



American Dietetic Association

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120 South Riverside Plaza, Suite 2000
Chicago, Illinois 60606-6995
312/899-0040
www.eatright.org

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

Re: CAN-SPAM Act Rulemaking, RIN 3084-AA96 [Project No. R411008], regarding Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act

To the Commission:

The American Dietetic Association ("ADA") submits these comments in response to the Federal Register Notice published by the Federal Trade Commission ("FTC") on August 13, 2004 seeking public comment on proposed rules regarding commercial electronic mail messages.

American Dietetic Association. The ADA, a non-profit corporation established under Section 501(c)(6) of the Internal Revenue Code, is a membership organization composed of approximately 65,000 dietitians and nutrition professionals. The ADA exists to serve and provide value to its members and to the general public. Membership and participation in the ADA provides an important resource to individuals to achieve a variety of personal, professional, business, social, and educational goals, and one of the benefits that ADA provides to its members is a variety of current communications, sophisticated educational courses and seminars, and related publications, such as books and periodicals. E-mail is one of the primary vehicles by which these services are offered and announced..

Support and Adoption of ASAE Comments. ADA acknowledges that the American Society of Association Executives ("ASAE") is an effective advocate for the non-profit association community, and ADA therefore supports and adopts as its own the comments submitted by the ASAE with respect to the CAN-SPAM Act and its implementation.

Additional Comments. In addition, ADA submits the following comments of its own.

ADA is strongly of the view that e-mail communications between non-profit membership organizations and their members (or donors) are not the kind of messages that the CAN-SPAM Act is intended to

regulate or complicate. Where a membership (or donorship) relationship exists, the members of the organization have, by virtue of their membership, indicated their willingness to receive e-mail messages and, indeed, their interest in doing so. The organization and its members, by virtue of their relationship, have created a commonality of interest, and the organization, in communicating to its members about various subjects, including opportunities for seminars, publications, and products of interest to its members, is simply performing the very tasks for which the members created it. To suggest that such communications should be regulated is to impose unwarranted and unnecessary regulations on the relationship itself.

In the membership context, there is ample means and opportunity for the member to advise the organization of a desire not to receive communications, and it would be extremely unwise and counterproductive of any membership organization to continue to send such communications to a member who has indicated such a desire. Consequently, the definition of "commercial electronic mail message" ("CEM") should not include any communications between a non-profit membership organization and its members, and the "primary purpose" of such communications should be held not to be commercial.

To the contrary, the Commission should find that such messages are in fact within the definition of "transactional or relationship" messages. When a message is sent by a membership organization to its members, it is virtually by definition a message that is relational in nature. The very fact of the communication arises from the membership relationship, and the primary purpose of the message itself is to enhance the membership relationship and to perform the functions that the organization is called upon to provide by virtue of that relationship. The organization exists in large part to provide services to its members, and to find that the "commercial" aspect of any messages from the organization to its members overrides the "relationship" aspect is to ignore the realities of the relationship. Consequently, if the primary purpose of such messages is in all instances interpreted to be transactional or relationship, those messages will not come within the definition of CEM.

The failure of the Commission to adopt this interpretation is difficult to quantify. It will, however, cause difficulties. To the extent that non-profit membership organizations will have to expend time and resources in determining in each instance whether a membership communication has a primary "transactional or relationship" purpose or a "commercial" purpose, as suggested by the proposed rule, it will undoubtedly have an impact on the limited staff resources. Moreover, it may result in confusion to the organization's members whose

communications from the organization when the messages are designated as advertisements. Rather than assuming the communication is from the organization, they may alternatively believe that the message is from a third-party vendor to whom the organization has given access to the membership list. In such cases, members might simply delete the messages without knowing their true import.

In short, ADA agrees with ASAE that the primary purpose of tax exempt non-profit e-mail communication is to provide information and resources to their members, donors, and other constituencies consistent with their tax exempt non-profit purposes, rather than to carry on a trade or business, which is the chief objective of for-profit taxable entities. Such e-mail 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 non-profit purposes.

Conclusion. ADA urges the Commission to clarify that the definition of "commercial electronic mail messages" does not include e-mail communications by non-profit membership organizations to their members or donors. The regulations should clarify that even where e-mail communications from non-profit membership organizations sent to current members and/or donors have an arguably commercial purpose, because they are promoting goods or services or are soliciting donations, they should be excluded from the CEM definition as transactional or relationship messages because their **primary purpose** is satisfy the organization's basic responsibilities under the terms of an existing member or donor relationship.

Sincerely,

Ronald S. Moen

RSM: CB: mlo