

September 13, 2004

Federal Trade Commission
Office of the Secretary
CAN-SPAM Act
Post Office Box 1030
Merrifield, VA 22116-1030

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

Dear Sir or Madam:

The American Association of Museums, headquartered in Washington D.C., is the national service organization that represents and addresses the needs of museums to enhance their ability to serve the public. AAM and its member museums and affiliate state and regional associations disseminate information on legislative and regulatory activities, current standards and best practices, and membership opportunities and provides personal development opportunities for museum professionals to ensure that museums have the capacity to contribute to life-long education in its broadest sense and to protect and preserve our shared cultural heritage.

Since its founding in 1906, AAM has grown to more than 16,000 members across the United States –nearly 10,500 individual museum professionals and volunteers, more than 3,000 museums, and 2,500 corporate members. AAM and its member associations and institutions appreciate this opportunity to comment on Notice of Proposed Rulemaking with respect to the CAN-SPAM Act (Project No. R411008) published in the August 13, 2004 Federal Register regarding the primary purpose, transactional or relationship messages, and opt-out processing.

Primary Purpose

The CAN-SPAM Act defines commercial email as “any electronic mail message the *primary purpose* of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet web site operated for a commercial purpose).” The Federal Trade Commission is proposing three sets of criteria for determining if an e-mail message’s primary purpose is commercial. Currently the criteria focus on what the message recipient would “reasonably interpret the primary purpose to be.”

AAM filed joint comments with Independent Sector in response to the Commission’s Advanced Notice of Proposed Rulemaking on this issue in April. At the time we argued that email messages sent by nonprofits should be exempt from the rule because they are not primarily for a commercial purpose. In the Commission’s proposed rule issued August 13, the suggestion of a nonprofit exemption was considered and rejected. The reason given for not exempting

nonprofits is: "Consistent with the CAN-SPAM, the proposed "primary purpose" criteria apply to all email messages with commercial content, regardless of whether sent by a nonprofit entity or a for-profit entity." The Commission adds that it seems likely that "most" messages from nonprofits would not have a commercial primary purpose and therefore would not be covered by the Act. The Commission additionally points out that while it does not have jurisdiction over nonprofits, the CAN-SPAM Act allows grants jurisdiction to Internet service providers.

AAM believes that museums and other nonprofit organizations should engage in responsible emailing practices, including honoring requests from any member of the public to remove his or her name and contact information from future solicitations and other communications. The criteria proposed by the Commission for determining which email messages will be subject to the CAN-SPAM Act are reasonable provided further modifications and clarification are provided in future related rulemakings. Specifically, provision must be made to allow adequate time for processing opt-out requests, a safe harbor should be allowed for unavoidable circumstances and inadvertent errors, and the term "transactional or relationship message" needs further clarification. The latter term is essential for many nonprofits that are membership organizations. As the Commission notes in its request for comments, "On the issue of messages between a nonprofit 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." 69 Fed. Reg. 50100. We offer comments on these issues now, though we understand that some of them will be the subject of future notices to be published shortly.

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 asked in March whether any elaboration is needed for this definition. AAM requests 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. AAM suggests the

Commission adopt a more workable 30-day time frame to process opt-out requests properly and fully.

Safe Harbor

AAM 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, including most museums, which do not have a large paid staff to devote to these tasks.

Communicating electronically with our members, supporters, and others who have shown an interest in museums' public missions has proven to be an invaluable tool for museums. Our nation's museums serve citizens in every district across the country and want to ensure that our efforts to protect and promote our country's cultural heritage 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,



Jason Hall,
Director, Government and Media Relations
The American Association of Museums