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Al Mansell, CRB
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VIA ELECTRONIC AND HAND DELIVERY

June 27, 2005

Federal Trade Commission
Office of the Secretary
Room 135-H (Annex D)
600 Pennsylvania Ave, N.W.
Washington, D.C. 20580

Re: "CAN-SPAM Act Rulemaking, Project No. R411008," 70 *Federal Register* 91, 25426-25449 (May 12, 2005) Definitions, Implementations, and Reporting Requirements Under the CAN-SPAM Act.

Dear Sir or Madam:

The National Association of REALTORS® ("NAR") appreciates the opportunity to provide comments to the Federal Trade Commission ("Commission") on the definitions, implementation, and reporting requirements of selected topics contained within the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "Act"). NAR represents approximately 1,200,000 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 five specific areas about which the Commission has sought input: (1) Defining the term "person" (in Part II.A.1.); (2) limiting the definition of "sender" to address scenarios where a single e-mail message contains advertisements from multiple entities (in Part II A.2.); (3) clarifying that Post Office boxes and private mailboxes established pursuant to United States Postal Service regulations are "valid physical postal addresses" (in Part II.A.4.); (4) shortening the time a sender has to honor a recipient's opt-out request (in Part II.B.); and (5) "transactional or relationship message" (in Part VII.B.2).

Below is a discussion of NAR's position on these important issues.

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real estate professionals who are members of the NATIONAL ASSOCIATION OF REALTORS®
and subscribe to its strict Code of Ethics.

EQUAL HOUSING OPPORTUNITY

Defining the term "person" (in Part II.A.1.).

NAR supports the Commission's proposed definition of "person" to mean "an individual, group, unincorporated association, limited or general partnership, corporation, or other business entity." Furthermore, we appreciate the FTC's recognition that harmonization of definitions – in this instance, tracking the definition of "person" in the Telemarketing Sales Rule – is helpful in complying with federal agency regulations.

Limiting the definition of "sender" to address scenarios where a single e-mail message contains advertisements from multiple entities (in Part II A. 2.).

NAR supports the Commission's proposed definition of "sender" and believes that it adequately clarifies who will be responsible for complying with the CAN-SPAM Act when a single e-mail contains content promoting or advertising the products, services or Web sites of multiple parties. In response to the FTC's ANPR soliciting input on this issue, NAR commented that the definition of "sender" should be limited to include only the individual or entity who has control over the electronic message, irrespective of whether any product or service of another party is advertised or promoted in the electronic message. NAR further stated that control over the electronic message would required an examination of a variety of factors including: the party who transmits the electronic mail message or causes the message to be transmitted; the party who is identified in the message as the sender; control over the form of the electronic mail message; control over the time the message is sent; control over the recipients of the message; and control over the content of the message.

We believe the criteria the Commission proposes for identifying the "sender" in situations where more than one person's products or services are advertised or promoted in a single e-mail message is consistent with NAR's ANPR comment letter and will be helpful when communicating with our members via e-mail, some of which may contain information about products or services offered by other parties that may be of interest to the members. NAR applauds the Commission for recognizing the heavy burden imposed on associations and small businesses to have to check multiple opt-out lists of the sellers of such products and services against hundreds of thousands of e-mail addresses every time it wants to send otherwise lawful communications to its members containing advertisements. In this regard, NAR reiterates our support for the Commission's proposed criteria for identifying the "sender" of an e-mail message when there are multiple advertisers.

Clarifying that Post Office boxes and private mailboxes established pursuant to United States Postal Service regulations are "valid physical postal addresses" (in Part II.A.4.).

NAR supports the Commission's clarification that a sender of an e-mail could satisfy the CAN-SPAM Act's valid physical postal address disclosure requirement by providing a Post Office box or private mailbox address. As the Commission knows, many of our members are independent contractors and work primarily out of their home. Interpreting "valid physical postal address" to mean the sender's street address would mean that many of our members who wish to send

legitimate commercial e-mail would have to include their complete home address, which could raise personal security issues. Allowing Post Office boxes and private mailbox addresses to satisfy the requirement of "valid physical postal address" would help our members comply with the Act without the imposition of costs that would otherwise be required to alter mail handling procedures.

Shortening the time a sender has to honor a recipient's opt-out request (in Part II. B.).

NAR opposes the shortening of the ten business day time period for processing opt-out requests. We strongly believe that shortening the time period for opt-out implementation to three business days creates a costly burden upon small businesses like a real estate brokerage and is thus unreasonable.

Most of NAR's members are self-employed or small business owners. Such a short time period for incorporating a consumer's opt-out request places NAR's members in danger of inadvertently violating the Act, as they most likely do not have the resources to instantaneously incorporate these consumer requests into all of their electronic mail lists. NAR urges the Commission to harmonize the CAN-SPAM opt-out timeframe with similar existing regulation, such as the Telemarketing Sales Rule, which requires telemarketers to scrub their telemarketing lists against the Do-Not-Call Registry ever thirty-one days.

As the Commission noted, many ANPR commenters, mainly representing large corporations, are able to process opt-out requests rather quickly through the use of sophisticated technology. However, it is likely that small businesses do not have such technology in place and will be required to purchase software or employ the services of a CAN-SPAM compliance company – either of which can be costly for the majority of our 1.2 million members who are *very* small businesses or self-employed.

NAR strongly believes that shortening the time period for processing opt-out requests from ten days to three will impose a substantial impact on a significant number of small entities by increasing and adversely affecting regulatory compliance costs. In this regard, we ask the Commission to reconsider shortening of the ten business day time period for processing opt-out requests and instead, harmonize it with the revised scrubbing requirement under the Telemarketing Sales Rule by extending the opt-out period to thirty-one days.

"Transactional or relationship message" (in Part VII.B.2).

NAR is disappointed that the Commission decided not to modify the definition of "transactional or relationship message" and urges the FTC to, in the near future, revisit this important issue. NAR appreciates the Commission noting its belief that e-mail messages from an association or other membership entity to its membership are likely "transactional or relationship" in nature pursuant to the CAN-SPAM Act. However, we still advocate that the Commission should formally modify its rule provisions to reflect such an interpretation in order to establish clear guidelines for compliance.

In its NPR, the Commission solicited comments on whether or not a "commercial transaction" under section 7702(17)(A)(i) exists even in the absence of an exchange of consideration. NAR responds affirmatively and submits that ongoing e-mail communications between real estate professionals and their clients and customers should qualify as "transactional or relationship" messages, event though the relationship between them may not be an ordinary commercial transaction including payment, or a promise to pay, consideration in some form.
To that end, NAR asks the Commission for confirmation 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 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.

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® 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.

Conclusion

NAR's comment letter has addressed five specific areas about which the Commission has sought input. First, NAR supports the Commission's proposed definition of "person" to mean "an individual, group, unincorporated association, limited or general partnership, corporation, or other business entity." Second, NAR supports the Commission's proposed definition of "sender" and believes that it adequately clarifies who will be responsible for complying with the CAN-

SPAM Act when a single e-mail contains content promoting or advertising the products, services or Web sites of multiple parties. Third, NAR supports the Commission's clarification that a sender of an e-mail could satisfy the CAN-SPAM Act's valid physical postal address disclosure requirement by providing a Post Office box or private mailbox address. Fourth, NAR opposes the shortening of the ten business day time period for processing opt-out requests, as the proposed three day period will create a costly burden on small business like a real estate brokerage. Finally, NAR requests that the Commission formally modify its definition of "transactional or relationship message" to clearly establish that it covers communications between an association and its members for association-related activities and benefits, and between real estate professionals and their clients and customers in the ordinary course of the relationships those parties form.

We appreciate your time and consideration of our comments. The National Association of REALTORS® stands ready to work with the Commission on CAN-SPAM and welcomes the opportunity to dialogue with FTC staff on the issues outlined in this comment letter.

Yours truly,

Al Mansell, CRB
2005 President