
April 20, 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:

The National Multi Housing Council and the National Apartment Association are pleased to submit comments in response to the Federal Trade Commission's (FTC) Advance Notice of Proposed Rulemaking on various topics related to the CAN-SPAM Act of 2003.

The National Multi Housing Council (NMHC) and the National Apartment Association (NAA) represent the nation's leading firms participating in the multifamily rental housing industry. Our combined memberships are engaged in all aspects of the apartment industry, including ownership, development, management, and finance. The National Multi Housing Council represents the principal officers of the apartment industry's largest and most prominent firms. The National Apartment Association is the largest national federation of state and local apartment associations. NAA is comprised of 164 affiliates and represents more than 30,000 professionals who own and manage more than 4.9 million apartments. NMHC and NAA jointly operate a federal legislative program and provide a unified voice for the private apartment industry.

The Commission is seeking comment on several areas of great interest to the combined NMHC/NAA membership. Our thoughts on each of those areas follow.

"Primary Purpose"

The CAN-SPAM Act of 2003 (the "Act") covers unsolicited electronic mail messages *"the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an internet website operated for a commercial purpose)."*

Electronic mail usage among NMHC/NAA members falls into two categories:

- 1) communications between the owners and operators of multifamily communities and residents/prospective residents, suppliers/vendors, and other consumers, and
- 2) communications between the associations and their respective memberships.

NMHC/NAA believes in any given electronic communication, the primary purpose can be determined by simply assessing the dominant content of the message.

The American apartment industry...working together for quality, accessible, affordable housing.

In the trade association environment, it is a common practice to include at the end of an otherwise informational message a brief notice or reminder of an upcoming meeting. For example, NMHC/NAA regularly send to our members electronic newsletters containing legislative and regulatory news, industry research, and operations information that might also detail an association-sponsored conference or publication. Clearly the dominant content and thus primary purpose of such an electronic message is to convey the noncommercial information and not to market the conference or publication.

Likewise, an apartment owner wishing to relay important property information to residents should be free to do so by e-mail without fear of running afoul of the rules simply because the apartment owner included at the bottom of the message information that may be construed as advertising a commercial product or service, such as a company logo or slogan.

We recommend the Commission adopt a primary purpose test that relies on the dominant content of the electronic message as a means to determine compliance obligations. It is important that the Commission create a bright line test for those messages that fall outside the scope of the Act.

Transactional or Relationship Messages

The CAN-SPAM Act defines five broad categories of messages as “transactional or relationship messages.” These messages are excluded from most of the Act’s substantive requirements and prohibitions. It appears that most of the types of electronic communications utilized by our memberships as described above meet the transactional or relationship definition in the Act. Specifically, the ongoing communications between a trade association and its members as well as between apartment owners/managers and their residents and/or vendors/suppliers should qualify under this definition.

While the other categories cover what many would believe to be common transaction or relationship scenarios, clearly missing from this list are messages sent in response to a consumer inquiry. It is crucial that the Commission recognize this category as a transactional or relationship message. In any given industry, messages sent via electronic mail are largely in response to consumer inquiries made through the internet, thus underscoring the need to include this as a separate category for exemption. Research shows that as many as 80 percent of consumers begin their search for an apartment on the Internet. Once properties are identified, consumers seek additional information by submitting online requests. Following the receipt of such an inquiry, an apartment provider follows up with a return e-mail or a telephone call. Because a consumer inquiry may not result in a completed transaction or meet the ongoing commercial relationship test, it may not fit the current definition under the law and must therefore be placed in a different definitional category. Otherwise, a company merely responding to a consumer inquiry could potentially be in violation of the law.

Ten Business Day Period for Processing Opt-Out Requests

The CAN-SPAM Act provides that senders of unsolicited commercial e-mail have ten (10) business days to process a recipient’s request to opt-out of receiving future e-mails. The Commission has the authority to modify this requirement to reflect a more reasonable time period. NMHC/NAA encourage our members to take measures to honor

opt-out requests as quickly as possible, but we believe that the strict 10-day requirement may be unreasonable..

The industry has recently been inundated with new communications-related compliance rules related to the use of telephone calls, facsimile machines, and now electronic mail. Each of these new rules includes a provision that empowers consumers to opt-out of receiving further communications. The Do-Not-Call rules have recently been amended to require calling lists to be scrubbed every 31 days. Since companies are already reconfiguring their compliance practices to accommodate the 31-day scrub for telephone calls, it seems only reasonable that the FTC adopt a similar timing requirement for electronic mail messages. The FTC can always reduce the time period at a later date if it finds that 31 days is too long.

“Sender” Defined

The Commission also seeks comment on who should be considered the “sender” of a particular electronic mail message under the terms of the Act. NMHC/NAA believes the Commission should define the sender to be the initiator of the message. If an entity sends an electronic message that includes the promotion of a third party, compliance with the requirements of this Act should fall to the initiator of the message and not the third party who may be unaware of that particular communication. It would be overly burdensome and unfair to consider several entities simultaneously as the senders of a message. For the same reasons, the sender should not have to honor the opt-out list of the third party entities that are advertised in the sender’s message.

Conclusion

As the FTC further clarifies the rules that regulate commercial e-mail—often the most efficient and cost-effective means of communication—it is imperative that the Commission does so in a manner that will not stifle legitimate business communications. The National Multi Housing Council and National Apartment Association urge you to: 1) clearly define “primary purpose” so that associations and businesses will have no doubt as to what electronic messages are covered under the Act as unsolicited commercial e-mails, 2) clearly exempt from the Act’s coverage electronic messages sent in response to a consumer’s inquiry, and 3) extend the period by which businesses must process consumer opt-out requests.

NMHC/NAA thank you for the opportunity to comment on these provisions of the CAN-SPAM Act and we look forward to offering additional thoughts on other aspects of the Act under your review.

Sincerely,



Jeanne McGlynn Delgado
Vice President, Property Management