



NATIONAL ASSOCIATION OF REALTORS®

The Voice For Real Estate®

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

Re: "FACT Act Affiliate Marketing Rule, Matter No. R411006" 69 Federal Register 114, 33324-33341 (June 15, 2004)

Dear Sir or Madam:

The NATIONAL ASSOCIATION OF REALTORS® ("NAR") appreciates the opportunity to provide comments to the Federal Trade Commission ("Commission") on the proposed rule as required by the Fair and Accurate Credit Transactions Act of 2003 (FACT Act) which amends the Fair Credit Reporting Act (FCRA) by adding a new provision that provides for consumer notice and an opportunity to prohibit affiliates from using certain information to make or send marketing solicitations to the consumer.

NAR represents approximately 1,000,000 real estate professionals engaged in all aspects of the residential and commercial real estate business including mortgage lenders and real estate settlement services, as well as some 1500 state and local associations of REALTORS®, and therefore has a significant interest in the outcome of this rulemaking process.

REALTORS® Committed to Consumer Privacy

Trust is foundation of the relationship between a REALTOR® and a consumer. And this relationship is the livelihood of REALTORS®. Consumers must trust that REALTORS® to whom they provide personal or financial information will protect what is confidential and use the balance of information in an appropriate fashion that is consistent with promoting their best interest. To cement this trust, REALTORS® value the privacy of their clients and are committed to protecting their personal financial information.

There currently exist protections for consumer confidential information with which real estate licensees must comply as the result of the fiduciary responsibilities imposed by most state real estate laws. These fiduciary responsibilities are further reinforced for NAR's REALTOR® members by the NATIONAL ASSOCIATION OF REALTORS® Code of Ethics and Standards

of Practice (Code of Ethics), which reiterates these responsibilities to protect consumer information.

For more than ninety years, the NAR's Code of Ethics has governed the professional activities of all REALTORS[®] including protecting consumer information. Standard of Practice 1-9 of the Code of Ethics states,

The obligation of REALTORS[®] to preserve confidential information (as defined by state law) provided by their clients in the course of any agency relationship or non-agency relationship recognized by law continues after termination of agency relationships or any non-agency relationships recognized by law. REALTORS[®] shall not knowingly, during or following the termination of professional relationships with their clients:

1. reveal confidential information of clients; or
2. use confidential information of clients to the disadvantage of clients; or
3. use confidential information of clients for the REALTORS[®]'s advantage or the advantage of third parties unless:
 - a. clients consent after full disclosure; or
 - b. REALTORS[®] are required by court order; or
 - c. it is the intention of a client to commit a crime and the information is necessary to prevent the crime; or
 - d. it is necessary to defend a REALTOR[®] or the REALTORS[®]'s employees or associates against an accusation of wrongful conduct.

Information concerning latent material defects is not considered confidential information under this Code of Ethics. (Adopted 1/93, Amended 1/01)

In this regard, REALTORS[®] are committed to protecting the confidentiality and privacy of their clients throughout the real estate transaction.

Exceptions Triggered by Oral, Electronic, or Written Communication

The NAR applauds the Commission for using its rulemaking discretion to clarify that the statutory exception for information used in response to a communication initiated by the consumer may be triggered by an "oral, electronic, or written communication." We also support the Commission's similar clarification that the statutory exception where the information is used to make solicitations authorized is requested by the consumer may be triggered by an "oral, electronic, or written communication."

The NAR believes it is imperative that oral communication be allowed as an acceptable form of consumer consent. Without such oral consent, the imposition of only written or electronic communication would have costly unintended consequences that are disproportionate to good it seeks to address and would have the unintended consequence of negatively impacting the very consumers that the measure is intended to protect. This would be the case, for example, in the situation where quick action is necessary if a consumer is going to be able to benefit from an affiliate's services within a very short timeframe. Furthermore, Congress has, on a number of occasions, considered defining consent as only written communication and decided against that high threshold.

One such example is the Telephone Consumer Protection Act (TCPA). The House Report accompanying the TCPA states that Congress "did not see a compelling need for [] consent to be in written form. Requiring written consent would, in the Committee's view, unreasonably restrict the subscriber's rights to accept solicitations of interest and unfairly expose businesses to unwarranted risk from accepting permissions or invitations from subscribers."¹

The Senate TCPA Report is equally on point. The Senate bill as introduced contained the phrase "express written consent" in the context of telemarketing, but dropping the requirement that consent be written was one of three changes the Senate Committee made before favorably reporting the bill. The Committee justified its decision to drop the written requirement because the Committee found that mandatory written consent was *ill-suited to the interests of consumers and sellers*.²

As the Commission knows there currently exist outstanding issues with the Federal Communications Commission (FCC) relating to their reversal of a longstanding interpretation of the agency's TCPA rules allowing for oral consent to receive fax solicitations. This has been a very contentious issue between the FCC and over 100 industry and trade associations representing millions of small businesses negatively impacted by virtue of the unintended consequences of the FCC's about face on allowing for oral consent. The Small Business Administration supports the allowance of oral communication as evinced of consent and now Congress is intervening to amend the TCPA to allow for oral consent for fax solicitations. Thus, we believe that Congress and other regulatory agencies would approve of your including oral communication as an acceptable form of consumer consent in the context of the exceptions in proposed paragraphs (c) 4 – for information used in making solicitations in response to communication initiated by the consumer; and (c) 5 – for information used in making solicitations affirmatively authorized or requested by the consumer.

¹ H.R. Rep 102-317, at 13 (1991).

² S. Rep. 102-178, at 5 (1991).

While we support the Commission's current exception trigger language, we respectfully request the Commission to make two points of clarification. Our concern relating to the "oral, electronic, or written communication" trigger language is specifically with the term "electronic." We advocate that the Commission clarify in its final rule that "electronic" means e-mail communication and fax transmission. If the Commission only has e-mail communication in mind when using the term "electronic" in the rule proposal, the NAR respectfully requests the Commission to include fax transmission in the trigger language, e.g. ". . . may be triggered by an oral, electronic, facsimile or written communication." The inclusion of facsimile communication would be extremely helpful to ensure the broadest allowances for compliance which most certainly works to serve the public interest.

Regulatory Burden

One concern the NAR has in connection with this proposed rule is the extent which Congress has mandated the imposition of yet another layer of regulatory burdens on our members. The NAR recognizes that this proposed rule is limited to the sharing of certain consumer information, i.e. eligibility information, between affiliates for the purpose of making or sending marketing solicitations for its products or services. We also understand that the Gramm-Leach-Bliley Act and the Fair Credit Reporting Act (precursors to this proposed rule) address the general issue of sharing of consumer information with or among affiliates. Because the two-opt outs are distinct statutory provisions, we are bound to comply with both despite the overlap and redundancy with yet another paperwork and regulatory burden.

Nevertheless, the we would be remiss if our comment letter did not draw to your attention that fact that critics of the mortgage brokerage, real estate sales and real estate settlement process often argue that the process is more difficult because of the voluminous number of forms and mounds of paper, which diminishes the meaning of effectiveness of disclosures and opt-outs to consumers. We understand the Commission does not have the regulatory discretion to exempt real estate professionals from the scope of this rule proposal. However, we feel it is important that the Commission understand our members' and consumer concerns that regulations adding to the existing paperwork and compliance requirements in this area, places an undue and costly burden on an industry composed of primarily small businesses.

Implementation Period

The FACT Act requires that regulations implementing the affiliate marketing provision be issued in final form no later than September 4, 2004 (9 months after the date of enactment). The FACT Act further provides that the regulations "become effective no later than 6 months after the date on which they are issued in final form."

The NAR recognizes that the Commission does not have the authority to establish an effective date beyond 6 months once the rule is final. However, it appears there is some regulatory

flexibility regarding the mandatory compliance date. In this regard, the NAR proposes a 12 month mandatory compliance date beyond the statutorily mandated effective date, given the needs to educate affected firms and participants as to their new duties, to put in place the necessary compliance procedures and to train the appropriate persons. This timeframe is also appropriate given that small businesses impacted by this new requirement will also be dealing with a multitude of additional new compliance requirements for the Do-Not-Call, Do-Not-E-mail and, potentially, unsolicited fax requirements in the early months of 2005.

Conclusion

The NAR appreciates the goal and intent of the FACT Act's affiliate marketing provision. We also appreciate the effort in which the Commission has attempted to workable solutions to comply with the FACT Act's statutory requirements.

Specifically, we are encouraged by the Commission's inclusion of oral communication as an acceptable form of consumer consent in the context of the exceptions in proposed paragraphs (c) 4 – for information used in making solicitations in response to communication initiated by the consumer; and (c) 5 – for information used in making solicitations affirmatively authorized or requested by the consumer. We strongly advocate that this approach will be included in the final affiliate marketing rule.

Furthermore, we reiterate our request that the Commission include facsimile communication in the exception trigger language – “oral, electronic, or written communication” – appearing in paragraphs (c)4 and (c)5 of the rule proposal.

The NATIONAL ASSOCIATION OF REALTORS[®] appreciates your attention to our comment letter and stands ready to work with the Commission on this and other consumer privacy-related issues.

Sincerely,



Joe Ventrone
Managing Director
Regulatory and Industry Relations Department