

GOVERNMENTAL AFFAIRS
OFFICE

AMERICAN BAR ASSOCIATION

Governmental Affairs Office

740 Fifteenth Street, NW
Washington, DC 20005-1022
(202) 662-1760
FAX: (202) 662-1762

DIRECTOR

Robert D. Evans
(202) 662-1765
rdevans@staff.abanet.org

SENIOR LEGISLATIVE COUNSEL

Donise A. Cardman
(202) 662-1761
cardmand@staff.abanet.org

Kevin J. Driscoll
(202) 662-1766
driscollk@staff.abanet.org

Lillian B. Gaskin
(202) 662-1768
gaskini@staff.abanet.org

LEGISLATIVE COUNSEL

R. Larson Frisby
(202) 662-1098
frisbyr@staff.abanet.org

Kristi Gaines
(202) 662-1763
gainesk@staff.abanet.org

Kenneth J. Goldsmith
(202) 662-1789
goldsmithk@staff.abanet.org

Ellen McBarrette
(202) 662-1767
mcbarnee@staff.abanet.org

E. Bruce Nicholson
(202) 662-1769
nicholsonb@staff.abanet.org

DIRECTOR GRASSROOTS
OPERATIONS/LEGISLATIVE COUNSEL

Julie M. Strandlie
(202) 662-1764
strandlie@staff.abanet.org

INTELLECTUAL PROPERTY
LAW CONSULTANT

Hayden Gregory
(202) 662-1772
gregoryh@staff.abanet.org

STATE LEGISLATIVE COUNSEL

Rita C. Aguilar
(202) 662-1780
aguilarr@staff.abanet.org

EXECUTIVE ASSISTANT

Julie Pasatiempo
(202) 662-1776
jpasatiemp@staff.abanet.org

STAFF DIRECTOR FOR
INFORMATION SERVICES

Sharon Greene
(202) 662-1014
greenes@staff.abanet.org

EDITOR WASHINGTON LETTER

Rhonda J. McMillion
(202) 662-1017
mcmillionr@staff.abanet.org

June 27, 2005

VIA ELECTRONIC FILING

Mr. Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: "CAN-SPAM Rulemaking, Project No. R411008"

Dear Secretary Clark:

On behalf of the American Bar Association ("ABA") and its more than 400,000 members throughout the country, I write in response to the Commission's request for comments on the above-referenced Notice of Proposed Rulemaking concerning "Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act" (the "NPR"). In particular, the ABA would like to express its concerns regarding that portion of the NPR that would prohibit senders from requiring that recipients (1) provide any information other than their e-mail addresses and opt-out preferences, or (2) visit more than a single Internet web page, when requesting to opt-out of future commercial e-mail messages.

The ABA supports many of the key provisions of the CAN-SPAM Act (the "Act"), including those provisions that prohibit the sending of false, misleading, predatory or abusive commercial e-mail messages and that create a single, national, uniform standard for the regulation of other commercial e-mail that is not otherwise prohibited. While the ABA supports federal legislation and regulations to curb improper commercial e-mails, we also believe that such measures should be crafted so as to protect the ability of associations and other tax-exempt nonprofit organizations to communicate effectively with their members and the public. Attached to this comment letter is the relevant policy statement adopted by the ABA Board of Governors on November 15, 2003.

The ABA previously filed written comments with the Commission on April 20, 2004, in response to the Advance Notice of Proposed Rulemaking published on March 11, 2004. In that initial comment letter, the ABA urged the Commission to clarify certain

June 27, 2005

Page 2

definitions in the new statute¹. The ABA now files this second comment letter in response to Section 316.5 of the new rules proposed by the Commission in the NPR.

Section 5(a)(3)(A) of the Act prohibits senders from initiating the transmission of a commercial e-mail message “that does not contain a functioning return electronic mail address or other Internet-based mechanism...that...a recipient may use to submit, in a manner specified in the message, a reply electronic mail message or other form of Internet-based communication requesting not to receive future commercial electronic mail messages from that sender at the electronic mail address where the message was received...” Section 5(a)(3)(B) of the Act also allows, but does not require, the sender to provide the recipient with “a list or menu from which the recipient may choose the specific types of commercial electronic mail messages the recipient wants to receive or does not want to receive from the sender.” In addition, that section requires that any such list or menu include “an option under which the recipient may choose not to receive any [future] commercial electronic mail messages from the sender.”

As part of the current NPR, the Commission has proposed a new rule that would add on to the specific requirements of Section 5(a)(3) of the Act by prohibiting senders from requiring recipients to take any steps to effectuate their opt-out requests other than “sending a reply electronic mail message or visiting a single Internet Web page...” See Section 316.5 of Proposed Rule, 70 Fed. Reg. 25453. In addition, the proposed rule specifically prohibits senders from requiring that recipients “provide any information other than the recipient’s electronic mail address and opt-out preferences...” *Id.*

In explaining the rationale for proposed Section 316.5, the Commission states that in its view, “the sole purpose of the Act’s opt-out provisions is to protect recipients’ privacy from senders of unwanted commercial e-mail...(and) it would be a complete subversion of this privacy protection to allow senders to compel recipients to disclose personally identifying information as the price of opting out.” See NPR at 25445. Therefore, the Commission maintains, “an e-mail recipient’s ability to submit an opt-out request should not be encumbered by any extraneous requirements.” *Id.*

Although the ABA agrees that it is inappropriate for a sender to require a recipient to pay any fee in connection with processing an opt-out request, we oppose that portion of proposed Section 316.5 that would prohibit senders from requiring that their member-recipients requesting to opt-out of future commercial e-mail messages provide “any information” other than the recipient’s e-mail address and opt-out preferences. We also oppose that portion of the rule limiting the opt-out process to “a single Internet Web page.” Both of these requirements are problematic in that they would interfere with the ability of association-senders and other membership-based organizations to have their member-recipients log on the entity’s website, edit the member’s profile, and thereby directly express the member’s complete opt-out preferences. In order to preserve this type of

¹ In its April 20, 2004 comments, the ABA urged the Commission to adopt rules that would effectively implement the new statute by (1) clarifying the definition of “primary [commercial] purpose” under Section 3(2)(A); (2) modifying the definition of “transactional or relationship message” under Sections 3(2)(B) and 3(17); and (3) clarifying the definition of “person” under Section 6(a) of the Act, so as to exclude from the Act e-mail communications sent by associations and other tax-exempt nonprofit organizations in pursuit of their tax-exempt nonprofit purposes.

system—and the many benefits it offers to association members—the ABA recommends that proposed Section 316.5 be revised to permit associations and other membership-based organizations to require their member-recipients to take those minimal steps necessary to amend their member profiles on the entity's website.

The ABA has instituted a process, consistent with Section 5(a)(3) of the Act, in which recipients who no longer wish to receive commercial e-mails can opt-out of receiving future messages. Under this existing system, all ABA commercial e-mails contain separate links for ABA members and non-members which allow them to opt-out of future commercial messages. Members wishing to opt out are asked to log on to the ABA website (which requires entering the member's name or membership number) and then click through to a separate web page which allows the member to amend his or her profile and opt-out of all or merely some types of future commercial e-mails. The process also allows the member to update or change the member's e-mail address or to instruct that all future e-mails be sent to a home or business e-mail address. In addition, the process also allows the member to make other changes to the member's profile by updating, changing or deleting the member's address or telephone or facsimile numbers.

The ABA believes that this system—in which its members log on to its website, edit their member profiles, and indicate which types of marketing communications they wish to receive, if any—works well and serves its members' interests. The ABA strives to promptly implement its members' preferences in a comprehensive way that is tailored to the needs of the individual member, not on a list-by-list basis. The ABA's e-mail lists are generated by settings and addresses present in its membership system, not by harvesting addresses from other web sites or from lists sold to the ABA, unlike many other mass e-mail senders. In addition, the ABA's e-mail lists are not populated until just prior to being sent, so that the ABA can include the most accurate e-mail address and restrictions that are present in its membership database. Although these procedures provide clear benefits to the ABA's members, the system will only be feasible if the ABA is able to continue to require its members to log on to its web site and edit their member profiles as part of the opt-out process.

The ABA believes that Section 316.5 should distinguish between the information that a sender should be able to request from its own members who wish to opt out of future commercial e-mails and the information that is requested from other recipients—such as prospective customers—with whom the sender has no existing relationship. Associations like the ABA and other membership-based organizations have a strong interest in serving their members and faithfully complying with their requests and preferences, as failure to do so risks alienating and ultimately losing the member. Therefore, when one of its members wishes to opt out of receiving all or some future commercial e-mail messages, it is imperative that the entity have all the information necessary to identify the member and then honor the member's specific requests and preferences quickly and completely.

Unfortunately, the rigid language of proposed Section 316.5 would hinder in several ways the ability of associations like the ABA to identify their own members and then promptly and accurately implement their requests to not receive future commercial e-mail messages. First of all, by preventing association-senders from requesting any information from their member-recipients except for the member's e-mail address and opt-out preferences—and by preventing associations

June 27, 2005

Page 4

from directing their members to more than one web page—the proposed rule would effectively ban the process by which association members are asked to opt out of future commercial e-mails by amending their member profiles online. This, in turn, will prevent an association from stopping future e-mail messages to a member when his or her e-mail address has changed since the original message was sent. In addition, by prohibiting associations from collecting the information necessary to identify the recipient as a member or nonmember, the rule would require associations to offer a generic menu of opt-out options to all recipients, rather than separate menus for member and nonmember recipients. Because members are typically entitled to receive a broader range of electronic materials (e.g., association newsletters, member-only event invitations, member-only discount offers, etc.), it will often be appropriate for associations to establish different menus for members and nonmembers who wish to opt out of some future commercial e-mails. Therefore, proposed Section 316.5 would inadvertently prevent associations from properly serving their members' needs and preferences in an efficient and comprehensive manner.

For these reasons, and to accomplish the purposes of the Act, the ABA urges the Commission to revise proposed Rule 316.5 to allow associations and other membership-based organizations to require their members to log on to and access the entity's web site—and in the process, provide the member's name or membership number and click through to a separate web page—prior to indicating the member's specific opt-out preferences.

Thank you for your consideration of our comments. If you would like to discuss the ABA's views on these important matters in greater detail, please contact our legislative counsel for business and administrative law issues, Larson Frisby, at (202) 662-1098.

Sincerely,

Robert D. Evans

enclosure

**RESOLUTION ADOPTED BY THE
BOARD OF GOVERNORS
OF THE
AMERICAN BAR ASSOCIATION
NOVEMBER 15, 2003**

RESOLVED, that the American Bar Association supports federal legislation and regulations that would prohibit the sending of false, misleading, predatory or abusive commercial e-mail messages but opposes measures, such as Section 106(a) of S. 877, the "CAN-SPAM Act of 2003," that would impose on law-abiding entities a duty to prevent third parties from promoting the entities' products or services in an improper way.

FURTHER RESOLVED, that the ABA supports federal legislation, regulations, and other measures that would protect and strengthen the ability of associations and other tax-exempt nonprofit organizations to communicate with, or otherwise serve, their members and the public, including the sending of commercial and non-commercial e-mail messages.

FURTHER RESOLVED, that the ABA opposes any legislation, regulations, or other measures prohibiting or regulating commercial or non-commercial e-mail messages to the extent that such measures could interfere with the ability of associations and other tax-exempt nonprofit organizations to communicate with, or otherwise serve, their members and the public.