

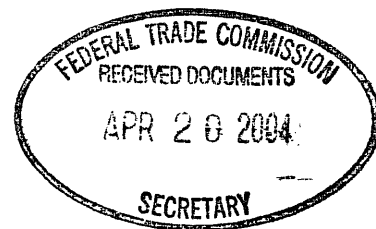


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Kimberly Hunter-Turner  
Vice President  
Federal Government Relations

**HAND DELIVERED**

**April 20, 2004**



***Before the***  
**Federal Trade Commission**

**CAN-SPAM Act Rulemaking**

**Project No. R411008**

**Comments of**

**Cendant Corporation**

Cendant Corporation ("Cendant") appreciates the opportunity to submit these comments on the Federal Trade Commission's ("FTC" or "Commission") Advance Notice of Proposed Rulemaking implementing the Controlling Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act" or "the Act") which became effective January 1, 2004 and imposes a series of new requirements on the manner in which commercial electronic mail messages may be sent.

#### **CENDANT OVERVIEW**

Cendant Corporation is a diversified global provider of business and consumer services within the hospitality, real estate, vehicle, financial and travel sectors.

Cendant's hospitality division is the world's leading franchisor of hotels through ownership of brand names that include Ramada®, Days Inn®, Howard Johnson®, Travelodge®, Knights Inn®, Super 8 Motel®, Wingate Inn®, Villager Lodge/Premier® and AmeriHost®, a leading operator of branded time share resorts (Fairfield®) and the world's leading time share exchange service (RCI®).

Cendant is also the leader in franchised residential real estate brokerage operations through its CENTURY 21®, Coldwell Banker®, Coldwell Banker Commercial®, Sotheby's International Realty® and ERA® brands, a leading residential mortgage company (Cendant Mortgage) and provider of employee relocation services (Cendant Mobility).

In vehicle services, Cendant owns and franchises the AVIS® and Budget® brands, some of the nation's largest car rental systems. Other Cendant subsidiaries provide vehicle fleet management services (PHH Arval and Wright Express).

The financial services division helps financial institutions enhance existing consumer products. Trilegiant Corporation Cendant is the premier membership-based provider of travel, shopping, health, entertainment, and consumer protection services. This division also includes JacksonHewitt, Inc., the second largest tax preparation franchisor.

Cendant provides services to the travel industry through its Galileo®, Wizcom reservations and global travel ticket distribution services as well as its on-line (Lodging.com and CheapTickets.com) and off-line (Cendant and Cheap Tickets) travel agencies.

As a general matter, Cendant supports the recent effort of the FTC to investigate and eliminate unsolicited commercial email in the industry. We actively support the CAN-SPAM Act in our business practices today. However, we have concerns regarding certain revisions proposed by the Commission in this proceeding. Cendant emphasizes that the proposed changes will have a significant impact on the costs of businesses that rely upon email communications in order to provide consumers with the goods and services that they desire. Cendant offers the following specific comments for consideration by the Commission.

#### **I. ESTABLISHED BUSINESS RELATIONSHIP EXCEPTION**

Many companies frequently use email to advise their existing customers of information that is desired by the customer. In response to customer request, Cheap Tickets has a practice of routinely emailing customers to alert them of new travel specials that Cheap Tickets knows would be of interest to the customer. In this example both the business and the consumer benefit. It is the relationship between the parties that provides the knowledge for the business entity to know its customers' needs and buying practices. This relationship, coupled with the ability to directly contact the customer through email to inform him of opportunities, creates a valued service to the customer while helping the business retain a satisfied customer. Without the ability to contact the customer the value of the relationship is lost. The proposed rule needs to provide an exemption to permit direct contact with existing customers to continue so long as they are permitted to opt out of continuing the email relationship.

The presence of an established business relationship was determined to be an acceptable criterion for granting exceptions from compliance with the National Do Not Call Registry. A similar exemption relative to a National Do Not Email Registry would be imperative to achieve the necessary balance between continued economic viability of senders and effective consumer protection. Accordingly, Cendant strongly supports the inclusion of an established business relationship exception if the intended recipient has not elected to opt-out of receiving commercial email from a sender. The characteristics an established business relationship should be consistent with the National Do Not Call Registry. Emails can be sent within 18 months after the end of a sale or transaction and within 3 months after a consumer inquiry. These emails can be sent even if the person's

email address is on the registry list. However, if a person requests to be placed on a company specific list, the business must do so and refrain from emailing them again.

## **II. TRANSACTIONAL OR RELATIONSHIP MESSAGES**

### **a. Cross-marketing Email Advertisements are Transactional Messages.**

The CAN-SPAM Act makes a distinction between “transactional or relationship messages” and “commercial electronic mail messages”. A “commercial electronic message” is defined as any electronic mail message wherein the primary purpose is the commercial advertisement or promotion of a commercial product or service. Commercial electronic messages are subject to the rules and regulations of the Act. A “transactional or relationship message” is defined as an email message that has the primary purpose of facilitating, completing or confirming a transaction. Transactional or relationship messages are not subject to the rules and regulations of the CAN-SPAM Act.

At Cendant, we concentrate on growing our core businesses by providing highly focused services to franchisees, licensees, affinity partners, consumers and corporate clients. Our ability to continue growth is based on our efforts to deliver superior marketing. In cross- marketing Cendant provides over 60 million members and customers access to travel, auto, residential and commercial real estate functions and other services. Cross- marketing helps define and unify our businesses and it allows Cendant to be custom marketers, designing each customer contact and offering in a way that serves the customer best.

For example, Avis car rentals are cross-marketed to customers who make hotel reservations. The communication is presented in the hotel confirmation email. At Resort Condominiums International (RCI), hotel rooms are cross-marketed whenever RCI members need them either before or after their timeshare stay. Budget car rentals are also cross-marketed through Cheap Ticket reservations/communications with customers. Cendant Mortgage may email interest rate sheets to an ERA broker with a promotion of a new mortgage product or service for a prospective home buyer located in the header, footer or body of the email.

One of Cendant’s primary concerns with the law is that it will dramatically limit our cross-marketing philosophy and current business practices. Cendant urges the Commission to make clear that cross-marketing within a family of businesses through email (confirmation, broker rate sheets etc.), is considered transactional in nature and therefore, excluded from the Act’s regulations.

**b. Clarification that Email Communication Containing Advertisements Exchanged Within the Real Estate Franchise Network Are Exempt.**

Cendant seeks specific clarification that real estate franchise licensing agreements, which are signed by the franchisor and franchisee satisfies the subsequent affirmative consent requirement found in section 5 (a)(4)(B) of the Act. All real estate franchise businesses are individually owned and operated under franchise agreements with Cendant subsidiaries. One of the keys to Cendant's success is the long-term success of our franchisees. It is customary business practice for the franchisor to send process improvement emails that can be construed as solicitations/advertisements to their franchisees. These emails give advice and assistance on a range of issues from business management, sales, accounting, tax and law to investment, risk management, valuation and market strategies. The primary purpose of most emails is to timely communicate and offer business seminars to our franchisees. In addition, Cendant seeks clarification from the Commission that although the franchisor has no direct contractual relationship with the sales associate, the franchisor has a vested interest to help the sales associate become educated in industry standards, more productive and more profitable. For example, the typical franchisor to sales associate email consists of educational seminar offerings on how to become a certified specialist, current training materials and program offerings that the sales associate could download or attend, and guidance on how to grow their business. Email is the most timely and efficient way to communicate these offerings to the hundreds of thousands of sales associates that work under our brand. Consent should not be required when it is a franchisor to sales associate business improvement communication.

With respect to franchise emails, generally, the commentary accompanying the CAN-SPAM Act does not set forth any facts evidencing abuses of any kind with respect to franchise emails. Absent any evidence of abuses, there does not appear to be any basis for subjecting emails between franchisor, franchisee, broker and sales agents to the restrictions of the "do- not email" list.

**III. SAFE HARBOR**

The Commission has been consistently cognizant of inadvertent violations resulting from errors by entities that make a good faith effort to comply with the laws and regulations under its charge. Cendant asks that the Commission equally recognize the chance for error in complying with the CAN-SPAM Act and its attendant regulations. This would be of particular importance under the auspices of a National Do Not Email Registry.

While the mechanism for such a registry is uncertain, it will surely be more involved than the National Do Not Call Registry. The latter handles telephone numbers for which there is a definable number of combinations available. With email addresses, on the other hand, there are an infinite number of combinations. Many people have

multiple email addresses and change them frequently. The chance for error increases exponentially. A safe harbor for inadvertent violations would be reasonable and appropriate.

#### **IV. MULTIPLE SENDERS**

There is a considerable question about the application of several entities or persons simultaneously being considered the "sender" of a particular electronic mail message under the terms of the Act.

Companies should not be responsible for the email sent from a third party even if they advertise with the third party. It would be almost impossible to control which of the third party's subscribers opted-out of receiving email from a particular company. It would unduly burden businesses by requiring them to cross-reference their opt-out list with third party advertising channels. In addition, permitting third parties, such as associations or other groups to have access to company specific do not email lists has the potential of inviting unfair competition. Most membership associations or groups also market products and services to their members. For instance once a consumer becomes a member of the association or group, the association or group might have an incentive to add that consumer's email to the national "do-not-email" list thereby preventing the consumer from receiving competing offers in the future.

#### **V. DUPLICATIVE REGULATION**

Establishment of a "National Do Not Email Registry" would result in a redundant system of regulation. The registry would add no significant benefit to the disclosure and opt-out requirements provided by Congress under the CAN-SPAM Act. Further, the ability of Internet Service Providers ("ISP's") to bring actions fortifies consumer protections under the Act and dispels the necessity of any additional regulatory safeguard.

Congress established the necessary requisites for the proper disclosure of a "commercial electronic mail message" under the Act. Conceivably, a recipient of a commercial email will not even need to open the message. If the subject line is consistent and accurate, as suggested in the proposal (ADV. in the subject line), the recipient could decide in a split-second whether to open or discard the message. The recipient can delete the email or know that the message is one the recipient may wish to opt out from receiving in the future.

This balanced approach affords the legitimate seller one opportunity to lawfully advertise its product or service. At the same time, the recipient can easily assert his or

her choice not to receive any future email from the seller.<sup>1</sup> Accordingly, the current provisions of the Act provide adequate protection without the addition of a “do- not email” registry.

## VI. ENFORCEMENT UNWORKABLE

Cendant supports the Commission’s efforts to stop unscrupulous senders of SPAM. However, the enforcement of a national “do- not- email” registry, while well intentioned may prove to have an inadvertent chilling effect on e-commerce by hindering the ability of legitimate businesses to communicate with consumers and impose unnecessary costs on companies that conduct business using email.

The spam problem is a result of criminal spammers who do not obey the law and who take steps to avoid detection and anti-spam measures. These bad actors are systematically breaking every provision of this new law and the numerous state laws. They are unlikely to comply with a “do-not-e-mail” registry. In most cases, it is very difficult, if not impossible, to find spammers. For this reason, it would be difficult to identify and take enforcement actions against spammers who violate a “do-not-e-mail” registry. As a result, only companies intending to comply with the registry requirement will be affected and incur additional economic and regulatory constraints.

Cendant appreciates the opportunity to comment on the FTC’s proposal. Cendant remains committed to working cooperatively with the FTC in finding feasible solutions to the concerns set forth herein.

Thank you for considering our views,

Respectfully submitted,

Handwritten signature of Kimberly Hunter-Turner in cursive script.

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<sup>1</sup> If the Commission adopts a consistent identifier to appear in the subject line such as “ADV”, Internet Service Providers may use that particular identifier as a tag to automatically block commercial electronic messages which Cendant would be opposed.