

Sender's Direct Telephone: (703) 848-7588  
Sender's E-mail Address: gdelta@deltalaw.net

September 23, 2004

Office of the Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Room H-159  
Washington, DC 20580

Re: Incentive Federation, Inc./CAN-SPAM Act Rulemaking  
Project No. R411008/Definition and Implementation of the  
CAN-SPAM Act as Set Forth in Sections 3(2)(c) and 3(17)(B)

Dear Sir or Madam:

The Federal Trade Commission ("FTC") has sought public comment on proposed rules regarding commercial electronic mail messages. The CAN-SPAM Act of 2003 (the "Act"), which took effect January 1, 2004, required the FTC to issue regulations "defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message." **Because the Act applies to a commercial electronic mail message, i.e., "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service...," the FTC published a notice in the Federal Register on August 13, 2004 soliciting comments on proposed rules regarding the scope of the term "primary purpose."** In its notice in the Federal Register, the FTC introduced proposed criteria to facilitate the determination of when an e-mail message has a primary purpose that is commercial, and sought comments in response to this proposal.

The Incentive Federation, Inc. (the "Federation"), through its undersigned counsel, hereby files this comment letter that asks the FTC to clarify the applicability of the definition of what constitutes a "commercial electronic mail message" ("commercial e-mail") with respect to non-profit, tax-exempt organizations under Section 501(a) of the Internal Revenue Code of 1986, as amended. The Federation respectfully requests that the FTC expressly provide that when a tax-exempt organization sends an e-mail message that is related to one of its tax-exempt purposes, that such e-mail message not be considered commercial and that it not be subject to regulation under the Act.

The Federation is a trade association that is exempt from income tax under Section 501(c)(6) of the Internal Revenue Code. Its members consist of other trade associations and some of the most prominent corporations in the United States. The Federation's address is:

George Delta, Esq.  
Legal Counsel  
Incentive Federation, Inc.  
733 15<sup>th</sup> Street, NW, Suite 700  
Washington, DC 20005

The Act defines commercial e-mail as “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service....” The Act’s definition of commercial e-mail is thus intended to apply only to activity that primarily furthers the commercial efforts of organizations that operate for profit. The literal language of the Act makes it clear that Congress did not intend to have the Act’s provisions apply to e-mail messages sent by tax-exempt organizations, as long as the e-mail is consistent with their tax-exempt purpose(s). Moreover, the Federation requests that the FTC incorporate in its final regulations language that makes it clear that e-mail that is transmitted by a tax-exempt organization to a member or a donor is not subject to the Act, regardless whether such e-mail message has any commercial content. The Federation maintains that any e-mail messages sent by a tax-exempt organization to a member or a donor would meet the definition of a “transactional or relationship message” as defined in Section 3(17) of the Act.

The FTC’s regulations under the Act should specifically address the reach of the Act relative to non-profit organizations. If the definition of commercial e-mail were expanded to apply in the same manner to e-mail messages that non-profit organizations send as it does to e-mail sent by for-profit entities, it would limit, harm, and obstruct the valuable work that non-profit organizations perform. There is no basis or justification in the Act, and Congress did not intend its provisions to be used to limit the effectiveness of trade associations, professional societies, chambers of commerce, unions, advocacy groups, social welfare organizations, charitable, educational, scientific organizations, churches, and other religious groups. Indeed, regulating or otherwise limiting the speech (e-mail messages) of some of these organizations could have serious constitutional implications that were not intended by Congress.

In the past, all tax-exempt organizations communicated regularly with their various constituents by regular mail and they often do so now by e-mail. These constituencies include members, donors, volunteers, and others who desire to receive communications from the tax-exempt organizations. Tax-exempt organizations are concerned that the Act might be applied to e-mail messages that they send and urge the FTC to clarify that “commercial electronic mail messages” do not include e-mail from tax-exempt organizations, provided that the e-mail is related to one of the organization’s tax-exempt purposes. The FTC’s final regulations implementing the Act should clearly distinguish between e-mail messages from a tax-exempt organization and those from a for-profit entity.

The Act regulates “commercial electronic mail messages,” which it defines as “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service....” Thus, the language of the Act is aimed specifically at for-profit entities and their commercial businesses. The Act provides no basis for concluding that Congress intended to regulate or limit the e-mail messages of tax-exempt organizations, provided that such messages are consistent with the tax-exempt purpose(s) of the organizations. The FTC can and should clarify that only *commercial* e-mail messages or e-mail that promotes or advertises a *commercial* product can be regulated under the Act. Congress did not intend to regulate, and the FTC’s regulations should clarify that the Act does not regulate, e-mail messages promoting a trade association’s annual meeting and conference, e-mail messages promoting a trade association’s publications, and other

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similar messages that are consistent with a trade association's (or other tax-exempt organization's) tax-exempt purpose(s).

As further evidence that the Act should not be used to regulate or limit e-mail messages that are consistent with the tax-exempt purpose(s) of non-profit organizations, it is worth noting that federal and state laws governing non-profit organizations differ from those laws that govern for-profit entities. Each state has a separate section in its corporation law to govern tax-exempt organizations, and the Internal Revenue Code contains separate provisions that govern their tax treatment. For example, the Internal Revenue Code contains a completely separate statutory scheme to tax the commercial activities of tax-exempt organizations. When a tax-exempt organization conducts business activities *that are not substantially related* to the purposes for which the organization received its tax exemption, these commercial activities are subject to the unrelated business income tax (UBIT). Thus, tax-exempt organizations pay the UBIT when they engage in activities that are not consistent with or substantially related to their tax-exempt purpose. Under the circumstances, the FTC should also clarify that the e-mail messages of tax-exempt organizations are not regulated by the Act as long as they are related to the tax-exempt purpose of the organization. This result would be sensible as it would not discourage tax-exempt organizations from pursuing their tax-exempt purpose through the use of e-mail.

In conclusion, the Federation urges the FTC to clarify that the term "commercial electronic messages" is aimed at the commercial activities of for-profit businesses. The regulations should make it clear that e-mail messages from a tax-exempt organization are not governed by the Act as long as they are related to or further the organization's tax-exempt purpose(s).

If you have any questions about our comments to the proposed rules, or if we can be of any assistance to you in formulating the rules, we would be glad to participate in any way possible.

Very truly yours,

INCENTIVE FEDERATION, INC.

By: \_\_\_\_\_  
George B. Delta, Counsel

bcc: Howard Henry  
Steven Slagle  
Karen Renk