



NATIONAL AUTOMOBILE DEALERS ASSOCIATION  
8400 Westpark Drive • McLean, Virginia 22102  
703/821-7040 • 703/821-7041

Legal & Regulatory Group

April 20, 2004

**Via E-Mail**

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

Re: CAN-SPAM Act Rulemaking, Project No. R411008  
Aspects other than the National Do-Not-E-Mail Registry

Dear Sir/Madam:

The National Automobile Dealers Association (“NADA”) submits the following comments in response to the Federal Trade Commission’s (“FTC” or “Commission”) Advanced Notice of Proposed Rulemaking (“ANPR”) requesting comment on aspects of the CAN-SPAM Act other than the National Do-Not-E-Mail Registry. These comments follow NADA’s comments to the FTC on March 31, 2004 concerning the National Do-Not-E-Mail Registry.

NADA represents approximately 20,000 franchised automobile and truck dealers who sell new and used vehicles and engage in service, repair and parts sales. Our members employ more than 1.1 million people nationwide. A significant number of our members are small businesses as defined by the Small Business Administration. Accordingly, NADA is particularly focused on regulatory changes that may increase the regulatory burden for small businesses.

As stated in our March 31, 2004 comments to the Commission, our members increasingly rely on e-mail messages to communicate product and service information to their customers. They also rely on e-mail messages to communicate non-advertisement and non-solicitation information to their customers. Our members may use e-mail messages as part of a program to market products to different categories of customers (e.g., all customers whose lease will soon expire) or they may use it purely on an individual basis (e.g., a salesperson who responds by e-mail to a customer who inquires into the availability, features and price of a particular vehicle). The latter occurs with increasing frequency as customers often inquire by e-mail into vehicle inventory and other products that are listed on dealership web sites. Because of the multiple purposes and situations in which automobile and truck dealers currently (or in the future) may use e-mail messages, it is critical that the FTC clearly set forth the definition of a “commercial electronic mail message” and the standards that govern its use. It also is important that the FTC establish safe harbors and non-exclusive examples of language that senders may use to satisfy the CAN-SPAM Act

requirements. This is particularly important for small businesses and others that do not have the in-house expertise or resources to develop specific compliance solutions for implementing general regulatory standards.

NADA offers the following comments in response to specific issues raised in the ANPR.

### Primary Purpose

It is essential that the Commission further define the criteria for determining the primary purpose of an e-mail message in a manner that is consistent with the statute. Among the possible interpretations of “primary purpose” identified by the Commission, the first interpretation, stating that the primary purpose is commercial when the “advertisement or promotion is more important than all of the e-mail’s other purposes combined,” 69 Fed. Reg. 11,779, appears most consistent with the statute’s intent.

However, whether the Commission adopts this or one of the other interpretations it has identified, it must provide senders with illustrative guidance on how it applies to multi-purpose e-mail messages. For example, how would it apply to an automobile dealership e-mail message that informs a customer that her car is due for scheduled maintenance and that invites her to contact the dealership to schedule an appointment? How also would it apply to daily or weekly e-mail messages from a trade association that provide information on industry developments, economic news, statutory and regulatory updates, upcoming seminars or convention registration deadlines? The amount of commercial content in the latter type of e-mail message usually is not fixed and will depend on industry developments in the period immediately preceding the e-mail. For example, the message may be dominated by news of a recent statute, regulation or court case that will impact the industry, or it may provide registration information for a fee-based seminar to assist members in complying with new regulatory obligations that they must assume. To the extent such a publication is a “newsletter,” 69 Fed. Reg. 11,780, it will not necessarily be funded by, or even contain, advertising within the newsletter.

Unless guidance is provided on these types of messages, many senders will treat them as commercial to avoid a potential enforcement action. This will disproportionately impact small businesses since many will be unable to analyze and apply a general “primary purpose” standard to every multi-purpose e-mail they wish to send. Their routine treatment of such e-mails as “commercial” will effectively expand the scope of the disclosure requirement contained in section 5 of the statute and ill-serve recipients of the messages who will be misinformed about their content. This may cause recipients to unknowingly opt-out of receiving non-commercial information based on the mistaken notion that the message is solely an advertisement. This appears particularly likely if the subject line contains an advertisement identifier.

The Commission poses the question: “Should the identity of an e-mail’s sender affect whether or not the primary purpose of the sender’s e-mail is a commercial advertisement or promotion?” Id. NADA Comments to FTC

We believe e-mail messages from trade associations should be excluded from the definition of a “commercial” e-mail message based on the non-profit purpose of these organizations. Accordingly, we urge the Commission to expressly state in the final rule that e-mail messages from trade associations or their affiliated entities do not constitute commercial messages.

#### Transactional or Relationship Messages

The Commission seeks comment on whether it should “expand or contract the categories of messages that are treated as transactional or relationship messages” in order to accomplish the purposes of the Act. 69 Fed. Reg. 11,777. As noted below, we believe there are several modifications or clarifications that will serve this purpose and better assist senders with their compliance responsibilities.

*To facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender.*

This category should include e-mail responses to customer *inquiries* or *applications* as well as e-mail messages to customers who previously have entered into a transaction with the sender.

Customers who inquiry into or apply for a product or service offered by a business, through whatever means (phone, e-mail, regular mail, etc.), reasonably expect to receive a response from the business. The Commission has recognized this expectation in the context of telemarketing calls. See 68 Fed. Reg. 4,593 (Jan. 29, 2003)(“A simple inquiry or application would reasonably lead to an expectation of a prompt follow-up telephone contact close in time to the initial inquiry or application...”). There is no reason to believe the customer’s expectation is any different with regard to e-mail messages. It is essential that the Commission recognize that e-mail responses to inquiries and applications constitute transactional or relationship messages in order to preserve the ability of businesses to efficiently meet the needs of their customers.

The same applies to e-mail messages that a business sends to a customer with whom it has an *established business relationship* based on a purchase, rental, lease or financial transaction. The Commission previously found that the experience of state law enforcement representatives “with state ‘do-not-call’ laws that have an exemption for ‘established business relationships’ suggest that this type of exemption is consistent with consumer expectations.” 68 Fed. Reg. 4,591. It further found that:

... many consumers favor an exemption for companies with whom they have an established relationship. Consumers also might reasonably expect sellers with whom they have recently dealt to call them, and they may be willing to accept these calls.

A consumer's reasonable expectation of receiving telemarketing calls from businesses with whom they have an established business relationship certainly applies with equal force to e-mail, which consumers increasingly rely upon to send and receive communications. See section 2(a)(1) of the CAN-SPAM Act ("Electronic mail has become an extremely important and popular means of communication, relied on by millions of Americans on a daily basis for personal and commercial purposes...."). In addition to consumer expectations, it is essential that businesses have the ability to contact their past customers without having to implement unnecessary compliance measures. Many small businesses limit their phone and e-mail communications to former and current customers and those who have applied for, or inquired into, their products and services. The Commission's decision as to whether these communications constitute transactional or relationship messages will determine whether these businesses must include the CAN-SPAM Act's notice and opt-out requirements in *any* of their e-mail messages (as opposed to merely *extending* these requirements to messages to this particular group of recipients). We urge the Commission to incorporate into the definition of transactional or relationship messages e-mail communications from a sender to customers with whom it has an established business relationship.

In the context of the motor vehicle industry, the Commission should specify that customer requests for product information to a dealership that are made through the web site of a third party, such as a "lead provider" that electronically forwards the customer's contact information upon the customer's request to an "authorized dealer" in its area, constitute an inquiry to any of the dealerships that receive the message. Because the customer initiates this communication and understands that the lead provider will send his inquiry to different dealerships in his area, the customer reasonable expects (and, indeed, seeks) a follow-up e-mail message or phone call from area automobile dealerships. Clarification of this issue is necessary since the customer's initial interaction is with the third party and not the dealers from whom it expects to receive a quote or other information.

*To provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient.*

The Commission should clearly state that this category includes scheduled maintenance notifications. Scheduled maintenance visits enhance the safety of the vehicle, protect the customer's warranty coverage and permit the service facility to review the status of any open or outstanding recalls affecting the vehicle. Although each of these purposes may be subsumed into the phrase "warranty information," "product recall information" or "safety information," the Commission can assist our members by expressly stating that scheduled maintenance notifications constitute transactional or relationship messages.

*To provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating or enrolled.*

The Commission should clarify whether this category applies to e-mail messages that an employer sends to employees about its products and services. Specifically, if an employee benefit includes a discount on certain products and services, would an e-mail message about those products and services constitute a transactional or relationship message?

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The Commission seeks comment on the appropriate treatment of transactional or relationship messages that advertise a commercial product or service. Transactional or relationship messages should be treated as such unless the product or service they are advertising or promoting is completely unrelated to the transactional or relationship element of the message. For example, if an automobile dealership sends a message to a customer that: (i) states the customer's vehicle is due for scheduled maintenance, and (ii) offers to perform the maintenance for a set fee, the message should retain its characterization as a transactional or relationship message notwithstanding its promotion of an available service. Because these two elements are directly related, it would be awkward and burdensome to require the dealership to send the first part in a transactional or relationship message and the second part in a commercial message that cross-references the first message and provides the required section 5 disclosures. It also would deviate from the statute's intent to require such messages to be treated as commercial messages when the message confers important safety and/or warranty information.

#### 10-Business-Day Period for Processing Opt-Out Requests

The Commission should extend the period for processing opt-out requests to 30 calendar days. This time frame is necessary for small businesses that may lack the personnel or resources necessary to continuously monitor and track opt-out requests and to ensure the requesters' e-mail addresses cannot be used in future commercial e-mail messages. This is particularly important for businesses that maintain separate databases for their different departments (e.g., sales, service, parts) as they may require additional time to ensure opt-out requests are honored throughout the entire company.

The challenge this requirement imposes on small businesses cannot be understated. Many small business owners and managers perform multiple functions within their business. They may not have the luxury of devoting full-time personnel to monitor their IT functions. If they are away from the office for a brief period of time or engaged in another essential business or regulatory function, they may be unable to act within the 10-business day window. They require the flexibility to meet other demands while honoring the opt-out requests of their customers.

### Implementation of the CAN-SPAM Act Generally

The Commission seeks comment on a variety of other issues, such as whether it should clarify the legal obligations of initiators and recipients of “forward-to-a-friend” commercial e-mail messages, 69 Fed. Reg. 11,778, and whether several entities or persons simultaneously could be considered the sender of a particular e-mail message. *Id.* Although we understand the Commission’s legitimate concerns about these scenarios, we urge it to promulgate rules that set forth clear and simple standards that do not expand the statutory duties on businesses that initiate commercial e-mail messages.

### Regulatory Flexibility Act

The Commission inquires into how it may minimize the burdens imposed by the statute on small businesses. In addition to the issues raised above, we request the Commission provide examples of what constitutes “affirmative consent” as set forth in sections 5(a)(4) & (5) of the statute.

NADA appreciates the opportunity to comment on this matter.

Sincerely,

Paul D. Metrey  
Director, Regulatory Affairs