



March 31, 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  
Request for Information Concerning a Do Not E-mail Registry  
Submitted Electronically

Dear Sir or Madam:

The Mortgage Bankers Association (MBA)<sup>1</sup> appreciates the opportunity to submit comments in response to the Federal Trade Commission's (FTC) Request for Information (RFI) concerning Section 9 of the CAN-SPAM Act.

Section 9 of the CAN-SPAM Act requires the FTC to present a report to Congress that:

- Sets forth a plan and timetable for establishing a National Do Not E-mail Registry ("E-mail Registry");
- Includes an explanation of any practical, technical, security, privacy, enforcement, or other concerns the FTC has regarding such a Registry;
- Includes an explanation of how the Registry would be applied with respect to children with e-mail accounts.

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<sup>1</sup> 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](http://www.mortgagebankers.org).

### **Do Not E-mail Registry: A Ready List for Off-shore Spammers**

We believe that the development of a Do Not E-mail Registry is problematic and hampers legitimate business communications. Moreover, it has the potential of increasing, rather than decreasing, unwanted spam.

While MBA respects an individual's right to privacy, we are concerned that the creation of a Do Not E-mail Registry will do little to further this privacy or reduce unwanted or offensive e-mails. Unlike telephone solicitations that are generated mostly within the United States by legitimate businesses, e-mail solicitations in the form of spam originate, to a large extent, outside of our borders. As a result, enforcement will be extremely difficult, if not impossible.

Our primary concern with a Do Not E-mail Registry is that it would benefit offshore spammers by providing a ready list of valid e-mail addresses. Already in spam messages, spammers put a notice to be removed from a list at the end of the message, but when used, it instead alerts the spammer that they have a "live" (working) e-mail address. Offshore companies that promote the majority of offensive e-mail traffic, such as pornography, herbal enhancers, and fraudulent money making opportunities, will benefit at the expense of legitimate U.S. businesses who will no doubt bear the majority of the expense of creating and maintaining this E-mail Registry. Spammers will be able to use the Registry and circumvent the law's protections. Supporters of an E-mail Registry argue that the cost of accessing the E-mail Registry will deter these spammers. It is unclear, at this time, whether this would be the case. What would a company pay for a list of tens of millions of valid e-mail addresses? What would that company pay knowing it could avoid any statutory penalty for violating the use restrictions? Illegitimate spammers will not incur the same costs US companies will face. Clearly U.S. companies will need to access the list repeatedly during a typical year. Illegal spammers need only access to the Registry once every few years to make it worthwhile. Thus, we believe the cost to access the E-mail Registry provides no real barrier at all.

### **Breadth of the E-mail Registry Could Stifle Business-to-Business Transactions**

MBA is also concerned with the potential breadth of the E-mail Registry, which could encompass business-to-business communications. Our members currently use e-mails on a daily basis to relay information on business opportunities, such as new loan products and rate information, to their business partners. The most common use of e-mails by full service mortgage companies is to deliver rate sheets. Rate sheets list the available mortgage products a

wholesale lender is willing to fund and at what price. They are critical to proper pricing of a home loan and structuring rate locks by consumers. Any delay in this information could cost loan officers or consumers thousands of dollars. Because of the risks associated with the existing fax ban laws, some of the industry is shifting from fax distribution of rate sheets to distribution via e-mail. Lenders also communicate new program and product information that helps consumers qualify for homes. This form of communication is more commonly done between a mortgage broker/lender and real estate agents, builders or financial planners, rather than between businesses and consumers, although e-mails to consumers also occur. If the Do Not E-mail Registry applies to business-to-business transactions, companies will be stifled in their ability to garner business or will face significant compliance burdens. As a result of these concerns we believe that any registry or other form of e-mail blocking system must not cover business-to-business messaging.

Allowing business e-mails to be added to a Do Not E-mail Registry or subjecting them to an e-mail blocking system is fraught with other administrative issues. For example, who would be deemed to have authority to place his or her business e-mail address on the registry? Likewise, should an unauthorized employee be able to block business e-mails or lodge a complaint against the sender of an e-mail? How could a business nullify a complaint from an individual employee if officers from the recipient company specifically authorized the sender to send e-mails or if the sender was subject to an exemption? Given the level of customer service and sophistication associated with the current Do Not Call Registry, we doubt the FTC would build such options into a database. As a result, many businesses will have overstated complaints and the appearance of non-compliance.

### **Lessons Learned: Concerns with Current Registry**

Several technological concerns with the current Do Not Call Registry deserve attention when considering whether a Do Not E-mail Registry is necessary or effective, and if so, how it should be designed. Today, the Do Not Call Registry is unmanned, meaning there is no live assistance in the event subscribers have technical difficulties retrieving the information. Many businesses have experienced technical difficulties accessing the Registry and currently have no way to resolve them other than to make no calls whatsoever or to risk violating the rule.

The lack of automation with the Do Not Call Registry is also problematic as it can take 24 to 48 hours to get the list downloaded. While we do not support an E-mail Registry, if one is created, we strongly recommend that the system be fully automated in a way that pushes the list out to subscribers on a periodic basis set and controlled by each business.

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MBA appreciates the opportunity to share our preliminary thoughts on the feasibility and prudence of developing a Do Not E-mail Registry. As stated above, we believe a Do Not E-mail Registry has unique problems in both implementation and effectiveness that are not present with the Do Not Call Registry. Namely, we believe the E-mail Registry can and will be tapped by spammers that are not subject to US law enforcement or to the jurisdiction of the FTC. As a result, individuals on the list will be ready targets for unlimited spamming.

Sincerely,

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

Kurt Pfothauer