

**Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580**

In the Matter of)	
)	
Definitions, Implementation and)	Project No. R411008
Reporting Requirements Under)	RIN 3084-AA96
the CAN-SPAM Act)	

**Comments of the
Office of Advocacy, U.S. Small Business Administration
on the Advance Notice of Proposed Rulemaking**

The Office of Advocacy of the United States Small Business Administration (Advocacy) submits these comments to the Federal Trade Commission (FTC or Commission) regarding its *Advance Notice of Proposed Rulemaking* (Advance Notice)¹ in the above-captioned proceeding. The Commission is seeking comment on several topics relating to the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act).² These topics include: (1) defining what is a commercial electronic mail message, (2) reasonableness of the 10-business-day period for processing opt-out requirements, and (3) the practicality, technical feasibility, privacy, and enforceability of a “National Do Not E-mail” Registry. The FTC established an earlier deadline for comments on the registry, which this comment addresses.

1. Advocacy Background

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (SBA), so the views expressed by Advocacy do not

¹ *In the Matter of* Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, *Advance Notice of Proposed Rulemaking*, 69 Fed. Reg. 11776 (rel. March 11, 2004).

² Pub. L. No. 108-187, 117 Stat. 2699 (2003) (codified at 25 U.S.C. §§ 7701 et seq.).

necessarily reflect the views of the SBA or the Administration. Section 612 of the Regulatory Flexibility Act (RFA) requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act.³

On August 13, 2002, President George W. Bush signed Executive Order 13272 requiring federal agencies to implement policies protecting small entities when writing new rules and regulations.⁴ This Executive Order highlights the President's goal of giving "small business owners a voice in the complex and confusing federal regulatory process"⁵ by directing agencies to work closely with the Office of Advocacy and properly consider the impact of their regulations on small entities. In addition, Executive Order 13272 authorizes Advocacy to provide comment on draft rules to the agency that has proposed the rule, as well as to the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget.⁶ Executive Order 13272 also requires agencies to give every appropriate consideration to any comments provided by Advocacy. Under the Executive Order, the agency must include, in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, the agency's response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁷

2. The FTC Should Continue to Consider the Impact on Small Businesses.

Advocacy commends the FTC for considering the impact on small businesses early in its rulemaking on implementation of the CAN-SPAM Act. In the Advance Notice, the FTC is soliciting information that should assist the Commission in addressing small business impacts in

³ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

⁴ Exec. Order. No. 13272 at § 1, 67 Fed. Reg. 53,461 (2002).

⁵ White House Home Page, *President Bush's Small Business Agenda*, (announced March 19, 2002) (last viewed February 2, 2004), available at <http://www.whitehouse.gov/infocus/smallbusiness/regulatory.html>.

⁶ E.O. 13272, at § 2(c).

⁷ *Id.* at § 3(c).

its report to Congress and in performing an initial regulatory flexibility analysis under the RFA for a subsequent proposed rule.⁸

Advocacy encourages the FTC to give careful consideration to the impact on small businesses and to perform a thorough economic analysis that builds upon the information gained from comments to the Advanced Notice. Because of small businesses' substantial use of e-mail, as noted below, implementation of the CAN-SPAM Act stands to have significant economic impacts on small businesses across many different industries. Advocacy is available to assist the FTC in its outreach to small businesses.

3. Small Business Use of the Internet and E-mail Is Substantial.

The FTC requested comments on the number of small entities affected by the CAN-SPAM Act.⁹ This information is relevant to the impact of a Do Not E-mail Registry on small business and the practicality of the registry.

According to Advocacy's estimates, there are approximately 22.9 million small businesses in the United States.¹⁰ They represent 99.7 percent of all employers and employ half of all private sector employees. Small businesses comprise 39 percent of high-tech workers (such as scientists, engineers, and computer workers), and 53 percent of all small businesses are home-based businesses.¹¹

Advocacy just released an economic study, *A Survey of Small Businesses' Telecommunication Use and Spending*, on March 11, 2004 that explores small business use of telecommunications including the Internet.¹² In that study, 73 percent of the respondents had

⁸ Advance Notice, 69 Fed. Reg. 11782.

⁹ *Id.*

¹⁰ Office of Advocacy, U.S. Small Business Administration, *Small Business by the Numbers* (December 2003), available at <http://www.sba.gov/advo/stats/sbfaq.pdf>.

¹¹ *Id.*

¹² Advocacy-Funded Study by Telenomic Research, *A Survey of Small Businesses' Telecommunication Use and Spending* (March 2004), available at <http://www.sba.gov/advo/research/rs236tot.pdf>.

access to the Internet and connected to the Internet in a variety of ways.¹³ Thirty-eight percent used dial-up services, 26 percent used cable modems, 21 percent used DSL, four percent used T1 lines, and three percent used wireless broadband. While dial-up is the single most common means for small businesses to connect to the Internet, a larger percentage use broadband technologies in the aggregate.

A second study commissioned by Advocacy, *E-Biz: Strategies for Small Business Success*, in 2002 explored strategies for small business use of E-commerce.¹⁴ That economic report found that 57 percent of all small firms use the Internet, 35 percent of small businesses sell on-line, and 83 percent use e-mail.¹⁵

In a third study, *E-Commerce: Small Businesses Venture Online*, Advocacy explored how small businesses are using the Internet.¹⁶ In 1998, 41.2 percent of small businesses had access to the Internet. Small businesses used the Internet for a variety of uses, but e-mail was one of the most popular functions. According to the study, half of businesses with computers reported using the Internet to send business-related e-mail and 22 percent used the Internet to sell goods and services.¹⁷ Also, the study found that 30 percent of small businesses surveyed used the Internet to promote their services, 50 percent used it to seek information about potential customers, and 85 percent used it for e-mail purposes.¹⁸

The National Federation of Independent Business conducted a small business poll in 2001 on small business Internet usage.¹⁹ Fifty-seven percent of the small businesses who

¹³ *Id.*

¹⁴ Advocacy-Funded Study by Joanne H. Pratt, *E-Biz: Strategies for Small Business Success* (October 2002), available at <http://www.sba.gov/advo/research/rs220tot.pdf>.

¹⁵ *Id.*

¹⁶ Office of Advocacy, U.S. Small Business Administration, *E-Commerce: Small Businesses Venture Online* (July 1999), available at http://www.sba.gov/advo/stats/e_comm.pdf.

¹⁷ *Id.* at 5-6.

¹⁸ *Id.*

¹⁹ National Federation of Independent Business, *NFIB National Small Business Poll: The Use and Value of Web*

responded used the Internet for business-related activities. Eighty-three percent stated that their most common use of the Internet was communicating by e-mail with suppliers and customers.²⁰

Advocacy realizes that the four studies on Internet business usage are not directly comparable to one another due to sampling, coverage, and other methodological differences. Nevertheless, we urge the FTC's careful review of all four studies in conjunction with the government's response to unwanted unsolicited commercial e-mail.

3. Conclusion.

Advocacy applauds the FTC for considering the impact on small businesses early in its rule development process and encourages the Commission to continue to do so throughout its implementation of the CAN-SPAM Act. Advocacy is concerned that a one-size-fits-all approach like a Do-Not-E-mail Registry will have unintended negative consequences on small business. As an alternative to a National Do Not E-mail Registry, Advocacy recommends that the FTC explore other means of controlling unwanted unsolicited commercial e-mail, including promoting technology-based solutions. Advocacy urges the FTC to take into account that small businesses make extensive use of the Internet and e-mail for legitimate business purposes. Finally, Advocacy is concerned that unintended consequences of the Do Not E-mail Registry could diminish its value and make it impractical.

Sites (2001), available at <http://www.nfib.com/PDFs/sbpoll/webpoll.pdf>.

²⁰ *Id.* at 2.

Thank you for your consideration of these matters, and please do not hesitate to contact me or Eric Menge of my staff at (202) 205-6533 or eric.menge@sba.gov if you have questions, comments, or concerns.

Respectfully submitted,

/s/ _____
Thomas M. Sullivan
Chief Counsel for Advocacy

/s/ _____
Eric E. Menge
Assistant Chief Counsel for Telecommunications

Office of Advocacy
U.S. Small Business Administration
409 3rd Street, S.W.
Washington, DC 20416

March 31, 2004

cc: Dr. John D. Graham, Administrator, Office of Information and Regulatory Affairs