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November 24, 2003

VIA FACSIMILE

The Honorable Bill Frist
Senate Majority Leader
United States Senate
Washington, D.C. 20510

The Honorable Thomas Daschle
Senate Minority Leader
United States Senate
Washington, D.C. 20510

Re: S. 877, the "CAN-SPAM Act of 2003"

Dear Senators Frist and Daschle:

On behalf of the American Bar Association ("ABA"), I write to express our support for those provisions contained in the House-passed version of S. 877, the "CAN-SPAM Act of 2003," that would prohibit the sending of false, misleading, predatory or abusive commercial e-mail messages and that would create a single, national, uniform standard for the regulation of other commercial e-mail that is not otherwise prohibited. While the ABA supports these key provisions, it has concerns over the unintended consequences that the bill may have on nonprofit organizations and the language contained in Section 6(a) of S. 877 that would impose on law-abiding entities a duty to prevent third parties from promoting the entities' products or services in an improper way.

As the largest association of attorneys in the United States with over 400,000 members nationwide, the ABA has a strong interest in working with Congress and the relevant federal agencies to ensure that the law governing electronic commerce is as effective as possible. Towards that end, while the ABA believes that new federal legislation and regulations to curb improper commercial e-mails or "spam" are appropriate and desirable, 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 for your reference is a copy of the new policy adopted by the ABA Board of Governors on November 15, 2003, which succinctly states the ABA's position on these matters.

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The American Bar Association supports the provisions in S. 877 that would prohibit the sending of spam that is false, misleading, predatory or abusive. In addition, the ABA supports the provisions in the legislation that would require all other commercial e-mail messages to contain a functioning “opt out” mechanism, as well as those provisions creating strict civil and criminal penalties for specified violations. These and other related provisions, taken together, are a reasonable and measured response to the problem of unwanted spam. If enacted, these provisions would curb many of the abuses under the current system without adversely affecting the ability of law-abiding entities to advertise their products and services.

The ABA also strongly supports the federal preemption provisions in the legislation that would create a single, national, uniform standard for the regulation of commercial e-mail messages that are not false or misleading. To date, at least 36 states have adopted statutes regulating unsolicited commercial e-mail messages, and as a result, the ABA and other national organizations are forced to comply with a patchwork of 36 different legal standards when sending such e-mails. Although well-intentioned, this multitude of different—and sometimes conflicting—state statutes has become a burden on electronic commerce in the United States and has interfered with the ability of the ABA, and other associations and nonprofit organizations, to effectively communicate with its members throughout the country. By expressly preempting the existing patchwork of state statutes in this new and developing area of interstate commerce, the proposed federal legislation would create a single, national, uniform set of standards for the sending of unsolicited commercial e-mail messages that are not otherwise false or deceptive.

The American Bar Association also supports the provisions in Section 3(2) of the House-passed version of S. 877 that define the term “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...” (emphasis added). By limiting coverage of the new legislation to just those e-mail messages that are primarily commercial in nature—instead of to the much broader universe of e-mail messages that may contain just a passing reference to a commercial product or service—this definition helps to strike a more reasonable balance between the need to establish minimum standards for electronic commerce and the importance of not interfering with the ability of the ABA and other associations to communicate effectively with their members and the public.

Although the ABA supports the “primary purpose” language contained in the bill’s definition of “commercial electronic mail message,” we believe that it could be further improved by specifically exempting e-mail communications, whether commercial or informational, that are sent by associations and other nonprofit organizations to their current members. Although the legislation was intended to apply primarily to unsolicited communications related to for-profit transactions and solicitations, the ABA is concerned about the unintended consequences that the broad coverage of the legislation could have on the nonprofit community. In particular, the ABA is concerned that many e-mail communications sent by associations and other nonprofit

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organizations to their members, such as notices of membership, renewals, seminars and conferences, though not commercial in nature, could be construed to be “commercial” within the meaning of Section 3(2). As a result, many of these activities could inadvertently come under the coverage of the legislation, even though this clearly was not the drafters’ intent.

The ABA’s members have come to expect e-mail communications from the Association informing them of the availability of such useful and valued services as continuing legal education programs, books, and publications. In order to encourage the continued free flow of valuable information and services that the ABA and countless other associations provide to their members, the ABA urges you to add language to S. 877 specifically exempting from the bill all e-mail communications sent by associations and other tax-exempt nonprofit organizations to their current members.

In addition to our concerns regarding the coverage of tax-exempt nonprofit organizations, the ABA also has concerns regarding the language contained in Section 6(a) of House-passed version of S. 877 that would impose a new duty on the ABA and all other entities sending commercial e-mails to police the misconduct of third parties. In particular, Section 6(a) provides that even if an entity’s commercial e-mail message is proper in every way, the entity still could be punished if it is shown that the entity “knows or should have known” that a third party has promoted the lawful e-mail message in a false or misleading way and the entity “took no reasonable action to prevent the transmission or to detect the transmission and report it to the [Federal Trade] Commission.”

Although well-intentioned, the language of Section 6(a) could have unintended adverse consequences for many entities sending legitimate commercial e-mail messages. For example, if an association or other entity sends a lawful commercial e-mail to hundreds or thousands of its own members and one of those members then, unbeknownst to the entity, forwards the e-mail to another person in a false or deceptive way, the law-abiding entity could be punished. Although entities should be required to ensure that their commercial e-mail messages are not false or deceptive when they are initially sent, it is not reasonable to require those entities to police the subsequent actions of those who receive the e-mail. For this reason, the ABA urges Congress to amend Section 6(a) of the bill to clarify that original law-abiding senders of e-mail are not responsible when third parties improperly re-send the e-mail in a way that is unintended by the original senders.

Thank you for considering the views of the ABA on these important matters. If you would like more information regarding the ABA’s positions on these issues, please contact our legislative counsel for business and administrative law issues, Larson Frisby, at (202) 662-1098.

Sincerely,



Robert D. Evans

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cc: The Honorable John McCain
Chairman
Committee on Commerce, Science and Transportation
United States Senate
Washington, D.C. 20510

The Honorable Ernest F. Hollings
Ranking Democratic Member
Committee on Commerce, Science and Transportation
United States Senate
Washington, D.C. 20510

The Honorable Conrad Burns
Chairman
Subcommittee on Communications
Committee on Commerce, Science and Transportation
United States Senate
Washington, D.C. 20510

The Honorable W.J. Tauzin
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

**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.