent millions of volunteers, donors, and people served. Our mission is to promote, strengthen, and advance the nonprofit and philanthropic community to foster private initiative for the public good. As nonprofit organizations, we note at the outset that the same jurisdictional questions that were addressed in the Do Not Call rulemaking also pertain to this rulemaking on commercial email messages. As the Federal Trade Commission explained in the preamble to the Do Not Call rule, activities conducted by nonprofit entities are outside the jurisdiction of the Commission. (68 Federal Register 4584-4585, January 29, 2003). Specifically, the Commission has jurisdiction over “corporations organized to carry on business for their own profit or that of their members.” (15 U.S.C 45(a)(2)). Since nonprofits are organized for purposes other than profit, they are outside of the FTC’s jurisdiction. As shown by recent cases, the courts have upheld the Commission’s different treatment of nonprofit and for-profit entities.¹

The Honorable John W. Gardner
(1912-2002)
Founding Chair

Brian O’Connell
*Founding President
and President Emeritus*

Primary Purpose

This distinction informs our response to a key question posed by the Commission regarding relevant criteria for determining whether the primary purpose of an email message is commercial. The Commission asks if the identity of the email’s sender should affect whether or not the primary purpose is commercial. INDEPENDENT SECTOR believes that in the case of a nonprofit organization, the identity of the sender is the relevant criterion in determining

that the primary purpose of the organization's email messages is not commercial. Just as nonprofits are outside of the scope of the FTC's jurisdiction because they are not organized to carry on business for profit, so too, email messages sent by nonprofits should be outside the scope of any rule governing commercial messages.

If, however, the Commission determines that messages sent by nonprofits cannot be exempted entirely, we offer the following comments on "transactional or relationship messages," the ten-business-day period for processing opt-out requests, forwarded emails in "tell-a-friend" situations, messages from sponsors of events, and valid physical postal addresses. We also urge the Commission to adopt a "safe harbor" policy for inadvertent violations of the rule, and to strive for consistency with the Do Not Call Rule. Nonprofit organizations have a responsibility to honor requests from any member of the public to remove his or her name and contact information from future solicitations and other communications. However, provisions must be made to allow adequate time for processing such requests and penalties should provide room for unavoidable circumstances and inadvertent errors.

Transactional or Relationship Messages

The CAN-SPAM Act exempts "transactional or relationship messages" from the definition of commercial email messages. Included in this exemption are messages that provide information with respect to memberships or comparable ongoing relationships. The Commission asks whether any elaboration is needed for this definition. INDEPENDENT SECTOR suggests that for additional clarification, the rule should include specific examples of exempted messages such as notices about membership dues and applications, reminders about upcoming seminars or conferences including registration instructions, information about new brochures or publications, and charitable solicitations.

Ten Business Days

The CAN-SPAM Act requires senders of commercial email messages to honor opt-out requests within ten-business-days. It would be extremely difficult for organizations of all sizes to comply with this requirement by flagging an email address throughout the entire database for different types of messages, but it would be especially onerous for smaller nonprofits that do not have extensive resources to devote to data management systems. INDEPENDENT SECTOR suggests the Commission adopt a more workable 30-day time frame to process opt-out requests.

Forward to a Friend

The Commission also asks for comments on whether it should clarify the legal obligations involved in forward-to-a-friend situations. INDEPENDENT SECTOR urges the Commission to clarify that in such situations the sender of the original message need only honor opt-out requests from those recipients to whom the message was sent directly, and not from the secondary recipients to whom it was forwarded. Extending the legal obligations beyond this first transmission would be nearly impossible to comply with and to enforce. The original sender would not be able to control how a recipient manages his or her own email lists and consequently it would be unfair to hold the original sender liable for the recipient's actions.

Physical Address

The Commission also asks whether clarification is needed for the Act's requirement that senders of commercial email include their valid physical postal address in the message. There are a variety of human service organizations, such as shelters for abused families and others with security concerns, for which listing a physical address is unwise. INDEPENDENT SECTOR suggests that a Post Office box is a sufficient physical postal address and that the Commission's rule should specifically state that.

Multiple or Simultaneous Senders

Just as INDEPENDENT SECTOR believes that email messages from nonprofits should not be considered commercial solicitations, we also believe that email messages sent by corporate sponsors of nonprofit events that are designed to generate support or participation in those events should not be considered commercial solicitations. Corporate sponsors of conferences or fundraising events, such as a "walk-a-thon" or team race, often send emails to generate participation or support for the event or for a particular "team" they are sponsoring. In such an instance, the corporation would be the primary sender of the email and would be responsible for processing opt-out requests. In the case of an email sent by the nonprofit to promote a conference or event, even if the email message includes the name or logo of a for-profit entity sponsoring the event, the primary sender would be the nonprofit organization, which would thus be responsible for processing its own opt-out requests. While we would encourage sponsors and charitable nonprofits to share information about individuals who do not wish to receive emails from their organizations, enforcing mutual responsibility on two unrelated entities would be costly and difficult for both the entities and the Federal Trade Commission. We believe that exempting such communications from these regulations would not violate the spirit and purposes of the CAN-SPAM Act.

There are also instances where an organization is the victim of "spoofing" and messages are being sent to look like they are coming from the organization. A helpful clarification would be to specifically state that an organization is not responsible for processing opt-out requests in such situations. We realize that other sections of the CAN-SPAM Act deal with the perpetrators of such fraud, but IS believes it would be useful to state that the victim of the fraud is not responsible for handling messages in such cases.

Safe Harbor

INDEPENDENT SECTOR also urges the Commission to consider establishing a policy for handling inadvertent violations of the CAN-SPAM Act. We suggest that the Commission create a safe harbor, as it did in the Do Not Call rule, for email senders that have made a good faith effort to honor opt-out requests, and that warnings be given with an opportunity to comply before any enforcement action is taken.

Finally, we urge the Commission to strive to be as consistent as possible with the Do Not Call rule to facilitate compliance. Monitoring all the various modes of communication (calls, faxes, emails) for compliance with varying new regulations places a significant burden on organizations that do not have a large staff to devote to these tasks.

Communicating electronically with our members, supporters, and others who have shown an interest in our missions has proven to be an invaluable tool for nonprofits. Nonprofits serve the community in countless ways impacting millions of people and we want to ensure that our communications are not hampered by a law that was written to combat a completely different type of communication. Again, we thank you for this opportunity to offer comments.

Sincerely,

Patricia Read
Vice President, Public Affairs
INDEPENDENT SECTOR

The undersigned organizations join INDEPENDENT SECTOR in these comments:

Alliance for Children and Families
American Association of Museums
American Red Cross
American Society of Association Executives
National Association of Independent Schools
UJA-Federation of New York

¹ Recent case law would support an exemption of messages from nonprofit organizations. On February 17, 2004 the U.S. Tenth Circuit Court of Appeals unanimously upheld the constitutionality of the FTC's Do Not Call rule and rejected plaintiffs' argument that the rule violates the First Amendment by treating charitable and political calls differently than commercial sales calls. In a separate case, U.S. District Court Judge J. Frederick Motz noted that the FTC does not have direct jurisdiction over nonprofits, and that FTC was correct in its determination that it can treat nonprofits differently than their for-profit agents in the Do Not Call rule. Judge Motz noted that it is the entity, not its activity that makes the difference in these

cases – “Courts have held that an entity’s exemption from FTC jurisdiction is based on that entity’s status, not its activity.” *National Federation of the Blind and Special Olympics Maryland v. Federal Trade Commission*, District Court of Maryland Civil No. JFM-03-963 (D. Md. filed February 24, 2004).