



June 27, 2005

The Honorable Deborah Platt Majoras  
Chairwoman  
United States Federal Trade Commission  
600 Pennsylvania Ave, N.W.  
Washington, D.C., 20580

CAN-SPAM Act Rulemaking, Project No. R411008

Chairwoman Majoras:

The Society for Human Resource Management (“SHRM”) submits the following comments in response to the Federal Trade Commission’s (“FTC” or “Commission”) notice for proposed rulemaking, which was published in the Federal Register on May 12, 2005.<sup>1</sup> SHRM is the world’s largest association devoted to human resource (“HR”) management. Representing more than 200,000 individual members, the Society’s mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society’s mission is also to advance the HR profession to ensure that it is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has 568 affiliated chapters and members in more than 100 countries.<sup>2</sup>

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<sup>1</sup> *CAN-SPAM Act Rulemaking: Project No. R411008*, Notice of Proposed Rulemaking: Request for Public Comments, 70 Fed. Reg. 25426 (2005) (“Notice”).

<sup>2</sup> SHRM is located at 1800 Duke St., Alexandria, VA 22314. Additional information about SHRM may be found on its Internet Web site. [www.shrm.org](http://www.shrm.org).

SHRM, like many organizations has a strong interest in the Commission's CAN-SPAM rules as an association that provides a variety of educational and professional development information to its members and chapters through various forms of communication, including e-mail. Some of these e-mail communications could be considered commercial e-mail messages, which subjects SHRM and its chapter affiliates to this regulation. To the extent that the FTC's CAN-SPAM rules are either vague or overly burdensome, SHRM, its chapters, and countless HR professionals around the United States could be disadvantaged. Therefore, SHRM is responding to the Commission's request for comments on the proposed regulation of commercial e-mail messages. SHRM hopes its comments and analysis will assist the FTC in fashioning workable and understandable rules that balance the important interests of both senders and recipients of commercial e-mail messages. Specifically, SHRM submits comments on the following issues.

The FTC should:

- Ensure that its rules are fair, understandable and reasonable; do not include unincorporated associations in the definition of "person;"
- Require senders to disclose their identity in the opt-out section of messages; retain the ten-day period for processing opt-out requests;
- Treat all communications from membership organizations to their members as transactional/relationship messages or adopt the IRS test used for Unrelated Business Income Tax ("UBIT") to distinguish between commercial and transactional/relationship messages sent by nonprofits; adopt the "safe harbors" as recommended by SHRM; and
- Seek legislative clarification to regulate small nonprofits less strenuously.

## **I. Since Congress Specifically Authorized the Use of Unsolicited E-mail Messages under Certain Circumstances, the FTC Should Ensure that its Rules are Fair, Understandable and Reasonable**

The Congressional intent for enacting the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM<sup>3</sup>) was not to prohibit the sending of all unsolicited commercial e-mail, but rather, to regulate it. Congress decided that a regulated balance was needed between a sender's ability to send communications electronically and a recipient's rights with regard to electronic communication. Therefore, congress created a regulatory framework that would allow individuals to know the identity of those sending commercial e-mail messages and to have access to accurate facts about the content of the messages. This information would then permit individual recipients to elect whether to opt-out of future messages from a specific sender of commercial e-mail messages. So long as a sender complies with these and other requirements, he or she is permitted by CAN-SPAM to send unsolicited commercial e-mail messages to individuals. The recipient's right under CAN-SPAM is to opt-out from future messages, but not to be free from all unsolicited e-mail messages.

In adopting CAN-SPAM, Congress plainly rejected the "Spamhaus-desired approach"<sup>4</sup> that would bar the sending of all unsolicited commercial messages unless the recipient had previously granted consent. This intent to protect legitimate, unsolicited commercial e-mail can

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<sup>3</sup> Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub.L. 108-187, 117 Stat. 2699 (December 16, 2003) ('CAN-SPAM').

<sup>4</sup> "Spamhaus is an international non-profit organization whose mission is to track the Internet's Spam Gangs, to provide dependable realtime [*sic*] anti-spam protection for Internet networks, to work with Law Enforcement Agencies to identify and pursue spammers worldwide, and to lobby governments for effective anti-spam legislation." <http://www.spamhaus.org/organization/index.html> (visited June 15, 2005). Spamhaus specifically rejects the premise of CAN-SPAM that unsolicited e-mail should be regulated and not banned. Its Web site contains the following statement: "The IP addresses of all senders of Unsolicited Bulk E-mail are placed on the Spamhaus Block List (SBL). Spamhaus does not accept 'but my spam is legal under CAN-SPAM' as an excuse." [http://www.spamhaus.org/position/CAN-SPAM\\_Act\\_2003.html](http://www.spamhaus.org/position/CAN-SPAM_Act_2003.html) (visited June 15, 2005). However, while many might share this view, it is not the view of Congress and, as such, must not dictate regulatory policy in this country.

be seen from the law’s legislative history. Congress recognized that unsolicited e-mail messages are important to the U.S. economy because they often result in sales to recipients. Senate Report 108-102 noted that “37 percent of consumers ... surveyed [by the Direct Marketing Association] have bought something as a result of receiving unsolicited e-mail from marketers.”<sup>5</sup>

Senator John McCain (R-AZ), then chairman of the Senate Committee on Commerce, Science and Transportation, which approved CAN-SPAM, made similar remarks:

The Federal Trade Commission defines spam generally as “unsolicited commercial e-mail” and some Americans do not want any of it. Other consumers like to receive unsolicited offers by e-mail; to these consumers, spam means only the unwanted fraudulent or pornographic e-mail that also floods their inbox. ... We must be mindful that in our quest to stop spam, we may impose e-mail restrictions that go too far and actually prohibit or effectively prevent e-mail that customers want to receive and that legitimate businesses depend on to service their customers.”<sup>6</sup>

SHRM believes that Congress’ goal of balancing the interests of senders and recipients would best be served by the FTC’s use of clear and specific guidelines for CAN-SPAM compliance. Sellers and senders have a strong need to know what can be e-mailed lawfully.

Similarly, it was not Congress’ intent that each small e-mail mistake or malfunction be treated as a CAN-SPAM violation that could subject the sender to liability. A strong supporter of CAN-SPAM’s restrictions, Senator Charles Schumer (D-NY), who worked closely with the bill’s chief sponsors, Senators Conrad Burns (R-MT) and Ron Wyden (D-OR), to shape the final bill, urged reasonableness in regulating commercial e-mail messages. Senator Schumer said: “Will we go after every spammer, somebody who makes a mistake here and there? No.”<sup>7</sup> The intent of Congress was for fair, understandable and reasonable regulation. Accordingly, the

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<sup>5</sup> S. Rep. 108-102 (2003).

<sup>6</sup> 149 Cong. Rec. S13020 (2003).

<sup>7</sup> *Id.*, at S15944.

Commission should adopt reasonable safe harbors (which will be discussed later in these comments) for senders who might make mistakes despite their good faith efforts to comply with CAN-SPAM or who might experience technical problems beyond their immediate control that result in compliance failures.

## **II. The Proposed Definitions of the Words “Person” and “Sender”**

### ***A. The Proposed Definition of “Person” to Include Small Unincorporated Associations is too Broad and Could Cause Harm to Membership Associations***

The *Notice* indicates that the word “person” is used throughout CAN-SPAM and the FTC’s associated regulations, but is not defined.<sup>8</sup> The Commission has proposed to adopt a definition of person that is broader than simply a natural person to include: “an individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.”<sup>9</sup>

SHRM is concerned about the expansion of this definition in the proposed regulation to include unincorporated associations. SHRM has 568 local chapters. Many of these chapters are unincorporated associations that operate with limited resources and primarily through the efforts of volunteers. While SHRM is confident that its chapters, both large and small, make good faith efforts to comply with CAN-SPAM’s requirements, the details of those requirements are generally vague. For example, there is no bright line test in the FTC’s rules to distinguish between a covered commercial message and non-covered transactional or relationship message.

SHRM and its many members are concerned, therefore, that the inclusion of unincorporated associations in the definition of a “person” for the purpose of CAN-SPAM could unfairly expose its chapters and even its members to liability. For example, SHRM has been

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<sup>8</sup> *Notice*, 70 Fed. Reg. 25428.

<sup>9</sup> *Id.*

advised that the state of Illinois sometimes holds individual members of an unincorporated association liable for the actions of another of its members. Since CAN-SPAM permits states to enforce its provisions, inclusion of unincorporated associations as “persons” could possibly create risk of personal liability for volunteer leaders, especially if coupled with state law claims. This level of risk could well discourage individuals and their employers from participating in the important work of SHRM and its local chapters, as well as the work of the countless other membership organizations around the nation.

SHRM recommends that the FTC should modify the term “unincorporated associations” in the definition of “person” for purposes of the CAN-SPAM regulations as they would apply to nonprofits. We suggest further that the FTC define an “unincorporated association” as: an “other than one created by a trust, consisting of two or more members joined by mutual consent for a common, nonprofit purpose.”<sup>10</sup> The Commission, to the extent that it is worried about creating an organizational loophole for “e-mail outlaws,” could state, however, that it would treat an unincorporated association that existed solely for the purpose of sending commercial e-mail messages as a person, while still leaving legitimate member associations free from the risks discussed herein.<sup>11</sup>

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<sup>10</sup> See National Conference of Commissioners on Uniform State Laws, “Uniform Unincorporated Nonprofit Association Act,” §1(2) (1996). This model act defines the term “nonprofit association.” SHRM suggests that such definition could appropriately be used for an unincorporated association as well and strongly recommends it to the FTC.

<sup>11</sup> Needless to say, the FTC would still have jurisdiction over individuals within an unincorporated association who elected to flout CAN-SPAM’s requirements.

***B. The Proposed Definition of “Sender” Appears to be Reasonable, but Senders Should also be Required to Identify Themselves in the Opt-Out Section of their Messages***

In response to earlier comments, the FTC has proposed to modify its definition of “sender” for those instances “where more than one person’s products or services are advertised or promoted in a single electronic mail message.”<sup>12</sup> In these cases, the Commission would treat each such person who is within the Act’s definition as a ‘sender,’ if this person meets one or more of the FTC’s criteria. These criteria are: “(i) The person controls the content of such message; (ii) The person determines the electronic mail addresses to which such message is sent; or (iii) The person is identified in the “from” line as the sender of the message.”<sup>13</sup> Thus, for example, if five individuals contributed to the content of a message, but only person “A” determined the content of the message, only person “A” would be deemed the “sender.”

SHRM believes that the FTC’s definition of “sender” for purposes of CAN-SPAM regulation is reasonable. Since SHRM exists to serve their members and advance the HR profession, we strongly encourage full and accurate disclosure of the sender’s identity and we attempt to “practice what we preach” by making sure that our members know our identity just by looking at the “from line” in each commercial and transactional or relationship message.

Further, SHRM agrees with both Congress and the FTC that full and accurate disclosure of the identity of the sender of e-mail messages is necessary for recipients to make sound choices concerning future communications from the sender. In addition, one way for an organization to demonstrate good faith compliance of these regulations is to clearly state the originator of the email in the body of the text. Therefore, SHRM suggests that the FTC consider mandating

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<sup>12</sup> *Notice*, 70 Fed. Reg. 25428.

<sup>13</sup> *Id.*

senders again identify themselves in their opt-out statement within each message. For example, a message from SHRM might state: “This e-mail message was sent to you by the Society for Human Resources Management (SHRM). If you would like to decline further messages from SHRM, please click here.”

### **III. Shortening the “Opt-Out” Implementation Period from Ten Days to Three Days Would Likely Harm Small Organizations**

The FTC has proposed to shorten the time period, from ten days to three days, that a sender of unsolicited commercial e-mail messages has to process “opt-out” requests from recipients.<sup>14</sup> The Commission reasoned that, since many e-mailers are able to process opt-out requests almost instantaneously, shortening the processing period to only three days is not an undue burden.<sup>15</sup>

This conclusion is not warranted by the facts. SHRM, which uses a commercial mailer for its e-mail communications to its members and other interested recipients, would agree that, in some instances, large senders of e-mail messages have computer systems and networks that can quickly and accurately process opt-out requests. However, the world of commercial e-mail is much larger than this.

For example, most of SHRM’s 568 local chapter organizations regularly use commercial e-mail to communicate with their members and other interested persons. However, many of these chapters do not have large professional staffs to process opt-out messages in the proposed timeframe. In many instances, chapter members may even perform traditional staff functions (e.g., membership, technology, and program development) on a part-time, volunteer basis. It would be unreasonable, in the view of SHRM, to expect these volunteers or even a single paid

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<sup>14</sup> *Id.*, at 25442.

<sup>15</sup> *Id.*, at 25444.

staff director to check for, and handle, opt-out requests several times per week to satisfy the proposed three day rule.<sup>16</sup>

Similarly, many SHRM chapters obtain the services of a part-time Web master to operate their Web sites and e-mail systems. In order to keep Internet Web site costs limited, many of these Web masters monitor chapter Web sites only on a weekly basis. This practice prohibits local chapters from complying with a three-day requirement.

Moreover, despite the prior representations of certain vendors (*e.g.*, Go Daddy Software)<sup>17</sup> that “e-mail marketing is generally all electronically automated,” this is not the case for many of SHRM’s chapters. They operate with their focus on the continuous improvement of the HR process, not on e-mail marketing. While e-mail is an important tool for our chapters, it is just that—a tool that does not always require state-of-the-art status. In short, many small SHRM chapters do not have automated e-mail systems for handling opt-out requests. Many use human intervention to comply with CAN-SPAM’s requirements.

As noted above, both Senators McCain and Schumer urged reasonable regulation of commercial e-mail messages. The Commission should take that direction to heart and not adopt a three-day time period for all entities, regardless of their size and resources, to process opt-out requests. The Commission should strongly consider retaining the ten-day processing period for all persons and entities. There is no compelling reason to change the existing rule. At a bare

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<sup>16</sup> SHRM also urges the Commission to keep in mind that, in the case of membership organizations, few members are likely to request that no more e-mail messages be sent. In the event that a member (or her or his employer) is dissatisfied with the organization, they are more likely simply to resign their memberships and stop paying dues, than they are to “opt-out” from further e-mail messages from the organization.

<sup>17</sup> Comments of Go Daddy Software, filed April 20, 2004, at 4 (“*Go Daddy*”), cited by the FTC in support of its shortened opt-out processing period. *Notice*, 70 Fed. Reg., at 25443.

minimum, SHRM recommends that the commission provide a ten-day safe harbor for all of these entities.

#### **IV. Transactional or Relationship Messages from Nonprofits and Membership Organizations**

The FTC has tentatively rejected establishing a CAN-SPAM exemption for all e-mail communications from membership organizations to their members.<sup>18</sup> The Commission reasoned that no such exception was specifically permitted under CAN-SPAM, even though it believes that “it is likely that many such messages may have a primary purpose that fits within the existing categories of transactional or relationship messages.”<sup>19</sup> However, if a mailing is primarily commercial in nature, it must comply with the FTC’s requirements for such messages, according to the Commission.

SHRM urges the FTC to reconsider this point, especially as it relates to non-profit entities, such as SHRM’s chapters. As the Commission must likely be aware from its recent deliberations over the definition of the “primary purpose” of an e-mail message, it is often difficult, at best, to categorize properly sent e-mail messages from an association to their members.

In one sense, all such messages are “transactional or relationship” messages. But for the recipient’s membership or interest in an association, there would be no reason for that association to send e-mail communications to the recipient in the first place. SHRM and its chapters are focused on the HR profession, not marketing by e-mail. We want to communicate with HR professionals about HR issues in order to advance our profession.

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<sup>18</sup> *Notice*, 70 Fed. Reg., at 25438.

<sup>19</sup> *Id.*

Similarly, but for a recipient's membership or interest in SHRM or the HR profession, we would not likely have that individual's e-mail address. Therefore, a very strong argument exists that all membership association e-mail communications should be considered as transactional or relationship in nature. SHRM urges the FTC to take that position in its rules.

On the other hand, SHRM and its local chapters often send commercial content to their membership in the form of e-mail messages. Membership organizations are often dependent on revenues from "commercial programs" to support the organization's mission. Few, if any, such organizations could operate at member-desired service levels based on membership dues alone. For example, SHRM offers its members seminars, symposia, conferences, books, and other tools for fees. Likewise, we often provide information about similar commercial resources that are available from third parties. However, the fact remains that, despite the commercial nature of these messages, this type of information is sent to members primarily because they are members. Likewise, we would not attempt to promote an HR conference to the general public in a widely broadcast e-mail message. SHRM, therefore, respectfully submits that the FTC could rationally conclude that all e-mail communications from membership organizations to their members or other interested parties should carry a rebuttable presumption of transactional or relationship messages.<sup>20</sup>

Alternatively, SHRM recommends that the FTC use the Internal Revenue Service's ("IRS") UBIT test as a basis for determining whether an e-mail message, sent by a nonprofit entity to its membership or other interested parties, is a commercial communication. The IRS

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<sup>20</sup> Of course, in the event that there were facts before the FTC demonstrating that a membership organization was being used for commercial marketing unrelated to its mission (*e.g.*, it was sending e-mail messages promoting car loans, discount mortgages, college degrees in two weeks), the FTC could (and should) treat the matter as a scam and act accordingly.

treats an activity of a nonprofit as an “unrelated business” that is subject to the UBIT whenever the activity meets three requirements: 1) it is a trade or business; 2) it is regularly carried on by the nonprofit; and 3) it is not substantially related to the furtherance of the exempt purpose of the organization.<sup>21</sup>

If this test were to be adopted by the FTC, a nonprofit’s e-mail messages that promote goods or services that are related to the nonprofit’s specific mission would not be considered commercial e-mail messages. Thus, for example, an e-mail message from SHRM to its members that also contained information about HR-related goods and services would still be considered a transactional or relationship message, just as the IRS would consider revenues from SHRM’s sales of such goods and services to be “substantially related to the furtherance of the exempt purpose of [SHRM]” and, therefore, not subject to the UBIT. However, SHRM’s inclusion of promotional information concerning other goods and services, *e.g.*, association affinity cars, would be considered “commercial content” that potentially could, under existing FTC rules, transform SHRM’s e-mail message into a covered message, just as any revenues from the promotion of vacation trips would be made subject to the UBIT.

## **V. The Need for Good Faith, Safe Harbors, and Clear Guidelines**

SHRM supports both CAN-SPAM and the FTC’s enforcement efforts taken pursuant to the law. Spam, which is often associated with fraudulent marketing schemes or worse, is a threat to the value and viability of the Internet for ordinary Americans and creates a cost burden for society. It should, therefore, be regulated. However, the FTC must also keep in mind Congress’

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<sup>21</sup> See generally, IRS, “Unrelated Business Income Tax General Rules,” <http://www.irs.gov/charities/article/0,,id=96104,00.html> (visited June 22, 2005).

admonitions about over-zealous or unreasonable regulation of commercial e-mail messages, as they were expressed by Senators McCain and Schumer.<sup>22</sup>

Accordingly, SHRM respectfully submits that the Commission should propose “safe harbors” and associated guidelines for situations where a sender of commercial e-mail messages can be assured that it would not be prosecuted by the Commission or sued by the states or Internet Service Providers when the sender has acted reasonably and in good faith.

SHRM recommends the following “safe harbors,” for which no government prosecution or lawsuits from Internet Service Providers would be permitted, should include the following: 1) A ten-day period to process opt-out requests for nonprofits, but only in the event that the FTC elects not to continue the existing ten-day processing period for all senders; 2) Disclosure of the sender’s full identity in the opt-out section of its messages would constitute fair disclosure of the sender’s identity; and 3) Use of the UBIT test for determining whether an e-mail message from a nonprofit is commercial or transactional/relationship in nature, but only in the event that the FTC does not formally adopt this test as a rule or treat all communications from membership organizations to their members as transactional/relationship messages.

## **VI. The Commission Should Seek Modification of CAN-SPAM to Permit Special Treatment for Small Nonprofits**

As discussed above, the FTC has already concluded that CAN-SPAM does not permit it to provide special treatment for small businesses and nonprofits. While SHRM disagrees with

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<sup>22</sup> See also, Remarks of Senator Patrick Leahy (D-VT), 149 Cong. Rec. S6501 (2003). “I have often said that Congress must exercise great caution when regulating in cyberspace. Any legislative solution to spam must tread carefully to ensure that we do not impede or stifle the free flow of information on the Internet. The United States is the birthplace of the Internet, and the whole world watches whenever we decide to regulate it. Whenever we choose to intervene in the Internet with government action, we must act carefully, prudently, and knowledgeably, keeping in mind the implications of what we do and how we do it. And we must not forget that spam, like more traditional forms of commercial speech, is protected by the First Amendment.”

this conclusion, it nevertheless urges the FTC to request Congress to grant the Commission specific authority to adopt less strenuous rules for nonprofits in order to shield them from unreasonably high compliance costs and unfair risks of prosecution.

SHRM would, of course, support a provision of an amended CAN-SPAM law that would permit the FTC to apply stricter regulations to any person or entity that attempted to use small business or nonprofit status as a ruse to avoid the requirements of the act. For example, an entity that operated as a nonprofit, but sent e-mail messages promoting low-rate mortgages, should not be permitted to hide behind the nonprofit label. It should be regulated as any other for-profit entity. However, the Commission does not need to hold bona fide nonprofits to detailed and burdensome regulations just to catch the scam artists.

## **VII. Conclusion**

SHRM appreciates the opportunity to submit these comments and we look forward to working with the FTC throughout the regulatory process. Once again, thank you for this opportunity and please feel free to use SHRM as a resource on issues regarding workplace public policy.

Respectfully,

By:

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Society for Human Resource Management

Dated: June 27, 2005

