September 10, 2004

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

RE: The National Club Association's comments to FTC's notice of proposed rule making, project No. R411008 CAN-SPAM Act – Definitions, Implementation and Reporting Requirements (16 CFR Part 316)

The National Club Association (NCA) represents approximately 1,000 private social/recreational clubs. A majority of our membership are tax-exempt entities under section 501(c)(7) of the Internal Revenue Code. Our membership consists of organizations such as country clubs, city clubs, yacht clubs and other social and recreational organizations. Because these groups are organized around a common non-business interest, communication between and among members of private clubs is an important tool in maximizing their associational rights. Electronic communication is becoming an increasingly vital tool clubs use to inform their members about the various activities hosted by the club.

Private clubs are unique entities that represent the constitutional principle of freedom of association. As such, the courts have afforded private clubs wide latitude in areas of membership selection and governance to facilitate those rights. In fact, in order to be considered a constitutionally protected private club, an organization must limit its contact and activities with non-members. A private club that sends e-mail that advertises membership opportunities could be subject to loss of its tax-exempt status as well as the loss of its constitutional protections. NCA believes that the FTC's proposed rule governing the applicability of the provisions of the CAN-SPAM Act to nonprofit entities is overly broad and potentially detrimental to private clubs' associational rights.

Section d: Messages of from nonprofit entities

The FTC, in its proposed rule, makes an effort to examine the impact of the proposed regulations on nonprofit entities. While this examination shows that the Commission reflected on the differences between the nonprofit sector versus the commercial sector, NCA believes that the analysis fails to take into consideration existing regulations and limitations on communication that apply to private, nonprofit clubs under existing Internal Revue Code provisions and established court precedents. NCA requests that the

Commission reconsider or refine its proposals in this section to better reflect the special needs of the nonprofit community, as well as the unique needs of private clubs.

The proposed rule by the Commission relies on an already restricted example of a nonprofit 'commercial communication' in its justification for applying the proposed "primary purpose" test to the entire nonprofit community. It notes:

> *'The NAA espoused a similar position: '[A] not-for-profit university advertising grandfather clocks probably is sending a commercial message that should be covered by the regulations regardless of its nonprofit status.'*

In the proposed regulation, the Commission relies solely on this unusual example as its justification for applying the primary purpose test to all nonprofits, while dismissing suggestions by the American Society for Association Executives for less intrusive and more appropriate measures. The Commission offers no justification for ignoring these suggestions. NCA urges the Commission to exempt private, nonprofit clubs from the scope of the regulations, and to incorporate suggestions from the greater nonprofit community to apply the regulations to the nonprofit community in a manner that is appropriate to their unique status.

Exempting nonprofit social clubs organized under section 501(c)(7) of the Internal Revenue Code would not facilitate unsolicited e-mails from these entities because they are already limited by statute and precedent from such communication. In fact, the disincentives for such unsolicited communication with nonmembers are far stronger – loss of tax-exemption and Constitutional protections – than the fines proposed by the Commission. Additionally, Treasury regulations indicate that a club's sale of goods and services to its members are not a business or commercial activity.

A truly private club qualifies for protection under the First Amendment's guarantee of freedom of association. The factors that determine a truly private club include, but are not limited to whether the club:

- Has a long-standing mission of serving a social, non-business purpose
- Has a nexus of social interest and congeniality
- Maintains a selective and exclusive membership criteria
- Limits activities and access to its facilities
- Applies restrictive guest policies
- Is controlled by its members
- Is limited in scope and size
- Operates as a nonprofit

In fact, in one of the seminal cases that helps define a truly private club, the Supreme Court noted that a Rotary club was not entitled to Constitutional associational protections because, "rather than carrying on their activities in an atmosphere of privacy, [The Rotary clubs] seek to keep their 'windows and doors' open to the world."[1] In other words, there is a strong disincentive for a private club to engage in the practice of sending unsolicited "commercial" e-mails to nonmembers, because doing so could be see by a court as the club opening its "windows and doors to the world" and destroying the social nexus, exclusivity, and intimacy of the club.

In the limited context of a private club, members must take affirmative steps to join, be approved by a membership committee, and desire to be part of the club's social community. Under the proposed regulatory guidelines, if any fee or service charge is levied, a club must engage in the burdensome process of collecting written permissions solely to be able to send their own members e-mails that may include:

- An flyer for upcoming member golf tournament
- A notice of an upcoming dinner dance or holiday party.
- An invitation to a discussion group or presentation at the club.

Such far-reaching regulations seem beyond the intent of the legislation to curb unwanted and excessive unsolicited commercial e-mails. In the context of a social club, communication with non-members is discouraged by court precedent, and e-mails sent to members typically involve a connection to club events. Regulating such communication is burdensome, excessive, and not in the interests of the federal government.

For private, nonprofit clubs the Internal Revenue Code limits a club's ability to seek revenue or funding from non-members and, as a result, have existing restraints on unsolicited commercial communication with non-members.

Just as clubs that observe certain formalities are exempt from federal and state anti-discrimination statutes, they can also be exempt from federal income tax on their operating income. Under section 501(c)(7) of the Internal Revenue Code, a club organized for pleasure, recreation or other non-business purpose is exempt from paying taxes on its income generated from membership dues and other operating levies.

This exemption reflects the government's recognition that these clubs are not-for-profit, mutual endeavors of their members. The members are simply sharing the costs of operations. They have joined together in the club not in the pursuit of financial profits, but because of common social or recreational purposes. They have decided those common purposes can best be achieved in the private setting of their club in association with their fellow members. Such a club generates no profit for its members but, is a

[1] Idid, at 548

pooling of resources for common purposes. Members pay the club only their share of the expenses. Members through initiation fees and assessments fund capital expenses. Operating expenses are usually paid through dues and direct charges. The club serves as a virtual conduit or intermediary whereby the members provide for their own recreation or social interaction.

Current federal regulations also distinguish between regular business activities and the transactions between private clubs and their members. Treasury regulations provide that ". . . a club otherwise entitled to [tax] exemption will not be disqualified because it raises revenue from members through the use of club facilities or in connection with club activities."[2] In other words, a club is not deemed to be engaging in business or taxable commercial activities merely because it sells meals, refreshments or services to its own members. This exemption reflects the recognition of the closed nature of a club and its purpose in catering to the social and recreational needs of its members.

Under the proposed rule, the Commission notes that:

> *"Under the Commission's proposed 'primary purpose' criteria, it seems likely that only the nonprofit entities' messages whose strongest, most prominent content advertises or promotes a product or service . . . would be deemed to have a primary purpose and therefore covered by the act."*

While this statement provides some insight into how the proposed regulatory standard may not apply to 501(c)(7) and other nonprofits, it remains vague and could result in arbitrary enforcement actions. The National Club Association believes that truly private social/recreational clubs should be exempt from the proposed regulations for the reasons discussed above. Such exemption would not undermine the goals of the act or regulation because of existing limits on private clubs' ability to send unsolicited communications to non-members. In the alternative, if the Commission feels that it should extend such regulations to such organizations, then the appropriate level of regulation would be to limit regulation of such commercial communication to any message that is not related to the exempt purpose of the organization as noted in the Commission's example provided by the National Advertising Association.

Sincerely,

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[2] Treas. Reg. 1.501 (c)(7)-1(a)(1960)