

September 10, 2004

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

Re: "CAN-SPAM Act Rulemaking, Project No. R411008," 69 *Federal Register* 156, 50091-50107 (August 13, 2004)

Dear Sir or Madam:

The NATIONAL ASSOCIATION OF REALTORS® ("NAR") appreciates the opportunity to provide comments to the Federal Trade Commission on the proposed criteria for determining the "primary purpose" of an e-mail message as addressed in the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN SPAM Act). NAR represents approximately 1,000,000 real estate professionals engaged in all aspects of the residential and commercial real estate business, as well as some 1500 state and local associations of REALTORS®. Both NAR and its members have a significant interest in the outcome of this proposed rulemaking.

NAR focuses these comments on the proposed criteria for dual-purpose messages that contain both commercial content and content that is neither commercial nor transactional/relationship. We address concerns regarding the subjectivity of the factors the FTC identified as relevant to an interpretation that the primary purpose of an e-mail message is commercial ("factors") and request the Commission to provide more detailed guidance to facilitate compliance with the CAN SPAM Act. NAR also requests the FTC to revisit its discretionary authority to modify the definition of the term "transactional or relationship message" under the Act to accommodate e-mail communication between trade associations and its members and other unique professional and consumer relationship circumstances.

• **Factors Illustrative of a Reasonable Interpretation that the Primary Purpose is Commercial**

Proposed §316.3 sets forth three criteria for determining the "primary purpose" of an e-mail message, which are all based on a reasonable interpretation standard. The Commission specifically states in proposed §316.3(a)(3)(ii),

Factors illustrative of those relevant to this interpretation include the placement of content that advertises or promotes a product or service at or near the beginning of the body of the message; the proportion of the message dedicated to such content; and how color, graphics, type size, and style are

used to highlight commercial content.

NAR argues that, while these factors are appropriate for considering, they still lack clear guidance to assist organizations and businesses with developing CAN SPAM compliance guidelines. As we have detailed below, what may seem self evident to the drafters of the proposed §316.3(a)(3)(ii) is not entirely evident to the layman who wants nothing more than to comply with the Commission's final rule. In this regard, NAR respectfully requests further objective clarification as to the factors identified as illustrative of a reasonable interpretation that the primary purpose of an e-mail message is to promote a product or service.

[Commercial content] at or near the beginning of the body of the message. Today's e-mail messages are not the straight text with special formatting features such as bold and underline that were the norm just a few years ago. In fact, it is now commonplace to create an e-mail message that is formatted like a webpage using similar multi-layered commercial and non-commercial text. Sidebars that contain commercial and non-commercial content and span the full length of the e-mail message are regularly used in web-like e-newsletter messages. One such example would be a "calendar of events" sidebar which includes dates of congressional hearings, coalition meetings and an annual convention which requires a registration fee. We would ask the FTC to consider this example and provide clarification as to whether the entire sidebar would be considered "at or near the beginning of the body of the message" or would the Commission look at the position of only the commercial text within the sidebar to determine if it is "at or near the beginning of the body of the message."

The proportion of the message dedicated to [commercial] content. NAR recognizes the complex issues the FTC faced when considering a "proportion of content" standard as a "primary purpose" criterion in response to Commission's CAN SPAM ANPR questions. As noted in the current rule proposal, some commenters suggested a percentage proposal which would measure the amount of e-mail space or volume dedicated to commercial content. The Commission rejected such a "rigidly mechanical" proportional standard for determining the primary purpose of an e-mail message indicating, "[a] standard that, for example counts the lines of commercial versus noncommercial content is not responsive to the countless ways to market products and services via e-mail."

The FTC instead has proposed criteria for messages that contain both commercial content and content that is neither transactional/relationship which employs a "net impression" criterion to determine whether the primary purpose of a message is commercial. One of the elements which the Commission considers as part of its "net impression" approach is the proportion of the message dedicated to such content. While we can appreciate the flexibility that the Commission has afforded e-mail senders by considering a "net impression" approach in lieu adopting a "rigidly mechanical" proportional standard, NAR is concerned that this aspect of the factors illustrative of a reasonable interpretation that the primary purpose if commercial remains too vague and open-ended.

When the Commission declined to go down the path of measuring "proportion" by percentages or by counting lines/text of commercial versus noncommercial or measuring space/volume dedicated to

commercial content, it left too much to the imagination of an e-mail sender of what exactly is meant by “the proportion of the message dedicated to such content.” In this regard, we ask the FTC to provide compliance guidance regarding this factor that would help both our organization and our members understand this aspect of dual-purpose (commercial content and content that is neither transactional/relationship) message.

How color, graphics, type size, and style are used to highlight commercial content. As mentioned above, e-mail technology has moved us well beyond the black courier message text to e-mails that utilize scripts in HTTP (e.g. clickable graphic images) or applications such as “onMouseovers” or “hot spots.” In dual-purpose e-newsletters, these new technologies can be similarly applied to both the commercial and non-commercial text which raises the question, “are the highlight factors (color, graphics, type size and style) too subjective?”

Clearly in a case where the noncommercial text is Times New Roman 12 pt. black font with no graphics and just below it is commercial text that is Times New Rom 24 pt. red font that flashes, the latter would appear highlighted from a reasonable consumer’s perspective. But what about blue commercial text versus green noncommercial text when all other factors are equal? Which color is considered highlighted? The issue of what constitutes “highlight” becomes further blurred when the commercial and noncommercial content both use: color text, but not the same color; graphics or images, but not the same size or exact HTTP script; and similar, but the same style or type size. What might be considered “highlighted” to some might not be considered highlighted to others. Thus, NAR respectfully requests the Commission to provide further guidance as to how it will determine whether or not commercial content is highlighted and whether the FTC will consider the factors (color, graphics, type size and style) independently or as a whole.

The last point we would like to raise relates to the Commission’s application of its deception policy and legal analysis to the content criterion for the dual-purpose message. It is quite clear from the language of §7704(2)(a) of CAN SPAM that it is appropriate to apply the Commission’s deception standard and prohibit a subject line that might mislead a reasonable consumer. However, it is not clear from the legislation that Congress intended the FTC to apply its deception policy when it weighs commercial versus noncommercial content. Additionally, the extensive body of law from which the deception policy is derived focuses on considering the *advertisement* in its entirety, not the advertisement together with unrelated, noncommercial content. Consequently, the advertising judicial standards will not provide all the necessary tools to e-mail senders when designing messages with both commercial and noncommercial content. NAR recognizes that the Commission must adapt existing policy and legal standards to evolving marketing practices. Our purpose in raising the issue of applying the deception standard to the evaluation of commercial versus noncommercial content is emphasize the need for precision that gives clear guidance to organizations and businesses when creating its e-mail messages.

• **Discretionary Authority to Modify the Definition of the Term “Transactional or Relationship Message”**

NAR appreciates the tremendous amount of work the Commission is tasked with under the CAN SPAM Act and understands that not all the issues/questions the FTC raised in its ANPR can be answered when congressional mandates are a priority. However, we would urge the FTC to revisit the issue of modifying the definition of the term “transactional or relationship message” to cover messages between an associations and its members for association-related activities and benefits. While this task is not statutorily required of the Commission, it is a step that would be very helpful in aiding legitimate business and organizations determine what steps are necessary in order to be truly in compliance with the CAN SPAM Act.

We are encouraged by the FTC statement in the rule proposal that, “on the issue of messages between a nonprofit entity and its members, it is possible – or even likely – that such messages are ‘transactional or relationship messages’ under §7702(17)(A)(v), depending on the facts of a particular membership.” NAR asks the Commission to elaborate on this perspective in a future rule proposal.

Additionally, we would ask the Commission for confirmation that business relationships between real estate professionals and his/her client, which does not include a monetary exchange at the onset of such relationship, qualifies as an ongoing commercial transaction. Please see Attachment A (excerpt from NAR’s comment letter in response to the CAN SPAM ANPR) detailing our position on need for modification of the definition of “transactional or relationship message.”

■ Conclusion

NAR’s comment letter has addressed a specific area in which the Commission has requested input. NAR does not oppose the proposed factors identified as relevant to an interpretation that the primary purpose of an e-mail message is to advertise a product or service. As our comment letter points out, “near the beginning,” “proportion of the message” and “highlight” remains too vague for the purpose of creating CAN SPAM compliance policy for organization and business that send dual-purpose e-mail messages. NAR believes it is essential that the FTC detail more objective criteria in order to provide clear guidance to initiators of e-mail to reduce the likelihood of innocent confusion that may lead to regulatory action.

We appreciate your time and consideration of our comment letter. The NATIONAL ASSOCIATION OF REALTORS® stands ready to work with the FTC on CAN SPAM and welcomes the opportunity to dialogue with Commission staff on the issue of “transactional or relationship messages.”

Yours truly,

Walter T. McDonald

Walter T. McDonald
2004 President