

**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 Advocacy offers these comments to help the FTC in assessing the impact of the implementation of this law on small businesses as well as to help the Commission in preparing a regulatory flexibility analysis for a proposed rule on curbing unsolicited commercial e-mail.

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 necessarily reflect the views of the SBA or the Administration. Section 612 of the Regulatory

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

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

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. Advance Notice and the Regulatory Flexibility Act

In the Advance Notice, the FTC asked for comment on how implementation of the CAN-SPAM Act would affect small businesses and requested information to help the Commission conduct its regulatory flexibility analysis. The FTC asked three questions in particular:

- What burden to small business does the CAN-SPAM Act impose by requiring disclosures in commercial e-mail messages? How can those burdens be minimized?

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).

- Does the CAN-SPAM Act impose any disparate impact on small businesses?
- Describe and estimate the number of small entities to which the CAN-SPAM Act applies.⁸

Advocacy commends the FTC for considering the impact on small businesses early and encourages the Commission to continue to do so throughout the rulemaking process. To assist the Commission in its analysis of the impact on small business, Advocacy offers the following comments on the above questions posed by the FTC.

3. Describe and estimate the number of small entities to which the CAN-SPAM Act applies.

Advocacy addressed the FTC's request for the estimations on the number of regulated small entities in our earlier comments.⁹ As stated in that submission, 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. Advocacy referenced several studies conducted by Advocacy and others that showed that many small businesses are using the Internet, and most small businesses on the Internet use e-mail as part of how they do business.¹¹

Building upon the estimates from our earlier comment, Advocacy recognizes that the burdens that unsolicited commercial e-mail can place on small businesses. Recent reports state that 60 to 80 percent of e-mail traffic is unsolicited commercial e-mail,¹² and a survey by Insight Expressed reported that 42 percent of the 500 small businesses it surveyed said they would

⁸ Advance Notice, 69 Fed. Reg. at 11782.

⁹ Comments of the Office of Advocacy, U.S. Small Business Administration to the *Federal Trade Commission's Advance Notice of Proposed Rulemaking* in Definitions, Implementation and Reporting Requirements Under the CAN-SPAM Act, Project No. R411008, RIN 3084-AA96 (filed March 31, 2004), available at http://www.sba.gov/advo/laws/comments/ftc04_0331.pdf.

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 Comments of the Office of Advocacy, *supra* note 9.

¹² Robert MacMillan, *Survey: Spam Driving Internet Users Away from E-mail*, THE WASHINGTON POST, April 14, 2004.

actually consider abandoning e-mail for business correspondence if the spam situation worsens.¹³

4. What burden to small business does the CAN-SPAM Act impose by requiring disclosures be made in commercial e-mail messages? How can those burdens be minimized?

To provide the FTC with information in response to this question, Advocacy spoke with small business trade associations and small businesses regarding the use of e-mail as part of day-to-day business. The small businesses advised Advocacy that two portions of the disclosure provisions of the CAN-SPAM Act could potentially burden small businesses.

The first issue of concern to small businesses was the Commission's request for comment on interpreting the definition of "sender" to include more than one person, such as third-party senders, forwarding campaigns, and advertisements. The FTC asked if the CAN-SPAM Act should apply to these groups as well.¹⁴

Small businesses told Advocacy that expanding the definition of sender would be problematic for them. The inclusion of advertisements as senders would create an administrative nightmare for small businesses, because small business newsletters or similar e-mails often include advertisements. Furthermore, a small business that is a franchisee or contractor cannot ensure that the larger company will comply with the request.¹⁵ Small businesses trade associations recommended that the FTC not include advertisements as a "sender" under the CAN-SPAM Act and construe "sender" narrowly.¹⁶ Advocacy is concerned that if the definition of sender is broadened, it will be difficult for small businesses to comply with the rule and it could diminish the value of the Internet as a tool in business communications.

¹³ Cade Metz, *Can E-Mail Survive?*, PC MAGAZINE, February 17, 2004.

¹⁴ Advance Notice, 69 Fed. Reg. at 11781.

¹⁵ Conversation with Paul Ruden, Senior Vice President of American Society of Travel Agencies (ASTA) (April 7, 2004); Conversation with Tom Kulzer, CEO & Founder of AWeber Communications; Conversation with Dawn River's Baker, Founding Member of International Council of Online Professionals (March 24, 2004 and April 7, 2004).

¹⁶ Conversation with Michael Zaneis, Director of Technology Policy, U.S. Chamber of Commerce (April 14, 2004) and Conversation with Andrew Langer, National Federation of Independent Business (NFIB) (April 14, 2004).

Another issue of concern to small businesses is whether a post office (P.O.) box should be permitted as a physical address of the sender of an e-mail.¹⁷ A recent economic study by Advocacy showed that 53 percent of small businesses are home-based businesses.¹⁸ Because of privacy concerns, many home-based businesses use P.O. boxes, and Advocacy has long supported the position that P.O. boxes should count as physical addresses to comply with regulations.¹⁹ Advocacy continues to take this position and recommends that the FTC find that P.O. boxes satisfy the physical address requirements of the CAN-SPAM Act.

5. Does the CAN-SPAM Act impose any disparate impact on small businesses?

The small businesses and their associations contacted by Advocacy identified several areas of the Advance Notice that could have a disparate impact on small businesses.

First, the FTC asked for comment on how to define a “transactional or relationship message.”²⁰ A Web-based small business informed Advocacy that it needs to be able to tell current customers about new products and services and recommended that regular unsolicited communications with established customers should be deemed transactional or a part of a relationship.²¹ Small business trade associations suggested that the FTC should define "transactional and relationship messages" to include e-mail sent with either verbal or written consent and that a business relationship should set a precedent that all e-mail correspondence

¹⁷ Advance Notice, 69 Fed. Reg. at 11781.

¹⁸ Advocacy-Funded Study by Joanne Pratt, *Homebased Business: The Hidden Economy* (August 1999), available at <http://www.sba.gov/advo/research/rs236tot.pdf>.

¹⁹ Letter from Jere Glover, Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration to William Henderson, Postmaster General, United States Postal Services (October 20, 1999), available at http://www.sba.gov/advo/laws/comments/ps99_1020.html; Comments of the Office of Advocacy, U.S. Small Business Administration to the World Intellectual Property Organization's Second WIPO Internet Domain Name Process, RFC-3 (filed June 14, 2001), available at http://www.sba.gov/advo/laws/comments/wipo01_0614.html.

²⁰ Advance Notice, 69 Fed. Reg. at 11780.

²¹ Conversation with Janet Attard, founder of Business Know-How -- a small business Web page for home offices and small businesses which provides information about starting, growing and managing small and home-based businesses (April 7, 2004).

would constitute transactional messages.²² As stated earlier, small businesses make extensive use of e-mail, and Advocacy believes that the FTC should construe the definition of transactional and relationship messages broadly in order to avoid having a disparate impact on small businesses

Second, the FTC sought comment on whether the 10-business-day period for processing opt-out requests was sufficient.²³ Small businesses were divided on this issue. One businesses trade association recommended that the time frame for honoring opt-outs be lengthened from 10 business days to 31 calendar days.²⁴ Another trade association said that a 10-day period is not unreasonable but anything shorter would present a problem for small firms.²⁵ Apart from the timing concerns, one small business said that e-mail is not always delivered in a timely manner and is sometimes lost before it reaches its recipient.²⁶ Advocacy encourages the FTC to explore ways to verify receipt of an e-mail before a small business is held accountable for an e-mail request to stop e-mailing a particular address.

The FTC also asked whether there should be a system of rewarding those who report CAN-SPAM violations.²⁷ Small businesses are especially troubled by the disparate impacts of this proposal and are worried that the system would be ripe for abuse and could lead to a cottage industry of spurious reporting of violations but would have little impact on stopping unsolicited commercial e-mail.²⁸

²² Conversation with U.S. Chamber of Commerce, *supra* note 17 and Conversation with NFIB, *supra* note 17.

²³ Advance Notice, 69 Fed. Reg. at 11780.

²⁴ See Conversation with U.S. Chamber of Commerce, *supra* note 17.

²⁵ See Conversation with ASTA, *supra* note 17.

²⁶ See Conversation with Janet Attard, *supra* note 22.

²⁷ Advance Notice, 69 Fed. Reg. at 11782.

²⁸ See Conversation with U.S. Chamber of Commerce, *supra* note 17. See Conversation with NFIB, *supra* note 17, See Conversation with Janet Attard, *supra* note 22, and Conversation with Lynn King, Regulatory and Industry Relations Representative of the National Association of Realtors (April 6, 2004).

6. Conclusion

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,

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