



NATIONAL ASSOCIATION OF REALTORS®

*The Voice For Real Estate®*

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**Walter T. McDonald, CRS, GRI**  
*President*

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 Roman 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

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welcomes the opportunity to dialogue with Commission staff on the issue of “transactional or relationship messages.”

Yours truly,

A handwritten signature in cursive script that reads "Walter T. McDonald". The signature is written in dark ink and is positioned below the typed name.

Walter T. McDonald  
2004 President

## **Attachment A**

### **“Transactional or Relationship Message” Definition Needs Clarification**

NAR seeks modification of the “transactional or relationship message” definition so that it clearly applies in certain circumstances. First, NAR believes that the relationship between trade associations like NAR or its state and local associations and their members is sufficiently analogous to an ongoing commercial transaction that communications from the association to its members should be considered “transactional or relationship” messages, to which the requirements of the Act do not apply. Second, ongoing e-mail communications between real estate professionals and their clients and customers should qualify as “transactional or relationship” messages, even though the relationship between them may not be an ordinary commercial transaction including payment, or a promise to pay, consideration in some form. Finally, the “transactional or relationship message” definition should incorporate messages sent by third parties at the direction of a person to whom the Act would not otherwise apply if such person were sending the messages directly, such as when a multiple listing service sends e-mail messages directly to prospective property purchasers at the direction of a real estate professional who is a participant in the multiple listing service.

#### *A. Association Communications Are “Transactional or Relationship Messages”*

From a trade association perspective, NAR believes that the Commission should refine the statutory definition of “transactional or relationship messages” so that it includes communications between an association and its members. The Act defines a transactional or relationship message in terms of an ongoing commercial transaction between two parties, including communications between the parties related to a commercial transaction, such as providing updated warranty information or account balances. These communications are not considered “commercial electronic messages” and are not subject to the requirements in the Act.

The relationship between an association and its members is also an ongoing commercial transaction, whereby members pay dues to the association in return for certain services and benefits. The Act’s language plainly applies to permit a trade association like NAR to allow unregulated communications with its members about such topics as account balances or related to an ongoing transaction between the association and the member involving products and services purchased by the member. However, it is not clear whether other communications between associations like NAR and its members involving association programs and services are likewise exempt from the Act’s requirements.

Like a business communicating with its customers as part of an ongoing commercial transaction, NAR believes associations should be able to provide communications to its members regarding the services and benefits that it offers to its members without regard to the Act’s requirements. These communications are analogous to the very types of communications the Act permits businesses to make with each other, and so should be permitted in the trade association context. Of course, the communications between an association and its members should be limited to

association business activities and benefits, with any other communications being regulated under the Act's commercial electronic message rules.

The information, programs, activities and benefits offered by associations that are the common subject of e-mail communications to members are examples of the reasons individuals choose to join REALTOR<sup>®</sup> associations and pay dues, and thus the relationship between associations and their members is precisely analogous to ongoing commercial transactions such as a "subscription," which is already covered by the Act. NAR therefore urges the Commission to adopt modifications to the rules confirming that association communications with members that fall within the "transactional or relationship" definition contained within the Act.

NAR's position that "transactional or relationship messages" includes communications between an association and its members is also supported by congressional intent. Specifically, Representative Burr, a senior member of the House Energy and Commerce Committee, stated the following as a precursor to passage of CAN SPAM,

Individuals or businesses that opt to join [trade] associations do so in large part because of the outstanding benefits afforded to them, including reduced professional insurance premiums, continuing education opportunities, legislative awareness seminars, and conventions.<sup>1</sup>

Representative Burr further indicated,

These e-mails are a valuable element of membership privileges agreed to by the member upon joining, as they keep the member apprised of upcoming events, industry-related products, and legislative alerts . . . . It is my belief that association members have essentially opted-in to the receipt of these e-mails by virtue of their membership, and that these e-mails would fall under the definition of "transactional e-mails" that S. 877 contains. Therefore, e-mail between a professional or trade association and its members should be a protected and mutually agreed-to line of communication and is hence not included in the definition of spam in the CAN SPAM Act of 2003.<sup>2</sup>

*B. The Act Should Not Apply to a Real Estate Professional's Communications with Clients and Customers*

NAR seeks confirmation from the Commission that the business relationship between a real estate professional and his/her client or customer qualifies as an ongoing commercial transaction, to which the requirements of the Act do not apply.

Real estate professionals often enter into written representation agreements with buyers and sellers of real estate that, at the outset of their business relationship, do not include a monetary exchange. The representation agreement usually requires the client to use the services of the real

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<sup>1</sup> 150 Cong. Rec. E5 (daily ed. Jan. 20, 2004) (statement of Rep. Burr).

<sup>2</sup> *Id.*

estate professional for a specified period of time, with the obligation of the client to compensate the real estate professional only when, and if, the client successfully sells or purchases a property. In some cases there may be no agreement at all between a real estate professional and a prospective purchaser which the professional agrees to serve, or the agreement between the professional and the prospective purchaser may require that the real estate professional seek to be paid by a third party, such as a cooperative fee paid by the seller's real estate professional to the buyer's agent. During the course of the relationship, there is quite a bit of communication between the real estate professional and client, and such communication occurs with increasing frequency in the form of e-mail. Such communication involves, of course, information about properties that may be of interest to the prospective purchaser, and may also involve recommendations by the real estate professional of particular third-party professionals such as inspectors, attorneys, and lenders.

NAR urges the Commission to adopt rules that confirm that the relationship between a real estate professional and his client or customer qualifies as an ongoing commercial transaction so that electronic mail messages to the client or customer are transactional or relationship messages. Of course, these communications would be limited to messages concerning the services provided by the real estate professional to the client. Additionally, these communications should not allow real estate professionals to send clients or others unsolicited electronic mail messages from third parties, like moving companies or other sellers. NAR believes such a rule is necessary because the statutory language appears to focus on "commercial transactions," which presumably require the payment of consideration. Because in many cases no compensation is paid to the real estate professional until the end of the transaction (and, indeed, in some cases no compensation is ever paid to the professional, such as where no real estate transaction is completed), it may be asserted that this relationship between real estate professionals and their clients and customers is not a commercial transaction involving e-mail messages to which the Act does not apply. Since the relationship between the real estate professional and his/her client constitutes an ongoing commercial relationship, albeit one with characteristics that differ from a conventional purchase of a product or service, NAR believes any messages sent by a real estate professional to the client or customer should be defined as transactional or relationship messages. The Commission's clarification on this point is sought by NAR.

*C. Third Parties Can Act as Agents for Persons Exempt From the Act and are Likewise Exempt*

Finally, NAR would like the Commission to clarify that the electronic mail messages described below are transactional or relationship message not subject to the Act's requirements.

A multiple listing service, or "MLS", is an entity through which real estate brokers share property listing data and offer to cooperate with each other to facilitate real estate transactions involving such listed properties. Many REALTOR<sup>®</sup> associations own or operate their own MLSs, in accordance with rules promulgated by NAR. The MLSs are supported by fees paid by MLS participants or subscribers.

In recent years, MLSs have increasingly moved to an Internet-based format to better serve their subscribers. One feature that some MLSs have offered to their subscribers is to enable

participating real estate professionals to customize property listing data searches for individual clients or customers seeking to buy property meeting certain specified criteria. Once this data search is created and the prospective purchaser's property preference criteria submitted to the MLS, the MLS will "automatically" send an electronic mail message to the prospective purchaser, who is the real estate professional's client, whenever a new property listing that meets the client's search criteria is submitted to the MLS. In some cases, these electronic mail messages are sent directly from the MLS to the client. This facility provides a convenient and automated way for real estate professionals to satisfy their clients' desires and needs without the burden of individually searching the MLS property listing database personally and sending the purchaser an e-mail of properties meeting the purchasers criteria.

As described above, NAR believes and seeks confirmation from the Commission that e-mail messages sent by the real estate professional to his client or customer are transactional or relationship messages to which the requirements of the Act do not apply. Similarly, NAR would like the Commission to clarify and confirm that electronic mail messages sent by an MLS in the circumstances described above are the functional equivalent of the real estate professional sending them to the client or customer directly, and therefore are also transactional or relationship messages which would not be considered commercial electronic messages subject to the Act's requirements. NAR believes this is the proper result because the messages arise out of, and are generated from, an ongoing commercial relationship between the real estate professional and his/her client, with the MLS simply serving as the subscriber's agent in delivering the information directly to the client.