

March 31, 2004

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

**Re: "CAN-SPAM Act Rulemaking, Project No. R411008," 69  
*Federal Register* 48, 11775-11782 (March 11, 2004)**

Ladies and Gentlemen:

The American Resort Development Association ("ARDA") is the Washington, D.C. based trade association representing the vacation ownership industry. Established in 1969, ARDA today has over 800 members, ranging from small, privately held firms to publicly traded companies and international corporations. ARDA's diverse membership includes companies with vacation timeshare resorts, private residence clubs, land development, lots sales, second homes, and resort communities. However, the majority of ARDA's membership is related to the timeshare industry.

ARDA supports the goals of the CAN Spam Act of 2003, aimed at curtailing the abusive, deceptive and fraudulent practices of spammers. The Act goes a long way toward addressing these practices and establishes a national standard for which all senders of commercial e-mail must comply.

Congress directed the FTC to write a report setting forth a plan and timetable for establishing a nationwide marketing Do Not Email Registry. The Commission is required to include an explanation of the practical, technical, security, privacy, and enforceability of a registry and how it would be applied with respect to children with e-mail accounts. Relative to this report and the Commission's request for comments, ARDA would like to limit its comments to issues associated with the National Do-Not-E-mail Registry, and identify some of the issues and concerns that ARDA has with the creation and implementation of a national Registry.

The overall key to the success of the CAN-SPAM Act will be diligent monitoring and enforcement by the Commission. Even with the establishment of a "National Do Not Email" Registry, unscrupulous senders will thwart the Act's prohibitions. The use of a national registry likely will prove meaningless to these entities and individuals while imposing additional economic and regulatory constraints on legitimate senders. The national registry will act as a deterrent to legitimate senders from engaging in lawful activity for fear of making an error in cleansing their database of potential customers. Thus, for the reasons cited herein, ARDA believes that a "National Do Not Email Registry" is unworkable and cannot support such a regulatory mechanism at this time. However, should additional facts become known that prove the viability of a national registry and adequately address those concerns set forth herein, ARDA has made some suggestions consistent with the regulations applicable to the National Do Not Call Registry.

### **Duplicative Regulation**

Establishment of a "National Do Not Email Registry" would result in a redundant system of regulation. The registry would add no significant benefit to the disclosure and opt-out requirements provided by Congress under the CAN-SPAM Act. Further, the ability of Internet Service Providers ("ISP's") to bring actions fortifies consumer protections under the Act and dispels the necessity of any additional regulatory safeguard.

With swift resolve, Congress established the necessary requisites for the proper disclosure of a "commercial electronic mail message" ("commercial email") under the Act.<sup>1</sup> Conceivably, a recipient of a commercial email will not even need to open the message. If the subject line is accurate, as required under the Act, the recipient can decide in a split-second whether to open or discard the message. The recipient can delete the email or know that the message is one the recipient may wish to opt out from receiving in the future.

This balanced approach affords the legitimate seller one opportunity to lawfully advertise its product or service. At the same time, the recipient can easily assert his or her choice not to receive any future email from the seller. Accordingly, the current provisions of the Act

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<sup>1</sup> ARDA will provide additional comments to the Commission under the second part of its ANPRM related to the CAN-SPAM Act seeking clarification of the provisions of the Act, including the definitions of some terms.

provide adequate protection without the addition of a "do not email" registry.

Congress granted ISP's the ability to "enforce" certain provisions of the Act. While this grant of authority goes beyond any provided to telecommunications providers under the Telephone Consumer Protection Act and other related laws and regulations, it is understandable. ISP's are the link to the Internet. Given this extra layer of enforcement, however, a national registry is an unnecessary redundancy.

### **Necessary for Permission to Conduct Marketing Activity**

With implementation of the National Do Not Call Registry, marketers have been forced to find alternate methods by which to contact prospective customers to obtain their permission. ARDA members use email in order to obtain permission for calls or facsimiles. The one-shot method of the CAN-SPAM Act assisted in retaining the ability to utilize email for this purpose, which likely would have been unavailable under the opt-in scenario passed by the state of California.

A National Do Not Email Registry would limit or possibly reverse the relief provided by the Act's opt-out protocol. A seller would have to find other ways to obtain permission to contact a potential customer by facsimile, telephone, and even email. With the restrictions on telemarketing and faxing, the seller's options have become more constricted and more costly. In order for the seller to comply with other marketing laws and regulations, the seller needs some reasonable avenue to contact a potential customer. The use of a single email, absent the additional prohibitions of a national registry, would provide a seller with a viable and cost-efficient method for obtaining permission imposing at most a minor inconvenience.

The Commission, as well as others, has recognized the concerns surrounding the integrity of the email addresses provided by registrants. The fear is that an unscrupulous downloader of the list may use registered email addresses for an illegal purpose. While this is a remote possibility, the solution could further increase costs to sellers in an unbalanced manner.

In a recent Wall Street Journal article, one software developer has suggested the use of an encryption “hashing” program.<sup>2</sup> This system may require sellers to expend additional funds (beyond a registration, downloading, or “scrubbing”) cost in order to utilize this technology and access the proposed national registry. Unlike the National Do Not Call Registry, it appears that sellers will be required to purchase proprietary software in order to access the proposed email registry. The software will be the only way a seller can read the email addresses on the list and compare those addresses to its own database of addresses. With the do not call registry, sellers need only download the registry or a portion of the registry every thirty-one days. The cost of downloading from the do not call registry is not prohibitive whereas to the extent the cost of purchasing a proprietary software package to access a do not email list could be.

There are no additional protections, like encryption, for the telephone numbers in the National Do Not Call Registry, at least from the standpoint of access by sellers and telemarketers. The do not call registry includes unlisted telephone numbers, which downplays any argument that email addresses need protection because they are unlisted. (In fact, many are listed in user profile databases, message boards, and similar forums on the Internet). The Telemarketing Sales Rule prohibits sellers and telemarketers from misusing the registered numbers, subject to penalty. Similarly, the severe penalties of the Act are the proper way to handle those who intentionally misappropriate email addresses for illegitimate purposes. The implementation of an encrypted database with costly access software likely will only benefit the producer of the software rather than consumers seeking more protection from illegitimate email senders.

While ARDA members applaud the Commission’s efforts and Congress’ intentions to provide more adequate protections of consumer privacy, the negatives seem to outweigh the positives. However, ARDA is concerned that if a national registry is established, it must have adequate protections for business as well as consumers. This focus would assist in working toward a balanced approach toward regulation. Accordingly, ARDA urges the Commission to make the following elements part of any national registry impacting legitimate marketing efforts.

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<sup>2</sup> Prince, Marcelo. “Solving the Spam Problem: A national do-not-spam list raises all sorts of questions. Advocates say they have the answers.” The Wall Street Journal, March 22, 2004.

## **Safe Harbor**

The Commission has been cognizant of inadvertent violations resulting from errors by entities that make a good faith effort to comply with the laws and regulations under its charge. ARDA members ask that the Commission equally recognize the chance for error in complying with the CAN-SPAM Act and its attendant regulations. This would be of particular importance under the auspices of a National Do Not Email Registry.

While the mechanism for such a registry is uncertain, it will surely be more involved than the National Do Not Call Registry. The latter handles telephone numbers for which there are a finite number of combinations available. With email addresses, on the other hand, there are an infinite number of combinations. The chance for error increases exponentially. A safe harbor for inadvertent violations, possibly gauged in part on a percentage value (as with the abandoned call rate under the TSR, but with a value to be determined), would be appropriate.

## **Established Business Relationship**

The presence of an established business relationship was determined to be an acceptable criterion for granting exceptions from compliance with the National Do Not Call Registry.<sup>3</sup> A similar exemption relative to a National Do Not Email Registry would be imperative to achieve the necessary balance between continued economic viability of senders and effective consumer protection. Accordingly, ARDA members strongly support the inclusion of an established business relationship exception if the intended recipient has not elected to opt-out of receiving commercial email from that sender. The characteristics of the established business relationship should be consistent.

## **Conclusion**

It is premature at this time to move forward with the creation of a National Do -Not Email Registry. There are too many unanswered questions surrounding the effectiveness of such a product to combat the abusive practices of spammers. The creation of such a registry is certain to be costly, unruly and potentially unenforceable. Until there is

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<sup>3</sup> 16 CFR s. 310.4(b)(1)(B)(ii).

ample evidence of consumer benefit from such a registry without sacrificing the ability for businesses to legitimate communicate and market to consumers, the Commission should withhold any action recommending the creation and implementation of a Do Not E-mail Registry.

Thank you for the opportunity to present the views of the American Resort Development Association. We look forward to offering additional thoughts on the other provisions currently under review in this rulemaking process.

Sincerely,

Sandra Yartin DePoy  
Vice President  
Federal & Regulatory Affairs