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April 19, 2004

Timothy J. Muris
Chairman
Federal Trade Commission
Office of the Secretary
Room 159-H
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: CAN-SPAM Act Rulemaking, Project No. R411008

Dear Chairman Muris:

These comments relating to the Federal Trade Commission's ("FTC's") Advanced Notice of Proposed Rulemaking on the CAN-SPAM Act are submitted on behalf of the National Association of Insurance and Financial Advisors ("NAIFA"). NAIFA (formerly the National Association of Life Underwriters) is a federation of nearly 1,000 state and local associations representing almost 80,000 life and health insurance agents and investment advisors. Originally founded in 1890, NAIFA is the nation's oldest and largest trade association of insurance agents and financial advisors. NAIFA's mission is to improve the business environment, enhance the professional skills and promote the ethical conduct of agents and others engaged in insurance and related financial services who assist the public in achieving financial security and independence.

This comment letter is divided into four parts. The first part discusses the insurance agent-customer relationship and why it fits within the definition of a "transactional or relationship message." The second part describes the importance of referrals in the insurance industry and the implications of the practice for the FTC's rulemaking including its inquiry into who should be considered the "sender" of an electronic mail message. The third part urges the FTC to adopt a de minimus exception to its rules so that businesses that send a small number of commercial electronic mail messages do not have to undertake the full burdens of compliance with the rules. The fourth part sets forth some problems with a national do not e-mail registry and recommends that the FTC not take this approach to regulating commercial e-mail.

1. <u>Insurance Agent-Customer Contacts Should be Considered "Transactional or Relationship Messages"</u>

The CAN-SPAM Act sets forth a category of electronic mail communications that it does not consider to be commercial messages. These "transactional or relationship messages" are exempt from many of the Act's requirements. The Act sets out four categories of transactional or relationship messages but gives the FTC discretion to alter or clarify its definitions.

Insurance agent-customer contacts are included as "transactional or relationship messages" under the Act because they involve conveying information to the customer pursuant to an ongoing commercial relationship. A commercial relationship exists between the agent and customer even though the premium for the insurance policy is paid to the insurer rather than to the agent. Maintaining these insurance agent-customer contacts within the definition of "transactional or relationship messages" will allow for customers to continue to get information about their insurance policies and for agents to fulfill their fiduciary obligations to their customers.

The principles underlying the exception for "transactional or relationship messages" is straightforward: where consumers have chosen to enter into a commercial relationship of some kind there are often messages associated with those relationships that are necessary to the consumer getting the benefit of the bargain made or that otherwise may be advantageous to the consumer. The insurance agent-customer relationship fits nicely within this principle. Insurance agents provide information to their customers regarding insurance products. The information provided by insurance agents is quite valuable and helps customers evaluate their options and make informed decisions. This flow of information, however, is not only provided prior to purchase of a product. The purchase of an insurance product is more appropriately characterized as the beginning of a relationship between the insurance agent and customer. In fact, this relationship can carry with it legal duties for the insurance agent to keep the customer informed regarding certain aspects of the products and options such as the possibilities for renewing or replacing those policies.

Agents fulfilling their duties and keeping customers informed should not be limited in the mode of communication they (or their customers) choose. Electronic mail is already an important way for agents to communicate with their customers and may well grow in importance in the future. NAIFA urges you to affirm the Act's treatment of insurance agent-customer messages as "transactional or relationship messages" in the FTC's rule.

2. Referral Business Should Not Be Limited by Regulations on E-Mail Forwarding

Referrals are a key component of the insurance business. Customers have knowledge about their friends and acquaintances that are important to take into account. If an individual feels they have been well-served by an insurance agent and that someone they know would benefit from hearing from that agent, then the FTC should not limit those interactions. The questions raised by the FTC's advanced notice of proposed rulemaking regarding "forward-to-a-friend" electronic mail make it appear that the FTC may limit these referrals. That would be unfortunate.

If people who do not have a financial stake in an e-mail or resulting transaction forward a commercial e-mail to their friends, those messages should not be regulated as commercial e-mail. Not only are such forwarded messages likely to be well-received and appreciated, but the original sender of the message as a practical matter cannot exercise control over what happens to the messages sent or to whom they are sent. The individuals forwarding the messages also are unlikely to be aware of a relevant FTC rule or have knowledge of how to comply with it given that they themselves are not forwarding the message for their own commercial purposes.

Similarly, the FTC should not place limitations on e-mail messages sent directly from an insurance agent to a prospective client when that contact is the result of a referral from a friend or acquaintance of the prospective client. By allowing "forward-to-a-friend" messages and referrals followed by direct contacts from an agent to continue without limitations, the practice of referrals – a valuable and relatively unobtrusive form of commercial activity – will continue to develop in the Internet age. We urge the FTC to allow these practices to continue unabated.

3. Adopt a *De Minimis* Exception

Many insurance agencies are small or very small businesses with only a handful (or, in some cases, only one) employee. For some agencies, commercial electronic mail messages with individuals with whom they do not already have a commercial relationship are infrequent. These agencies should not have to comply with all of the same regulations as senders of large volumes of e-mail messages. The FTC should set a common sense threshold that exempts businesses that send a small number of commercial e-mail messages from regulation.

4. Do Not Implement a National Do Not E-mail Registry

A national do not e-mail registry is unlikely to be an effective vehicle for stemming the tide of spam. The purveyors of spam who have become an annoyance and burden for many people – both due to the volume and content of the messages – are able to operate without large staffs and facilities and can make it very difficult to trace the origin of the messages they send. These characteristics distinguish e-mail from the FTC's do not call list. Call centers need larger facilities than spammers and it is relatively easy to trace the origin of phone calls. In part because of these differences, some spammers may well ignore a do not e-mail registry or even use such a registry as another ready source of e-mail addresses to bombard. Obviously, this would make a do not e-mail registry ineffective and may, in fact, aggravate the problem of unwanted spam.

At the same time, a do not e-mail registry is likely to be costly and cumbersome for businesses – especially those that do not send a large volume of commercial e-mail – to implement. Remaining current with such a registry will tax the administrative and information systems of many businesses, particularly small businesses. This is due in part to the fact that all businesses will likely be forced to repeatedly check a large national registry because e-mail addresses, unlike telephone numbers, cannot be segregated geographically. In NAIFA's view, these burdens outweigh the benefits (if any) of a national do not e-mail registry.

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In sum, NAIFA urges the FTC to affirm the CAN SPAM Act's treatment of insurance agent-customer messages as "transactional or relationship messages," allow "forward-to-a-friend" and referral messages to continue without restrictions, create a de minimus exception allowing businesses that send a small number of commercial e-mail messages to avoid some of the costs of compliance with the FTC's rule, and refrain from implementing a national do not e-mail registry.

Thank you for your consideration.

Sincerely,

Heather Eilers-Bowser

Heather Eilers-Bowser
Director-Federal Relations