

BANKER & TRADESMAN

THE REAL ESTATE, BANKING AND COMMERCIAL WEEKLY FOR MASSACHUSETTS

ESTABLISHED 1872

COMMENTARY

CAN-SPAM Regs Require Caution, Compliance of Mortgage Lenders

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NEW REGULATIONS ISSUED BY THE Federal Trade Commission will assist mortgage brokers and lenders in marketing or promoting their services or products over the Internet. The brokerage and lending industry is highly competitive, especially in a refinance market with falling interest rates.

To stay competitive, most brokers and lenders maintain databases containing client-contact information. Increasingly over the last decade, those databases include client e-mail addresses. Lenders may also obtain e-mail addresses when purchasing loans in the secondary market. In turn, brokers and lenders commonly send unsolicited e-mails advertising or promoting their services to obtain additional business and stay competitive. For example, brokers and lenders many times send e-mails informing recipients of an interest-rate drop, availability of home equity lines of credit, changes in conforming loan levels, etc. The practice amounts essentially to an e-mail "cold call" and may or may not be appropriate under federal law depending on its form, content and classification.

On Jan. 1, 2004, the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM) became effective. CAN-SPAM applies to any unsolicited "commercial" e-mail, which means any unsolicited e-mail of which the "primary purpose" is the commercial advertisement or promotion of a commercial product or service. For the most part, CAN-SPAM requirements do not attach to non-commercial e-mails or so-called "transactional or relationship" messages, as defined



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by the act, although some sections of the act apply to transactional or relationship messages.

On Dec. 16, 2004, the FTC issued final regulations providing guidance for determining the "primary purpose" of an e-mail. The regulations become effective on Feb. 18, 2005. According to the regulations, commercial e-mails shall have a "commercial" primary purpose if an e-mail "exclusively" promotes or advertises a commercial product or service. If an e-mail promotes or advertises a commercial product or service and contains transactional or relationship content, then the primary purpose of the e-mail is commercial if the recipient "reasonably interpreting" the e-mail's subject line would likely conclude that it advertises or promotes a commercial product or service or the e-mail's transactional or relationship content does not appear "in whole or in substantial part" at the beginning of the e-mail. Finally, if an e-mail promotes or advertises a

commercial product or service and contains other content that is not transactional or relationship content, then the primary purpose of the e-mail is commercial if the recipient "reasonably interpreting" the e-mail's subject line or body of the message likely would conclude that the message advertises or promotes a commercial product or service. With regard to determining the primary purpose of a transactional or relationship e-mail, the regulations essentially mirror the definition of transactional or relationship message contained in CAN-SPAM and provide that the primary purpose of an e-mail shall be transactional or relationship if the message "consists exclusively" of such content.

Act Requirements

The marketing e-mails sent by most brokers and lenders likely meet the definition of commercial e-mails, although some might argue that a broker or lender has an "ongoing commercial relationship" with existing clients and, as a result, such e-mails fall within the definition of a "transactional or relationship" message. Because CAN-SPAM does not define an "ongoing commercial relationship" or its scope, and in light of the exclusivity standard for transactional or relationship messages in the regulations, brokers and lenders should comply with CAN-SPAM until the definition is clarified further.

Generally, CAN-SPAM compliance, as it relates to commercial e-mails not containing false or misleading header information, requires each and every e-mail to:

- Contain a functioning return e-mail address or other clearly and conspicuously displayed "Internet-based mechanism" allowing

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a recipient to opt out from receiving future e-mails.

- Maintain a viable opt-out mechanism capable of receiving opt-out requests from recipients for no less than 30 days after sending the original e-mail.

- Contain a clear and conspicuous identification that the e-mail is an advertisement or solicitation (unless the recipient has “affirmatively consented” to receiving the message, as defined by CAN-SPAM).

- Contain a clear and conspicuous notice of the opportunity to use the opt-out mechanism.

- Contain a valid, physical postal address.

In addition, although not expressly required by CAN-SPAM, it is good practice to place the notice of the opt-out mechanism and identification of the nature of the e-mail “above the fold” and in bold. Furthermore, it

is important not to send any more e-mails to recipients using the opt-out mechanism within 10 business days after receipt of an opt-out request.

CAN-SPAM does not prohibit brokers and lenders from sending unsolicited marketing e-mails. Rather, it requires brokers and lenders to make certain that recipients are aware that the e-mails are being sent for such purposes and that recipients may choose not to receive any more e-mails. The use of e-mail for marketing purposes is a worthwhile practice and good for the economy. Most often, the information conveyed is helpful because refinancing, for example, may save the recipient money or may provide the recipient extra money for home improvement, which further spurs the economy. In addition, fueled by the concept of commercialism, the e-mails generate busi-

ness for brokers and lenders, which bolsters competition and potentially creates economies of scale.

Any broker or lender sending e-mails to potential or existing clients that do not comply with CAN-SPAM should do so with trepidation because penalties under the act range from civil fines to imprisonment. State Attorney General Thomas Reilly already has brought an enforcement action against a business offering mortgage loans by e-mail, although the alleged conduct attributed to the defendants in that case goes beyond more than mere technical violations of CAN-SPAM. Similarly, the FTC has brought enforcement actions against alleged notorious spammers. Accordingly, when sending unsolicited e-mails, it would serve brokers and lenders well to adopt specific procedures to achieve CAN-SPAM compliance. ■