

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	
Controlling the Assault of Non-Solicited	)	CG Docket No. 04-53
Pornography and Marketing Act of 2003	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	
	)	

TO: The Commission

**COMMENTS OF THE NATIONAL ASSOCIATION OF REALTORS**

The National Association of REALTORS® (NAR) urges the Commission to adopt rules in the above-captioned proceeding concerning the sending of mobile service commercial messages (MSCMs) that are clear, practical, and as easy to follow for a three-person office as for a large and technologically-sophisticated operation. NAR represents over one million real estate professionals who are involved at the local level in residential and commercial real estate nationwide as brokers, salespeople, property managers, appraisers, counselors, investors, developers and others engaged in all aspects of the real estate industry. Both the cell phone and e-mail are integral parts of a real estate professional's work day. As such, NAR's members are both potential senders and receivers of MSCMs, and therefore appreciate the goal of curbing abusive unsolicited MSCMs. Given the varied nature of how real estate professionals operate, however, NAR is concerned that the Commission will adopt rules that are not realistic and that interfere with consumers' expectations. Consequently, NAR urges the Commission to define clearly the scope of MSCMs covered by the new rules such that persons who want to receive

property information or price sheets from agents or suppliers on their wireless phones need not undertake burdensome procedures in providing “express prior authorization.”

**I. IN THE REAL ESTATE CONTEXT, THE SCOPE OF PERMISSIBLE MOBILE SERVICE MESSAGES SHOULD BE CONSTRUED IN ACCORDANCE WITH LONGSTANDING INDUSTRY PRACTICE.**

The definition of a mobile service commercial message, and the type of MSCM permitted under the new rules, should be construed so as to not disrupt ordinary and legitimate business practices in the real estate industry.<sup>1</sup> NAR members do not use e-mail to send mass “spam,” but rather use this productive and efficient tool to contact specific individuals who have purposely entered the market to buy or sell real property. For example, real estate brokers and agents regularly send e-mails to potential clients who have made an informal inquiry (and have given their cell phone number) about buying or selling a home. In this and similar instances, real estate professionals will use mobile service messaging (MSM) to contact a limited and specific set of recipients. By properly defining the scope of messages subject to the MSCM rules, the Commission would ensure that legitimate and accepted business practices in the real estate industry are not disrupted.

**A. Oral Consent to Receiving an MSCM Should Constitute “Express Prior Authorization.”**

In the real estate context, an MSM subscriber should be found to have given “express prior authorization” to receiving an MSCM so long as the subscriber has given verbal

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<sup>1</sup> NAR agrees with the Commission that the definition of a “mobile service commercial message” should be limited to messages sent to e-mail addresses assigned to subscribers of a commercial mobile radio service. This definition decreases the likelihood that a real estate professional will inadvertently send a prohibited MSCM. See Notice of Proposed Rulemaking, CG Docket No. 04-53, March 19, 2004 at ¶ 10.

consent to being contacted.<sup>2</sup> To hold real estate professionals to a more burdensome standard would hinder communication with individuals in the local real estate market who *want* to receive property information from agents and brokers on their mobile phones.

The reality of the relationship between real estate professionals and customers makes obtaining signed or even electronic consent before sending a mobile service commercial message impractical. As NAR explained in its Petition for Reconsideration of certain aspects of the fax advertising rules, it is typical for a real estate agent to have a relationship with an interested customer for many months before any agreement is signed between the two – if an agreement is reduced to writing at all.<sup>3</sup> In a tight housing market, such as Washington D.C., the delay caused by having to obtain express written or electronic consent from a new client before the agent can e-mail relevant house listing information could mean the difference between buyers getting the home they want or losing it.

Thus, when a potential customer provides his or her real estate agent with an e-mail address, the agent should not have to obtain written or electronic consent simply because that address may be assigned to a CMRS device. As explained below, the burden on local real estate agents and brokers in simply identifying whether an e-mail is directed to a CMRS subscriber is significant. By defining “express prior authorization” to include oral consent the Commission would ensure that the currently thriving real estate market is not disrupted by

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<sup>2</sup> Section 14(b) of the CAN-SPAM Act requires that MSM subscribers be provided “the ability to avoid receiving mobile service commercial messages unless the subscriber has provided express prior authorization to the sender.”

<sup>3</sup> National Association of Realtors Petition for Reconsideration of Telemarketing and Facsimile Advertisement Rules, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Aug. 25, 2003).

unnecessary regulation, while at the same time leaving actual spam (for which no consent, oral or otherwise, is given) subject to enforcement action.

If the Commission is concerned that the oral-consent requirement could be subject to abuse, it could consider imposing a requirement that the oral consent be acknowledged by the sender in the mobile service commercial message or a subsequent communication.<sup>4</sup> This requirement could bolster the enforceability of the consent requirement but would do so in a way that does not unduly burden legitimate users.

**B. The Commission Should Clarify that a “Mobile Service Commercial Message” Does Not Include Certain Routine Practices Unique to the Real Estate Industry.**

The CAN-SPAM Act states that the term “commercial electronic mail message” does not include a “transactional or relationship message.”<sup>5</sup> In accordance with Congressional intent to exclude transactional messages from CAN-SPAM, the Commission should clarify that the definitional scope of an MSCM does not include the kinds of transactional or relationship messages that are at the heart of the real estate industry.<sup>6</sup>

Specifically, the MSCM rules should not apply to a real estate professional’s communication with clients and customers when that communication is limited to messages concerning the services provided by the real estate professional to the client. Note that this formulation would *not* include messages sent on behalf of third parties, like moving companies

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<sup>4</sup> For example, the real estate professional could write “per your request” in the e-mail sending a listing to an MSM subscriber.

<sup>5</sup> Pub. L. No. 108-187, § 3, 117 Stat. 2699, 2701 (2003).

<sup>6</sup> The NAR recently documented to the Federal Trade Commission how communications typical in the real estate industry constitute a “transactional or relationship” message. *See* Letter from Walt McDonald, NAR, to Office of the Secretary, FTC, Project No. R411008, April 20, 2004 (Attached as “Exhibit A”).

or other sellers – those third-party communications would be covered by the MSCM rules. The back-and-forth messages between a real estate professional and a client are clearly “transactional,” even though the real estate agent is not compensated 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). The Commission’s rules should not lock-in one type of business model and prejudice other business models, especially one that is as commonplace and well understood as that found in the real estate context.

Moreover, the relationship between trade associations like NAR or its state and local associations and their members is analogous to an ongoing commercial transaction. Accordingly, the new mobile service commercial message rules should not constrain the sending of mobile service messages by NAR to its members regarding the services and benefits of membership.

## **II. IN ENABLING CONSUMERS TO AVOID RECEIVING MSCMs, THE COMMISSION MUST NOT HARM SMALL BUSINESSES THAT RELY ON E-MAIL TO COMMUNICATE WITH LOCAL CUSTOMERS.**

NAR’s members are both potential senders and receivers of mobile service commercial messages, and thus support the Commission’s efforts to control abusive unsolicited MSCMs. However, these efforts must not create undue compliance burdens on the vast majority of NAR’s members who operate as small businesses. Especially if the Commission does not grant the above-requested clarification regarding the scope of the new MSCM rules, a ban on sending MSCMs – either to all MSM subscribers or those placed on a Do-Not-MSCM list – would effectively prevent real estate agents and brokers from using e-mail in the manner to which local participants in the industry have become accustomed. It is unreasonable to expect individual agents and brokers to keep track of a Do-Not-MSCM registry or to even know how to

determine whether an e-mail message is directed to an MSM subscriber. Nor can the NAR itself maintain adequate communication with members if forced to ensure that no e-mail is directed to an MSM subscriber or particular subset of subscribers when it contacts its over one million dues-paying members. In light of this, the Commission must assess whether a ban on MSCMs is tantamount to an outright ban on e-mail.

**A. Implementation of a Do-Not-MSCM Registry Would Cause Substantial Compliance Problems for Small Businesses.**

Over the past decade, e-mail has become a basic tool to local real estate professionals. This development has allowed a two-person real estate agency in Tulsa to be nearly as sophisticated as a fifty-person operation in Los Angeles. Yet the clock will turn back for these small businesses if they must keep track of a “Do-Not-MSCM” registry or other ban on sending mobile service commercial messages to a large number of individuals.

Most local real estate agents and brokers would find it difficult to check the e-mail address of a referred potential or existing client against a monthly or quarterly list to determine whether the intended recipient is a mobile service messaging subscriber. Individual real estate agents and brokers cannot be expected to make a legal interpretation as to whether each and every e-mail sent is “relationship” or “commercial” and “unsolicited,” and if so, whether that e-mail is directed to an MSM subscriber. Rather than implementing costly and time-consuming compliance measures, local agents and brokers may abandon e-mail as a primary method of communication or else ignore the Commission’s rules.

**B. REALTORS® Would Be Further Harmed Because a Do-Not-MSCM Registry Would Impede Communications from NAR.**

In addition to the impact on real estate professionals’ ability to make legitimate communications to local real estate market participants by e-mail, a Do-Not-MSCM registry would impair communications between real estate professionals and their industry organization,

the NAR. Because the majority of NAR's one million members work in small offices, members look to NAR for information on new products and services to support their businesses, such as office management solutions, real estate publications, insurance options, technology tools, and risk management training materials.

Under a Do-Not-MSCM scenario or similar ban on sending MSCMs, whenever sending e-mail to its membership, NAR would first have to make a legal interpretation as to whether each and every e-mail is in fact commercial. Erring on the side of caution, the smallest amount of promotion of a product or service would require NAR to check each of its one million members' e-mail addresses to determine if it is directed to any mobile service messaging subscribers and (assuming there is not a ban on sending *all* mobile service commercial messages), if the MSM subscriber is on a Do-Not-MSCM registry. And finally, prior to actually sending the e-mail, NAR would have to verify the e-mail address of any potential member who is an MSM subscriber, given the risk of liability associated with inadvertently sending the e-mail message to the wrong subscriber. Surely Congress did not intend to create such a substantial compliance burden on legitimate communications between a trade association and its members.

### **C. A Do-Not-MSCM Registry Would Attract Security Attacks.**

Perhaps most alarming, the registration of MSCM addresses or domain names would pose a significant threat to the privacy of NAR's members, who are avid *consumers* of e-mail and specifically MSMs. For all the well-documented reasons that security experts and chief regulators such as FTC Chairman Timothy Muris have doubted the wisdom of a Do-Not-Email list, the Commission should not adopt an MSCM registry.<sup>7</sup>

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<sup>7</sup> See, e.g., Associated Press, *FTC Chairman Doubtful of Anti-Spam List*, The Boston Herald, March 12, 2004 ("Chairman Timothy Muris, repeating comments he made before the [CAN- (continued...)")

A publicly-distributed list of MSM addresses would be a prime target for security attacks, providing spammers a plethora of confirmed e-mail addresses.<sup>8</sup> If a single unlawful spammer were to obtain the list, it could become widely available on the Internet, leading to the bombardment of the very same mobile service messaging subscribers who signed-up for the list in an effort to *avoid* unsolicited MSCMs.<sup>9</sup> And even if the FCC were to act as the “scrubber” of the list (thus keeping the list of MSM addresses private), a professional spammer could use a “dictionary attack” to create millions of random e-mail addresses (some fake, some valid) for submission to the FCC. The FCC would return to the spammer a scrubbed list consisting of only the fake addresses. By running a comparison of the original list to the scrubbed one the spammer could discern a list of “live” MSM subscribers. Of course, these dictionary attackers could then resell that list to other spammers.

Moreover, enforcement of such a list would be ineffective at best. As the FTC explained in recent testimony before the U.S. Senate Committee on Commerce, Science and Transportation, “[Spammers] easily hide their identity, forge the electronic path of their e-mail messages, or send messages from anywhere in the world to anyone in the world.”<sup>10</sup> And like legitimate senders, spammers are unable to know that the address to which a message is directed

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SPAM Act] passed, said he does not think the FTC can come up with a way to enforce such a list and significantly reduce unwanted e-mail.”).

<sup>8</sup> The security implications of a Do-Not-MSCM list are considerably greater than in the case of the Do-Not-Call registry. In the latter case, most of the registered numbers are already publicly available, leaving abusive telemarketers little reason to make illicit use of the list.

<sup>9</sup> NAR has documented a similar argument at the Federal Trade Commission in opposing the creation of a Do-Not-Email registry. See Letter from David A. Lereah, NAR, to Office of the Secretary, FTC, Project No. R411008, March 31, 2004.

<sup>10</sup> *Unsolicited Commercial E-mail*, Hearing Before the Senate Committee on Commerce, Science and Transportation, 108th Cong. (May 21, 2003) (statement of The Honorable Mozelle W. Thompson, Commissioner, Federal Trade Commission).

is that of an MSM subscriber. But unlike legitimate users, they won't care. A Do-Not-MSCM registry would thus increase the proliferation of unwanted and abusive mobile service commercial messages.

### **III. THE MECHANISM BY WHICH CONSUMERS MAY BLOCK FUTURE MSCMs SHOULD OCCUR AT THE CARRIER OR DEVICE LEVEL.**

NAR wholeheartedly supports the statutory goal of allowing consumers to block future mobile service commercial messages from a particular sender if they so desire. However, the mechanism enabling consumers to reject MSCMs must be simple for both consumers and senders of MSCMs to understand and administer. Real estate professionals should be able to e-mail listings and other relevant information to consumers wishing to receive such information. The fact that a consumer at some point in the future may decide to forgo receipt of *all* MSCMs (even those to which the consumer had previously given "express consent") does not warrant imposition at the sender level of "tagging" or other filtering information.

Accordingly, any filtering mechanism should not depend on action by the sender, but rather the recipient. For example, a web-based management system administered by the CMRS carrier under which a mobile service messaging user could establish a limited set of addresses from which the user wishes to accept or reject MSCMs would be reasonable. Requiring *senders* to setup and maintain an opt-out website would essentially prevent most local real estate professionals from sending *any* arguably commercial e-mail to their customers.

## CONCLUSION

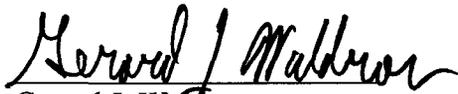
The Commission should define the scope of the new mobile service commercial message rules to ensure that legitimate and accepted practices in the real estate market are not disrupted. Also, where the rules are applicable, compliance measures should be simple for even very small businesses with limited resources to follow. And the ability of a sender to block future MSCMs from a particular sender should be administered at the carrier or wireless device level and not by the sender.

Respectfully submitted,

**NATIONAL ASSOCIATION OF REALTORS®**



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*Its Counsel*

April 30, 2004

# EXHIBIT A



NATIONAL ASSOCIATION OF REALTORS®

The Voice for Real Estate®

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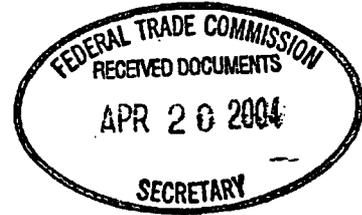
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Walt McDonald  
President

April 20, 2004

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Re: "CAN-SPAM Act Rulemaking, Project No. R411008," 69 *Federal Register* 48, 11775-11782 (March 11, 2004) – "Primary Purpose," "Transactional or Relationship Message," "Sender" and Other Definitional Issues.

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 1,000,000 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 four specific areas about which the Commission has sought input. First, NAR proposes that the Commission implement a simple test to determine the "primary purpose" of an electronic mail message. Second, NAR requests clarification of the "transactional or relationship message" definition contained in the Act 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 the in ordinary course of the relationships those parties form. Third, NAR seeks a longer period for businesses to respond to opt-out requests, as the proposed 10-day period is not reasonable and imposes a costly burden upon small businesses like a real estate brokerage. Finally, NAR seeks clarification of the Act's definition of "sender," including application of that term in the context of "forwarded messages."

Below is a discussion of the arguments in support of NAR's positions on these issues.



## **I. NAR Proposes Simplified “Primary Purpose” Test**

NAR encourages the Commission to create a simple “primary purpose” test so that it will be clear to associations like NAR which of its communications are commercial electronic mail messages subject to the Act’s requirements.

Trade associations like NAR and its state and local associations commonly use electronic mail to provide members with information about association business and benefits, such as meeting information, association activities, legislative activity, legal news, and a variety of other subjects. These various activities and programs, along with the communications that describe them, are precisely what members expect and desire to receive from the association. Correspondingly, the fundamental reason associations send such messages to members is to communicate such information to the members, even though the messages may also contain information about products, services, or events offered through the association. This promotional information is generally an insubstantial portion of the message, and would not be the subject of an independent, “self-standing” message if the association did not seek to distribute to members non-commercial content about association programs, activities and benefits. In other words, associations commonly transmit electronic mail messages to their members containing content to which the Act would not apply, but which messages also include incidentally promotional information the delivery of which is not the “primary purpose” for the message.

NAR proposes that the Commission adopt regulations that establish a “primary purpose” test, which focuses on whether the commercial portion of the electronic mail message is the dominant portion of the electronic mail message, taking into consideration a variety of factors. One factor to be considered is, as noted above, whether the sender would transmit the message even if all commercial solicitations were removed from the electronic message. Put another way, the criteria should ask whether the *non-commercial* portion of the electronic message stands, and would be sent by the association, on its own? If so, then the message is not a commercial electronic message. Another factor to be considered would be the extent of the non-commercial communications between the parties. Since an organization like NAR already engages in an extensive amount of non-commercial communications with its membership, this factor should weigh towards a finding that the primary purpose of a message is not subject to the Act’s requirements. Yet another factor would simply compare the amount of promotional and non-promotional content of a message, measured in some appropriate way. Other factors might also be included. This standard would also not unduly burden NAR and its member associations with additional requirements when it sends messages to its membership.

## **II. “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® 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 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

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

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

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.

### **III. 10-Business-Day-Time Period for Processing Opt Out Requests Is Not Reasonable**

Pursuant to Congressional directive, the Commission is seeking comment on whether 10 days is a reasonable time period for a business to process opt-out requests received from consumers. NAR supports the implementation of a rule containing a longer period for businesses to respond to opt-out requests, as the 10-day period creates a costly burden upon small businesses like a real estate brokerage and is thus unreasonable.

Most of NAR's members are 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 may not have the resources to instantaneously incorporate these consumer requests into all of their electronic mail lists. NAR proposes the Commission adopt a rule incorporating a longer period, such as the 31-day period the Commission recently included in its Do Not Call Rules. A longer time period will give small businesses a reasonable time to assure the consumer's opt-out request is processed and will not detrimentally effect the interests of those receiving commercial electronic messages, as businesses will still have to cease sending commercial electronic within a relatively short time frame.

### **IV. Commission Should Clarify the "Sender" Definition, Including Application to "Forwarded" Messages**

NAR believes the Commission should clarify that a "sender" of an electronic mail message is limited to the party who controls all aspects of an electronic mail message.

The Act defines a "sender" of an electronic mail message as "a person who initiates such a message and whose product, service, or Internet web site is advertised or promoted by the message." In its Advanced Rulemaking Notice, the Commission sought comments on the scope of this definition, including whether the definition encompasses every individual or entity whose product is promoted within the electronic mail message qualifies as a sender. Additionally, the Commission has sought comment on the effect of forwarding an electronic mail message.

NAR believes that the Commission should limit the definition of "sender" 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. Control over the electronic message would require 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. NAR communicates via e-mail with its nearly 1,000,000 members, and includes in some of those communications information about products or services offered by other parties that may be of interest to the members. It would impose a heavy burden upon NAR 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. NAR's messages are clearly identified as coming from NAR and NAR controls all aspects of these messages - indeed, the messages from NAR contain information that the members expect to receive from NAR and is the reason many members join NAR. Moreover, and as noted above, third-party advertisements contained in an NAR initiated electronic mail messages are ordinarily incidental to the message's content and would be understood as such by the recipient. Broadening the definition of sender would impose a costly and unnecessary burden on NAR's communications with its members without benefit, since any members who preferred not to receive NAR messages containing advertisements or promotions of the products of others could simply opt-out of receiving such e-mails from NAR. Thus, the definition of sender should be clarified to apply only to the individual or entity who controls and initiates the sending of an electronic mail message, whether or not the message contains information about products or services sold by others.

In regards to the mail forwarding questions posed by the Commission, NAR also believes that the requirements of the Act should not apply to someone other than the individual or entity who actually initiates the sending of a message, except perhaps if consideration is paid by a party initiating a message to a recipient who "forwards" that message in exchange for that consideration. All other message forwarding by message recipients should not invoke application of the Act's requirements to the original message sender with respect to a message recipient other than the party to whom the original sender directed the message. The original sender has no control over the message after transmission to the original recipient, and thus it is impossible for that sender to assure that the message complies with the Act's requirements with respect to other recipients. Fundamental fairness also requires that a sender not be held responsible for sending a message to a party who has opted-out when in fact another party has sent the message to such person, and the sender has no ability to control or prevent the message from being sent indirectly improperly. Thus, the definition of "sender" should only include the original sender of a forwarded message when some type of consideration has been exchanged between the parties- all other message forwarding should not be covered within the Act's definition of a sender.

## **V. Conclusion**

NAR's comment letter has addressed four specific areas about which the Commission has sought input. First, NAR believes the "primary purpose" test for commercial electronic mail messages

should simply involve an examination of the electronic mail message's commercial content, in light of a series of factors. Second, NAR seeks clarification of the "transactional or relationship" definition contained within the Act so it is clear that this definition covers communications between an association and its members for association-related activities and benefits. NAR has also requested clarification of this definition for specific examples impacting multiple listing services and real estate professionals. Third, NAR seeks a longer period for businesses to respond to opt-out requests, as the 10-day period creates a costly burden upon small businesses like a real estate brokerage. Finally, NAR seeks clarification on the Act's definition of "sender," including application of the Act's requirements to the original sender of a message when the message is forwarded by the initial recipient to one or more subsequent recipients.

Yours truly,

A handwritten signature in black ink that reads "Walt McDonald". The signature is written in a cursive, slightly slanted style.

Walt McDonald