



American Staffing Association

SUBMITTED ELECTRONICALLY

June 27, 2005

Federal Trade Commission
CAN_SPAM Act
Post Office Box 1030
Merrifield, Virginia 22116-1030

Re: CAN-SPAM Act Rulemaking, Project Number R411008

Dear Sir/Madame:

The American Staffing Association submits the following comments regarding the *Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003* ("CAN-SPAM Act" or "Act"), and the notice of proposed rulemaking ("NPR") issued by the Federal Trade Commission ("FTC") in the May 12, 2005 issue of the Federal Register.

The association represents temporary and contract staffing firms throughout the United States. ASA's more than 1,300 member firms operate over 15,000 offices nationwide that generate approximately 85 percent of U.S. staffing industry revenues.

Temporary and contract workers play a vital role in fostering U.S. economic growth. These employees typically work on multiple assignments or projects, often for different employers. The advantages of flexible work are widely recognized by workers and employers alike, and the needs of such employers can only be realized through staffing firms' continuous recruitment of qualified candidates.

The Internet has greatly facilitated the recruitment of candidates and the provision of temporary and contract jobs to persons who otherwise might be unemployed or without full time work. Many staffing firms use electronic mail to apprise prospective candidates of current or potential job openings. To accommodate the needs of today's flexible workforce, the regulations under the CAN-SPAM Act should explicitly exclude such email from the definition of "commercial electronic mail message," even when "affirmative consent" has not been received, and provided that the recipients are not charged fees of any kind for the staffing firms' services.

Email Recruitment Plays A Key Role in Staffing Firm Job Placements

Staffing firms recruit and hire their own employees and assign them to other organizations to support or supplement their regular workforces, to provide assistance in special work situations such as employee absences, skill shortages, and seasonal workloads, and to perform special assignments or projects. Job applicants are screened and tested and then assigned to customers needing their particular skills. Staffing firms invest millions of dollars each year in training their temporary employees—expenditures that have grown dramatically according to the Department of Labor.¹

Staffing firms supply employees to every industry in every job category—from unskilled industrial labor; to assembly and production work; to office and clerical support; to technical, scientific, professional, and managerial positions. They provide a wide range of human resource services such as recruiting, skills assessment, skills training and upgrading, risk management, and payroll and benefits administration—thereby allowing their business customers to concentrate on their core businesses and to benefit from more predictable and stable labor costs.

Central to what staffing firms do—at the very heart of their business—is their ability to recruit qualified candidates for job openings. Increasingly, staffing firms use electronic mail to provide candidates with information about the staffing firm, as well as current or prospective jobs that may match the individuals' qualifications and interests. They interview interested candidates and place them on temporary assignments as they become available. Electronic mail greatly facilitates such placements by streamlining and expediting the recruiting and hiring process.

The Proposed Rules Should Exempt Job E-Mails When Candidates are Not Charged Fees of Any Kind

The Act currently defines "commercial electronic mail message" to mean any electronic mail message the primary purpose of which is the *commercial advertisement or promotion of a commercial product or service . . .*"² (emphasis supplied). The Act exempts from this definition electronic mail messages the primary purpose of which is to provide information *directly related to an employment relationship . . . in which the recipient is currently involved.*³ (emphasis supplied)

¹ See U.S. Dep't of Labor, *Report on the American Workforce* (1999) at pp. 18-24.

² CAN-SPAM Act, Sec. 3(2)(A)

³ *Id.* at Sec. 3(17)(A)(iv).

The exemption implicitly recognizes that e-mails regarding employment do not constitute commercial advertisements or the promotion of a commercial product or service because they generally do not seek to sell, lease, or otherwise transfer something to the recipient for consideration.

However, the current exemption does not go far enough: any proposed and final regulations should make clear that e-mails regarding current or prospective job openings that are sent to individuals who are not currently employed by the sender, and who are not charged any fees or other consideration in connection with any current or prospective job, do not fall within the commercial electronic mail message definition and therefore are not covered by the Act.

Without an explicit exemption, courts may construe the Act as applying to email job recruiting, which will inhibit economic growth by hindering job offers and placements.

Failure to Clearly Exempt Job-related E-Mails Would Be Inconsistent With the Act's Objectives

Among the Congressional findings supporting the Act's passage was that most unsolicited e-mail messages are fraudulent, vulgar, pornographic, or misleading. The Act seeks to prevent such abuses by clearly informing recipients that they are receiving a solicitation or advertisement, thus allowing them to delete or avoid reviewing such messages and affording them the opportunity to opt-out of any future commercial e-mails from the sender. In short, the Act serves a valuable purpose by protecting citizens from patently offensive, harassing or unwanted e-mail messages.⁴

Subjecting job-related e-mails to the Act's requirements would be inconsistent with the Act's objectives because such communications do not fall within any of the categories of communication that Congress intended to restrict. On the contrary, it would discourage employment and economic growth because recipients are more likely to disregard or delete e-mails labeled as advertisements and solicitations and are thus likely to ignore, to their detriment, potential employment opportunities. Therefore, such emails should be excluded from the Act's requirements.

Excluding Job-Related E-mails Is Consistent With Existing Case Law

Courts have recognized that communications offering job opportunities, for which candidates are not charged fees, are not commercial in nature and should not be subject to laws similar to

⁴ E-mails contemplated by the Act apparently include advertisements for pornographic web sites, advertisements for Viagra and other sexually related products, and various forms of moneymaking schemes.

the CAN SPAM act. At least one court has held that an unsolicited fax informing a recipient of a job opening did not violate the Telephone Consumer Protection Act of 1991 because it did not constitute an advertisement of the sender's goods, services, or property. See *Lutz Appellate Services v. Curry*, 859 F. Supp. 180 (E.D. Pa. 1994). As the court noted, "[w]hen ... an employer places a "help wanted" ad, no one speaks or thinks of it as a property solicitation or an offer of property. Likewise, when an employer hires an employee, no one characterizes the hiring as a property sale, exchange or transaction." Accordingly, the court held that the job messages were not covered. See also, *Missouri v. American Blast Fax*, 196 F. Supp. 920 (E.D. Mo. 2002).

Conclusion

For the foregoing reasons, we respectfully urge the FCC to adopt in any final rule provisions that exclude from the requirements of the Act unsolicited electronic messages sent to prospective job candidates for the purpose of apprising them of current or prospective job openings, provided that the candidates are not charged a fee of any kind.

Yours very truly,

AMERICAN STAFFING ASSOCIATION

Edward A. Lenz
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and General Counsel