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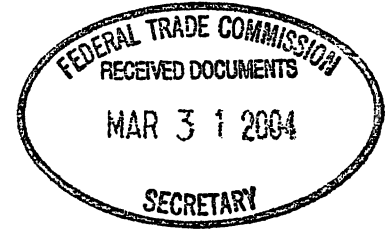


NATIONAL ASSOCIATION OF REALTORS®

The Voice For Real Estate®

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March 31, 2004

Federal Trade Commission
Office of the Secretary
Room 159-H (Annex D)
600 Pennsylvania Ave, N.W.
Washington, D.C. 20580

Re: "CAN-SPAM Act Rulemaking, Project No. R411008," 69 Federal Register 48, 11775-11782 (March 11, 2004)

Dear Sir or Madam:

On behalf of the NATIONAL ASSOCIATION OF REALTORS® (NAR), we appreciate this opportunity to comment on the Federal Trade Commission's advance proposal on topics related to §§3(2)(c), 3(17)(B), 5(c)(1), 5(c)(2), and 13 of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN SPAM Act). The NAR is America's largest trade-membership association representing 1 million members, including NAR's institutes, societies and councils, involved in all aspects of the residential and commercial real estate industries. As a trade-membership association, the NAR routinely uses e-mail to communicate with our members and therefore has a significant interest in the outcome of this rulemaking process.

In this advance rule proposal, the FTC is seeking comment on a number of issues related to the CAN SPAM Act. This comment letter will focus on the Do-Not-E-mail Registry. The NAR, however, will be submitting an additional comment letter addressing other aspects of the CAN SPAM Act on or before April 12, 2004.

The NAR strongly supports the Commission's efforts to control fraudulent, misleading and abusive unsolicited e-mails and e-mailing practices. However, we believe that such efforts must be carefully considered to balance the elimination of abusive spamming practices with the needs of small businesses to conduct legitimate business via e-mail without the imposition of significant compliance burdens. In this regard, we am extremely concerned that the establishment of a Do-Not-E-mail Registry ("Registry") will:

- Penalize trade associations, membership organizations, and non-profits engaging in legitimate e-mail communications with members.



- Pose a significant threat to our members' privacy that could occur should the security of a Do-Not-E-mail Registry be breached by spammers; and
- Be virtually impossible to enforce.

Do-Not-E-mail Registry Would Impede Communication with Members

As previously mentioned, NAR's membership consists of professionals who are involved in residential and commercial real estate as brokers, salespeople, property managers, appraisers, home inspectors, counselors, investors, developers, and others engaged in all aspects of the real estate industry. In addition to membership at the national level (NAR), our members belong to one of more than 1,600 local boards and 54 state and territory associations. NAR, our state associations and local boards all exist to serve and provide value to our collective members who expect the transmission of information in return for their membership dues.

Real estate and industry related professionals join NAR for a variety of reasons, many of which will be negatively affected by the establishment of a Registry. One of the significant reasons for joining NAR is the opportunity to take career development coursework and attend industry-related conventions, which are typically offered to members with a "preferred member" pricing structure (i.e. cost is set at a reduced price than that offered to non-members).

Furthermore, because the majority of our 1 million members are very small businesses, members look to NAR for information on new products and services to support their businesses, such as: office management solutions, real estate publications, insurance options, technology tools and risk management training material. The NAR commonly uses e-mail to inform members about all of the above, which we might add, are an important part of our service as an association and are expected as a benefit of membership.

If a Registry were implemented, compliance for a 1 million membership association such as NAR would be extremely burdensome and taxing on our financial resources. For example, NAR would first have to make a legal interpretation as to whether each and every e-mail is in fact commercial. Erring on the side of caution,¹ the smallest amount of commercial advertisement or promotion of product or service would require the NAR to check each of its million members' e-mail addresses against a Registry to determine whether or not an e-mail message to a member may be transmitted. And finally, prior to actually sending the e-mail, NAR would have to verify the e-mail addresses of our million members, given the risk of liability associated with inadvertently sending the e-mail message to the wrong e-mail address.

¹ The NAR recognizes that the FTC has open for comment an advance rule proposal regarding the interpretation of "primary purpose," which may mean that the e-mail's commercial advertisement or promotion is equal to or less important than any other single purpose of the e-mail. The NAR will be commenting separately on this issue. However, for the purposes of a discussion on a Registry without guidance on "primary purpose" one must assume the most restrictive interpretation – that *any* commercial advertisement or promotion is more important than any other single purpose and hence - would be covered by the provisions of the CAN SPAM Act.

If the FTC establishes a Do-Not-E-mail Registry, we believe that it will require the establishment of significant compliance measures that will result in some members not receiving notice of the benefits that their membership conveys. This inability to easily inform members of the benefits available to them as the result of their NAR membership will ultimately impact members' perceptions of the value of NAR's membership. For these reasons, the NAR believes that the establishment of a Do-Not-E-mail Registry will severely impede our communication with members and compromise the value of benefits associated with becoming a member of NAR, our state associations and local boards.

Do-Not-E-mail Registry Would Attract Security Attacks

In addition to our concerns with communication restrictions that would be imposed by a Do-Not-E-mail Registry, we are also concerned with the significant threat to our members' privacy that could occur should the security of a Do-Not-E-mail Registry be breached by spammers. As many computer security experts have indicated, the creation of an effective, secure and enforceable Do-Not-E-mail Registry is not as simple a task as creating a Do-Not-Call Registry and enforcement system. If such a registry were created based on the Do-Not-Call model, as some have advocated, it would mean putting valid e-mail addresses into the hands of the chronic spammers, who often operate outside the jurisdiction of the United States.

The NAR is also concerned that other Registry options being discussed, such as the FTC acting as an intermediary to scrub association or company e-mail lists, would actually increase directory harvest attacks (also known as dictionary attacks). For example, professional spammers currently utilize software to create millions of random e-mail addresses most of which vary only by one letter or number. Under the scenario where the FTC would act as a "scrubber," a dictionary attacker would simply submit their randomly created e-mail list (some fake and some valid) for scrubbing and receive back a list of addresses that could be used for e-mail solicitations – i.e. are not on the Do-Not-E-mail Registry. A simple comparison between the list submitted for scrubbing with the returned scrubbed list would put valid addresses on the Do-Not-E-mail Registry into the hands of dictionary attackers who typically resell lists to many other spammers.

If the FTC endeavors to establish a Do-Not-E-mail Registry, we believe much careful research and beta-testing is required before any Registry is implemented so that it not be a prime target for attacks by illegitimate spammers and unscrupulous computer hackers. This position is supported by a statement of Representative Dingell, also representing the views of Representative Tauzin, Chairman of the U.S. House Committee on Energy and Commerce, where he noted his expectation that, "the FTC should take care not to inadvertently adopt a do not e-mail registry (sic) that would facilitate the availability of working e-mail addresses to persons who might use them in violation of the act."²

² 150 Cong. Rec. E72 (daily ed. Jan. 28, 2004) (statement of Rep. Dingell).

Given the challenges of creating a safe, secure and effective system, a Registry will not be an inexpensive undertaking. Since development and maintenance costs will most likely be borne by the users of the Registry, we believe that a Do-Not-E-mail Registry would have a significant economic impact on our association and members by imposing significant compliance costs. These expenses would be layered on top of compliance costs imposed last year when our association and members were subjected to several new federal regulations (Do-Not-Call regulations, Do-Not-Fax regulations and CAN SPAM provisions). These newly imposed compliance measures, which have greatly impacted the ordinary course of communication with members and clients, have yet to be absorbed. The imposition of additional and significant Registry compliance obligations would be truly problematic for our organization.

Enforcement Will Be Difficult

The NAR believes that the likelihood of abuse associated with a Do-Not-E-mail Registry together with the cross-border scope of spamming practices warrant further consideration by the FTC and Congress as to just how effective a Registry would be. In recent testimony before the U.S. Senate Committee on Commerce, Science and Transportation, the FTC stated,

“[Spammers] easily hide their identity, forge the electronic path of their e-mail messages, or send their messages from anywhere in the world to anyone in the world. Tracking down a targeted spammer typically requires an unusually large commitment of staff time and resources, and rarely can it be known in advance whether the target’s operation is large enough or injurious enough to consumers to justify the resource commitment.”³

Furthermore, the FTC testified,

“Our law enforcement experience has taught that the path from a fraudulent spammer to a consumer’s in-box typically crosses *at least one international border and frequently several*. Thus, fraudulent spam exemplifies the growing problem of cross-border fraud. (emphasis added).⁴

The NAR wholeheartedly agrees with Federal Trade Commission Chairman Muris when he recently reiterated his position that it is doubtful the agency could effectively enforce a Do-Not-E-mail Registry. As the Chairman noted, the problem is tracking down spammers, many of which originate from overseas, use aliases or “conceal their identities by routing e-mail through hacked or unprotected computers.”⁵

³ *Unsolicited Commercial E-mail*: Hearing Before the Senate Committee on Commerce, Science and Transportation, 108th Cong. (May 21, 2003) (statement of The Honorable Mozelle W. Thompson, Commissioner, Federal Trade Commission).

⁴ *Id.*

⁵ Jennifer C. Kerr, *FTC Chairman Doubtful of Anti-Spam List*, Washington Post, March 12, 2004.

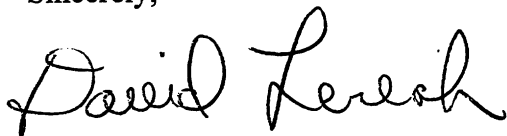
Conclusion

Technology experts report that 90 percent of spam received by Internet users in the U.S. is sent by a hard-core group of under 200 spam outfits, many of which are run by individuals with criminal records.⁶ Furthermore, spam analysts estimate that a professional spammer can send out 80 million e-mails a day and can expect one sale per million e-mails, at \$40 to \$50 a sale.⁷

As stated earlier, the NAR supports efforts to control fraudulent, misleading and abusive unsolicited e-mails and e-mailing practices. However, if the experts are correct and roughly 200 chronic spammers are responsible for 90 percent of spam traffic, we would respectfully question as to whether it wouldn't be better if government resources were spent on enforcement efforts targeting these entities that are already violating the CAN SPAM Act rather than imposing new compliance costs on those firms who are doing their best to comply with efforts to control unwanted e-mails? Today, these chronic spammers clear over a million dollars a month as a result of e-mail advertisements – rest assured, they will not comply with a Registry and they will make it very difficult to be found.

Once again, we urge you to closely consider whether the incognizable consumer benefits of a Do-Not-E-mail Registry and the potential risk to privacy of a central depository of legitimate e-mail addresses outweigh the onerous and costly compliance burdens on trade associations, membership organizations non-profits and their member/client bases.

Sincerely,



David A. Lereah
Senior Vice President and Chief Economist

⁶ <http://www.spamhaus.org/rokso/>

⁷ *Id.*