



April 20, 2004

Federal Trade Commission
Office of the Secretary
Room 159-H
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: CAN-SPAM Act Rulemaking, Project No. 411008
Submitted Electronically

Dear Sir or Madam:

The Mortgage Bankers Association (“MBA”)¹ appreciates the opportunity to submit comments in response to the Federal Trade Commission’s (“FTC”) advanced notice of proposed rulemaking and request for public comment (“ANPR”) concerning the implementation of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act” or the “Act”).

The CAN-SPAM Act imposes a series of new requirements on the use of commercial electronic mail (“e-mail”) messages and provides civil and criminal and enforcement tools to combat unwanted e-mail solicitations and e-mail initiated fraud. The Act also allows state attorneys general to enforce the civil

¹ MBA is the national association representing the real estate finance industry, an industry that employs more than 400,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation’s residential and commercial real estate markets; to expand homeownership prospects through increased affordability; and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters excellence and technical know-how among real estate finance professionals through a wide range of educational programs and technical publications. Its membership of approximately 2,700 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, life insurance companies and others in the mortgage lending field. For additional information, visit MBA’s Web site: www.mortgagebankers.org.

provisions in the Act and grants Internet access services providers with private rights of action against senders of e-mails who violate the law.

MBA's comments will focus on the "primary purpose" test, the 10-day implementation time line and definition of "transactional or relationship message."

Primary Purpose Test

The CAN-SPAM Act applies to "commercial electronic mail messages," which is defined in the Act as "any electronic mail message the *primary purpose* of which is the commercial advertisement or promotion of a commercial product or service..." (emphasis added). 15 USC §7702(2). Determining the primary purpose of a particular e-mail, therefore, is paramount for determining whether the message is within the scope of the law.

The ANPR suggests six ways to define primary purpose:

1. based on whether the e-mail's commercial advertisement or promotion is more important than all of the e-mail's other purposes combined;
2. based on whether the e-mail's commercial advertisement or promotion is more important than any other single purpose of the e-mail, but not necessarily more important than all other purposes combined;
3. based on the "net impression" that the material, as a whole, makes on the reasonable observer;
4. based on whether the advertisement or promotion is more than incidental to the e-mail;
5. whether the commercial aspect of the e-mail financially supports the other aspects of the e-mail; or
6. based on the identity of an e-mail's sender.

The FTC also inquires as to whether there is a more appropriate test. MBA favors a "but for" test. A "but for" test would ask whether the message would have been sent in the absence of (*but for*) the commercial advertisement or promotion. If the e-mail would have been sent without the advertisement, then the primary purpose of the e-mail is not a "commercial e-mail message" and, therefore, is not subject to provisions of the Act. On the other hand, if the e-mail would not have been sent without the commercial advertisement or promotion, then the primary purpose is a solicitation and subject to the provisions of the Act. We believe this test creates a standard that ensures that a secondary advertisement or promotion would not render other non-promotional messages in the e-mail in violation of the CAN-SPAM Act.

As with the other proposed tests, the "but for" test has a level of subjectivity that warrants a secondary measure in certain circumstances. There will be instances where a determination cannot be clearly made as to whether a message would

have been sent without the commercial advertisement. In those cases, we suggest applying the first test (“whether the commercial message is more important than all of the e-mail’s other purposes combined”) as a secondary measure for assessing whether the commercial advertisement is or is not the primary purpose.

The “but for” test achieves the goal of determining primary purpose by examining the motive of the sender. The “but for” test would also ensure that informational messages are not deemed commercial messages merely because of the presence of *de minimis* advertising. The other alternatives proposed in the ANPR do not offer this level of reasonableness and would create hurdles to the normal operation of mortgage lenders and others.

The second test requires senders to continually evaluate what informational messages can be combined with advertising. That is because a message with a relatively unimportant purpose (such as to announce 50 years in business), even if combined with a highly important message (pricing changes), could be deemed a “commercial e-mail message” if an advertisement or promotion is also included. The second test would no doubt deter multiple messages in one e-mail communication, which defeats the goal of reducing e-mail traffic.

In the case of the third and fourth tests, the size or prominence of the advertisement, the language used in the notice, and the observer’s knowledge of the industry or products could be a factor in the outcome of applying those tests. Such factors should be irrelevant to the determination of primary purpose.

The last two standards, while relatively objective, are also overly inclusive and would treat the vast majority of, if not all, multi-purpose e-mails as advertisements. For example, under the fifth or “financial” test, it appears that any revenue generated from a secondary message would effectively trump other non-revenue generating messages within the e-mail. This approach would be problematic for trade associations who advertise conferences in combination with other advocacy or informational messages. Conferences generate significant revenues for non-profit trade associations, including MBA, and contribute to the overall budget of a trade association and its advocacy or informational missions. The mere presence of a listing of conferences and dates on an advocacy notice should not place the entire message within the scope of the law’s restrictions.

The most problematic standard is the sixth or “sender” test, which appears to always treat the e-mail message as a solicitation if the sender is a for-profit organization. This requirement is overly broad and anti-competitive.

Primary Purpose and Transactional or Relationship Messages

The ANPR asks whether the primary purpose of an e-mail should be considered when the communication includes a combination of advertisements or promotions and transactional and relationship messages. MBA believes that a transactional and relationship message should always remain as such, even if combined with advertising or promotional material. This will allow for the proper functioning of the various exemptions under the Act. Without a bright-line test, the mere presence of an advertisement in a message that would otherwise be defined as a transactional and relationship message could be deemed a “commercial e-mail message” or an “unsolicited commercial e-mail message.” As a result, the transactional or relationship message would not be eligible for various exemptions, but rather would be subject to various restrictions and requirements.

For example, the Act provides an exemption from the “opt-out” notices and restrictions for transactional and relationship messages. Under the exemption a recipient cannot opt out of a transactional or relationship message. If the rule allows a primary purpose test to transform a “transactional or relationship message” into an “unsolicited commercial e-mail message” because of the presence of advertisements, then the rule could effectively bar the transmission of specific account, billing or transactional information to persons who submitted opt-out requests. This would be contrary to the intent of the exemption and would be harmful to consumers.

The Act also requires that “unsolicited commercial e-mail messages” include a clear and conspicuous identification that the message is an advertisement. If a transactional or relationship message is deemed to be an “unsolicited commercial e-mail message” because of the inclusion of an advertisement or promotion, the labeling requirements would be triggered. Labeling a message that provides account and billing information as an advertisement would mislead consumers and cause them to ignore important communications.

10-day Time Period for Processing Opt-Out Requests

The CAN-SPAM Act prohibits senders and persons acting on their behalf from initiating the transmission of an unsolicited commercial e-mail message to any recipient who has opted out of receiving further unsolicited commercial e-mail messages from the sender. The Act provides that senders have 10 business days after receiving a recipient’s opt-out request to process it and put it into effect. The Commission has the authority to modify the 10-day rule if it determines that a different time period would be more reasonable “after taking into account (A) the purposes of subsection 5(a); (B) the interests of recipients of

commercial electronic mail; and (C) the burdens imposed on senders of lawful commercial electronic mail.” 15 USC §7704(d).

MBA believes that the FTC should grant 20 business days to process opt-out requests due to the amount of manual processing that is inherent in managing a company-specific opt-out list. While there are different business models, it is common for the process to work in the following manner: Opt-out requests are sent to an electronic mail box that is checked daily by dedicated staff. Staff must manually cross-reference the requests with numerous databases, e-mail directories and/or files. Staff must then flag individuals who have opted out, so that they are not contacted in future e-mail campaigns. This involves significant data processing labor and time.

The most time consuming problem lenders have encountered is the challenge of properly identifying which client has sent in the opt-out request. The amount of data or quality of the data provided by the person opting out is often lacking or inconsistent with the lender's data. In many cases, the person opting out only supplies a name (or partial name) and an email address making it difficult to process against a database of millions of clients and prospects, often with the same name. Unfortunately, attempts to match e-mail addresses are not always successful either due to changes in e-mail addresses or old information in the lender's databases (which is usually obtained at origination of a 30-year loan and relationship). The ability to maintain an absolutely accurate and up-to-the-minute database is virtually impossible. However, lenders make every attempt to honor opt-out requests as soon as possible. When setting an appropriate compliance time line, however, it is reasonable and appropriate to consider human processing time and the need to deal with problems, such as identifying who sent in the request.

Companies must have sufficient time to run e-mail campaigns without the burden of frequent scrubbing. A 10-business day window is an extremely short time frame to complete the entire campaign process. Under the 10-business day scenario, a lender would have to process all outstanding opt-out requests, resolve all unmatched requests (as mentioned above), push the campaign out to a third party (if one is used) and complete the campaign within 10 days. The alternative would be to rescrub the company's marketing list every 10 days at a significant cost to the lender. Using third parties to perform e-mail campaigns becomes impractical and costly under the 10-day rule because these firms will actually have less than 10 days to use a specific list. Our members inform us that two business days are lost performing the front-end data processing required to ensure that an up-to-date list is delivered to the third party. At the point of delivery, the third party has only eight days to run the campaign. Because it takes approximately two days to rescrub a list, even in a highly automated shop, the third party must begin rescrubbing on the 8th day of the 10-day period,

reducing the uninterrupted use of any list to 6-8 days. This is overly restrictive and extremely costly.

The borrower's inconvenience, however, is only temporary. Once the person's name is added to the list, the consumer will no longer receive solicitations from that company. By extending the time frame to 20 business days, consumers suffer only a short, one-time wait. The consumer does not suffer any reoccurring delays or inconvenience.

Transactional or Relationship Messages

The Act defines a "transactional or relationship message," among others things, as "an electronic mail message the primary purpose of which is to facilitate, complete or confirm a commercial transaction that the recipient has previously agreed to enter into with the *sender*,..." (emphasis added). 15 USC §7702(17).

MBA believes that this language should be read broadly to permit the sender to receive "approval" through a third party. This interpretation would allow for the execution of specific home purchase transactions that involve the referral of business from a real estate agent or builder to a preferred mortgage lender. In a typical referral transaction, the real estate agent or builder will ask its preferred lender(s) to contact the consumer to assist him or her in completing the purchase of a home by providing the necessary financing that is used to pay the sales price. The consumer is informed by the real estate agent or builder that the lender(s) will contact him or her. The consumer does not provide direct consent to the lender, but does provide verbal agreement to the real estate agent or builder. Moreover, the majority of referral business involves a specific piece of real estate or a specific request from the third party to pre-approve the consumer so that he or she has more bargaining power when shopping for a home.

The Act does not specify that the consent must be provided directly to the sender, only that the recipient must agree to the transaction. The language, therefore, implies that consent or agreement can be given through a third party. MBA believes that these transaction-specific communications should fall within the definition of a "transactional or relationship message" and not be prohibited under the opt-out provisions, and that this understanding should be made explicit in the rule.

The transactional or relationship message exemption should also take into consideration the unique nature of the home purchase transaction. Unlike the purchase of other goods or services, the overwhelming majority of home purchases must be financed in order for the transaction to be completed. In fact, MBA estimates that nearly 90 percent of home purchases involve mortgage financing. As a result, there is a strong nexus--if not outright dependency on financing—in a home purchase transaction. Also, at the time of home purchase,

the consumer wants to receive information about financing opportunities, especially from a lender recommended by the real estate agent or builder. In fact, failure to contact the borrower in these situations would be considered poor customer service by lenders and consumers alike.

MBA also believes this clarification is necessary to create a level playing field. A company that conducts e-mail campaigns will be disadvantaged when it comes to working on specific home purchase transactions because that lender will receive opt-out requests, possibly from the very consumer being referred; whereas, lenders who do not run e-mail campaigns will not be prohibited from e-mailing the same consumer.

In sum, we respectfully request that the FTC clarify that a verbal or written agreement given to a third party on behalf of the sender is deemed to be granted to the sender. Stated differently, if the recipient communicates its agreement to enter into a transaction with the sender (the lender(s)) to a third party (a real estate agent or builder), then the sender's e-mail message is considered to be a transaction or relationship message. Alternatively, the FTC could clarify that a message that facilitates a transaction is permissible if that message is specific to that transaction (a specific home or need for pre-approval) and not a general communication of products or services. Either clarification would allow for the appropriate flow of information to consumers at a critical time in the home buying process. We believe consumers would welcome such contact.

Summary

MBA appreciates the opportunity to share our preliminary views on the advanced notice of proposed rulemaking implementing the CAN-SPAM Act. To summarize, MBA urges the FTC to:

- Adopt a "but for" test to determine the primary purpose of an e-mail message. The "but for" test would ask whether the message would have been sent in the absence of ("*but for*") the commercial advertisement or promotion. Where the "but for" test does not produce a clear answer, MBA supports applying the first test ("whether the e-mail's commercial advertisement or promotion is more important than all of the e-mail's other purposes combined") as a secondary threshold.
- Stipulate that transactional or relationship messages are not transformed into "commercial e-mail messages" or "unsolicited commercial e-mail messages" because of the presence of advertising or promotional material.

- Extend the 10-business day rule to 20 business days to allow for the proper operation of e-mail campaigns and to avoid placing undue financial burden and risk of liability on businesses that are attempting to comply with the law.
- Clarify that an agreement to enter into a transaction with the sender that is relayed through a third party is considered a “transactional or relationship message” and, therefore, exempt from the CAN-SPAM Act restrictions. Alternatively, the FTC could state that an e-mail message that facilitates a transaction is permissible if that message is specific to that transaction (i.e., a specific home or need for pre-approval) and not a general communication of products or services.

Please contact Vicki Vidal, Senior Director, at 202/557-2861 if you have further questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kurt Pfothauer".

Kurt Pfothauer
Senior Vice President, Government Affairs