



September 13, 2004

Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: American Society of Association Executives Comments on
CAN-SPAM Act Rulemaking, Project No. R411008

To Members of the Commission:

The American Society of Association of Executives¹ ("ASAE") hereby submits comments in response to the Notice of Public Rulemaking; Request for Public Comments, 69 Fed. Reg. 50091-107 (August 13, 2004) ("Proposed Rule") issued by the Federal Trade Commission ("FTC" or "Commission").

Prior Comments. ASAE previously submitted comments in response to the March 11, 2004 Advance Notice of Proposed Rulemaking² and reiterates the position stated in those comments that *the FTC should clarify the applicability of the commercial electronic mail message definition as it relates to tax exempt nonprofit organizations*. In particular, ASAE took the position, and requested in its prior comments, that the Commission should expressly provide that e-mail transmitted by a tax exempt nonprofit organization primarily related to one or more of the organization's duly authorized tax exempt nonprofit purposes should not be considered commercial electronic mail messages under the Act and, therefore, be specifically exempt from regulation under the Act. Notwithstanding this position, ASAE has the following additional comments.

The FTC Should Clarify that Nonprofit Organization Electronic Communications with Members are Transactional or Relationship Messages. Although the Commission did not accept ASAE's prior position in the Proposed Rule, the Commission stated on page 50100 of the Proposed Rule in the Federal Register:

¹ The American Society of Association Executives represents over 25,000 professionals that manage tax exempt nonprofit organizations and is considered the "association of associations."

² 69 Fed. Reg. 11776 *et seq.*

Under the Commission's proposed "primary purpose" criteria, it seems likely that only nonprofit entities' messages whose strongest, most prominent content advertises or promotes a product or service – i.e., seeks to induce a purchase of goods or services – would be deemed to have a commercial primary purpose and therefore be covered by the Act. ***On the issues of messages between a nonprofit entity and its members, it is possible – or even likely – that such messages are "transactional or relationship messages"*** under § 7702(17)(A)(v), depending on the facts of a particular membership. (Emphasis added.)

In this statement, the FTC recognized both that only a few messages of nonprofit organizations would be expected to be primarily commercial in nature and also that most electronic communications to members are likely to be "transactional or relationship messages." Section 7702(17)(A)(v) of the Act, which is essentially the same as Section 316.3(b)(5) of the Proposed Rule, states that "the term 'transactional or relationship message' means an electronic mail message the primary purpose of which is –

(v) 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." (Emphasis added.)

ASAE respectfully posits for the Commission's consideration the premise that, in nearly all cases, a member is entitled to receive the messages, information, and other materials sent by a nonprofit organization or membership association to its members. As a result of paying dues or providing other consideration necessary to be considered a member, whether a voting member or not, the organization or association is under a requirement and obligation to send to all members, for example, information about the organization's educational meetings and conferences, professional books and publications, newsletters and magazines, position papers and legislative briefings, announcements of new surveys and association activities, and all manner of nonprofit tax exempt activities of the organization.

Thus, it should be clear that a recipient member is entitled to receive any material or messages that a nonprofit organization sends to its members. This is no different than warranty or similar operational information that is sent by a commercial company following the purchase of a product. 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 therefore be unjust if this same treatment were not extended to electronic mail messages of similar content sent to current members of tax exempt nonprofit organizations. The purchaser is entitled to receive the product information; the association member is entitled to receive membership information. Furthermore, other contributors, donors, or similar supporters of tax exempt nonprofit organizations may have similar expectations with respect to receiving information and material from the nonprofit organization. ***Therefore, as recognized by the Commission in their proposed regulations, any such messages from a***

*nonprofit organization*³ *should be considered transactional or relationship messages and not commercial electronic messages under the Act. ASAE respectfully requests the Commission to make this clear in any final rule.*

The FTC Should Recognize that the “Opt-Out” Requirements of the Act Raise Unique Questions for Nonprofit Membership Organizations. The failure of the Commission to establish this position, or to adopt ASAE prior position, will cause a significant problem under the Act. Specifically, if a member opted-out from receiving messages from a nonprofit organization to which the member belonged, what is the organization to do? Must the organization stop sending all information to the member that the member otherwise deserves and is entitled to receive? Must the organization establish some sort of hierarchy, menu, or decision tree to determine which materials the member intends to opt out from? If the member renews his or her membership, does the opt-out continue to apply, or is the organization permitted to start sending all materials and messages the member is entitled to receive with the beginning of a new membership year?

The remedy is for the Commission to promulgate a very simple statement in conjunction with any final rule; *nonprofit organization messages to their members – even from subsidiaries or agents of the organizations - are presumed to be transactional or relationship messages, and not commercial. If the Commission does not take this position, then nonprofit organizations need guidance as to how to handle opt-out provisions.*

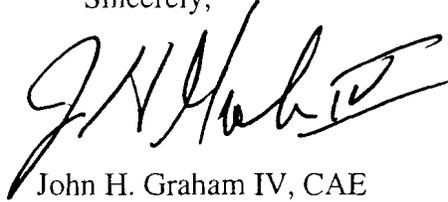
In response to Question P, Nonprofit Organizations Electronic Communications to Members Should not Require Application of the Three Part Test, But Communications to Non-Members Would. The Commission asked several questions on page 50105 of the Proposed Rule. Question P is specifically applicable to nonprofit organizations.

Assuming that the Commission adopts ASAE’s position above with respect to transactional or relationship messages of nonprofit organizations to members, such messages would not be considered commercial and the test would not be applicable. However, the situation is admittedly different with respect to communications to non-members. Although a tax exempt association likely legitimately believes its mission to further the interests of a line of business or commerce, or an industry or even educational or scientific area, requires that communications be sent to ALL in the affected constituency, this sort of implied entitlement is not specified in Section 316.3(b)(5) of the Proposed Rule.

³ This conclusion should be the same even if the nonprofit organization’s members, or perhaps other constituents or stakeholders, receive information from either a nonprofit or for-profit subsidiary of the organization. Either way, the member is entitled to receive that information or message.

Conclusion. Many underestimate the value of the American nonprofit community and the benefits from membership in nonprofit organizations. Associations truly do advance America. ASAE respectfully requests that the Commission adopt the position stated above to ensure that tax exempt nonprofit organizations are recognized for the value they contribute to society and to our world.

Sincerely,

A handwritten signature in black ink, appearing to read "John H. Graham IV". The signature is fluid and cursive, with a large initial "J" and "G".

John H. Graham IV, CAE
President and CEO