



September 13, 2004

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

Dear Sir or Madam:

Re: CAN-SPAM Act Rulemaking, Project No. R411008

The Mortgage Bankers Association (“MBA”)<sup>1</sup> appreciates the opportunity to comment on the Federal Trade Commission’s (“FTC”) notice of proposed rulemaking (“NPR” or “proposal”) regarding the definition of “primary purpose” under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act” or “Act”).

We applaud the FTC for offering the business community a thoughtful approach for dealing with dual messages in electronic communications with consumers and other businesses. We also appreciate having another opportunity to comment on the results of very careful deliberations by the FTC.

### Background

An electronic mail message is subject to the restrictions of the CAN-SPAM Act only if it is deemed to be a “commercial electronic mail message.” The problem for the industry is determining when a message falls within this definition, especially if a message has both account information, for example, and a solicitation for a product or service. Under the law, a “commercial electronic mail message” is defined as “any electronic mail message the *primary purpose* of which is the commercial advertisement or promotion of a commercial product or service...” 15 USC 7702(2)(2004) (emphasis added). The

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

FTC's treatment of "primary purpose" thus becomes the defining test. The proposal establishes three tests for determining the primary purpose of a message.

The tests are based on the type of information being communicated. The first test applies to messages that include only advertisements or promotions of products or services. The second test applies to dual messages that include both advertising and "transactional and relationship" information as defined by the rule. The third test also applies to dual messages, but relates to messages that include both advertising and non-transactional and non-relationship information (i.e., non-commercial information). We would like to comment on the last two tests:

#### Test for Messages Containing Advertisements and "Transactional and Relationship" Information

The proposal provides that an e-mail message will be deemed to be a commercial electronic mail message if:

"(i) a recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message advertises or promotes a product or service; or (ii) the electronic mail message's content pertaining to one of the functions listed in paragraph (b) [*referring to transactional and relationship information*] of this section does not appear at or near the beginning of the message." (parenthetical added).

69 Fed Reg 50106 (to be codified as 16 C.F.R Part 316.3(a)(2)) (August 13, 2004).

The test proposed in subparagraph (ii) is relatively objective and, therefore, we support this portion of the test. While this standard will require some redesign of electronic billing statements and adjustment to computer applications, we believe it is feasible. Had the FTC applied the opt-out requirement to dual messages, the burden of managing various categories of transactional messages would have become unwieldy and resulted in grave errors that would have harmed consumers. We are also pleased that this standard does not impose a "proportions test." Because most mortgage account statements include only one or two line items, unlike credit card statements, a proportions test would have discriminated against the mortgage industry by effectively prohibiting our industry from using a valuable tool to inform consumers about other products.

We remain somewhat perplexed, however, with the first test found in subparagraph (i), which provides that the header of an email could determine whether the message was an advertisement, which would be subject to considerable requirements, or a transactional and relationship message, which would not. When would a sender devise a header that gives the impression that the message is an advertisement when the

information contained therein also includes transactional information? It would be disadvantageous for a business to cloak a dual transactional or relationship message as an advertisement. It is, therefore, difficult to see how abuses would occur and why this test is necessary. Moreover, leaving this determination to the interpretation of the “reasonable recipient” interjects considerable subjectivity into what is otherwise a relatively objective and manageable standard. Also relevant is that abusers of email advertisements (“spammers”) frequently do not use the subject line. It is unclear whether the law would prohibit this situation.

#### Test for Messages Containing Advertisement and Non-Transactional & Non-Relationship Information

The primary purpose test is also applied to dual messages that include both advertisements and information that is not defined as “transactional and relationship.” We interpret non-transactional and non-relationship information as information that does not contain any commercial message, including non-subscription news, market information, and possibly even personal messages.

Under the proposal, these types of dual messages will be considered commercial electronic mail messages if:

- (i) a recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message advertises or promotes a product or service; or
- (ii) a recipient reasonably interpreting the body of the message would likely conclude that the primary purpose of the message is to advertise or promote a product or service. 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.

Id. (to be codified as 16 CFR Part 316.3(a)(3)).

Because of the subjectivity of the tests applied in this case, we believe this provision will be highly litigated. We understand the need for the FTC to ensure that spammers do not circumvent the rules by disguising what would otherwise be an advertisement with non-commercial messages. However, by introducing significant subjectivity into the standard, many legitimate businesses will be caught in the vagueness of this standard. MBA believes, first and foremost, that the FTC should exclude from the rule, personal messages and single email address transmissions that include non-commercial messages from the rule, regardless of whether advertisements are also included in the body. Second, we believe that it must be clarified that the mere inclusion of information related to your industry does not constitute an advertisement or render non-commercial

information (e.g. law firm providing information on a recent case, state or federal law to potential clients; mortgage company providing market information to mortgage brokers; trade association providing status of a regulation or law to non-members) into commercial information. While we are concerned with the vagueness of the portions, color, style and size language, the clarification of what is and is not an "advertisement" will help define when those subjective standards can be applied.

#### Clarification of the Definition of "Transactional or Relationship Message"

The mortgage industry is concerned about the potential application of the Act to the routine practice of mortgage lenders sending rate sheets to mortgage brokers by email. This type of email message would conceptually be a "transactional or relationship message" within the meaning of the Act. These rate sheets facilitate commercial transactions between the mortgage broker and the lender, allowing the broker to get up-to-date pricing from lenders. These sheets provide notice of changing market conditions as part of an ongoing use by the mortgage broker of the lender's products and services. We respectfully request the FTC to clarify that email messages from lenders to mortgage brokers containing rate sheets meet the definition of "transactional or relationship message" within the meaning of the Act.

#### Clarification of Affirmative Consent

As a final matter, we believe that it is imperative that the FTC explicitly state that verbal consent is sufficient to comply with the definition of "affirmative consent" and that definition's requirement for a "clear and conspicuous" requirement. The speed at which mortgage banking must be conducted demands a verbal affirmation option.

MBA appreciates this opportunity to comment. If you have any questions, please contact Vicki Vidal, Senior Director, Government Affairs at 202/557-2861

Most sincerely,



Jonathan L. Kempner  
President and Chief Executive