Re: CAN-SPAM Act Rulemaking
Project No. R411008

Comments of the Nonprofit Federation of the Direct Marketing Association

On behalf of its member organizations, the Nonprofit Federation respectfully requests the Commission to affirm that the CAN-SPAM Act is inapplicable to nonprofit fundraising. Please note that we limit this request to *fundraising* activity and not other activity carried out by nonprofits.

The DMA Nonprofit Federation (DMANF) is the leading and largest international association for nonprofit organizations that use direct and interactive marketing media such as mail, telephone, and the Internet to communicate with donors, members, and the public. Since 1982, the Nonprofit Federation and its predecessor organizations have advocated for nonprofits in postal, regulatory, legislative, and accountability issues. Among its more than 300 members are many of the most recognizable names in the nonprofit world.

In response to the enactment of the CAN-SPAM Act, the Federation informally polled its members and others in the fundraising community. We found exactly what we had expected to find. And our findings greatly limit the concern of the Nonprofit Federation with this rulemaking.

In the first place, to the best of our knowledge, none of our members -- or any other bona fide nonprofits, for that matter -- engage in spamming (that is, sending unsolicited electronic messages in bulk). Nor have they ever engaged in spamming. Also, to the best of our knowledge, seldom -- if ever -- do any of our members send *any* emails without prior permission. In short, fundraising conducted by member nonprofits *already complies* with the substantive requirements of the CAN-SPAM Act. The enunciated requirements in the Act are in effect satisfied by virtually universal, standard email fundraising practices.

But, the statutory damages created by Section 7(f)(3) of the Act are considerable. And while we understand the FTC lacks jurisdiction to take an action directly against a bona fide nonprofit organization (see 15 U.S.C. 44), state attorneys general, for instance, may not be so limited. For this reason and others, our members desire some further assurance that their routine fundraising will not place them unwittingly into the territory encompassed by the Act and its sanctions.

On the face of it, it appears that Congress did not contemplate that nonprofit fundraising would be regulated by the Act. It regulates "*commercial* electronic mail messages" (emphasis added) which is defined as "any electronic mail message the primary purpose of which is the *commercial* advertisement or promotion of a *commercial* product or service …" Fundraising, (i.e., soliciting donations in support of nonprofit organizations and programs) is most certainly not "commercial" nor does it involve *sales* of products or services.

However, there are commonplace fundraising practices that do involve exchanges of products or services, though not in a commercial context. Many nonprofit organizations choose to conduct fundraising campaigns that involve the *incidental* provision of products or services, such as premiums or various membership benefits, as incentives for donations. Such campaigns, commonly conducted by mail, may also be conducted by email.

The Telemarketing Sales Rule provided a previous platform for this issue and, we think, a blueprint for its resolution. In that instance, the Commission acceded to the urging of the fundraising community by issuing an opinion letter (to Lewis J. Paper, December 15, 1995), attached. This letter clarified the Commission's intent to interpret that Rule so that it "… imposes no restrictions on the legitimate fundraising activities of nonprofit organizations." We think the Commission should offer the same assurance here.

We suggest the following interpretive language (paraphrasing that of the Commission's letter opinion, referenced above):

> *only if products or services offered in an email communication as an inducement for the consumer's payment have an actual or claimed value equal to or greater than the amount of the donor's payment, will such an email be deemed "commercial"*

As the Commission observed then, this will effectively segregate legitimate fundraising while still permitting the unprotected activity to be categorized as "commercial."[1]

We respectfully ask the Commission to create the same result for nonprofit email and the CAN-SPAM Act and to declare product or service-related email fundraising outside the Act. This is consistent with a fair reading of congressional intent and with the established policy of the Commission.

Thank you for your consideration.

Sincerely,

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1. We note here that there is much nonprofit quid quo pro activity that is not fundraising but neither is it "commercial," or so we believe. That is, nonprofits legitimately and frequently sell things. They sell tickets to performances, charge admissions to attractions of all kinds, bill for medical services, and so forth. We believe that "substantially related" (see generally, Internal Revenue Code, sec. 513(a)) sales of goods or services are not "commercial" and therefore also not within the ambit of the CAN-SPAM Act. But, here we neither seek a blanket exemption for nonprofit activity nor a further exploration of the interplay between CAN-SPAM and principles embedded in the IRC.