



National Association of Insurance and Financial Advisors

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June 27, 2005

Mr. Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Via Electronic Mail

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

Dear Secretary Clark:

This letter provides the comments of the National Association of Insurance and Financial Advisors (“NAIFA”) on the Commission’s Notice of Proposed Rulemaking requesting public comment on certain definitions and substantive provisions under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM or the Act), 70 Fed. Reg. 25426 (May 12, 2005). NAIFA (formerly the National Association of Life Underwriters) is a federation of approximately 800 state and local associations representing approximately 225,000 life and health insurance agents and their employees. Founded in 1890, NAIFA is the nation’s oldest and largest trade association of insurance agents and financial services professionals. NAIFA’s mission is to improve the business environment for its members, as well as 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.

NAIFA supports the Commission’s efforts to craft a rule that will effectively combat the distribution of “spam” email that presents a nuisance and privacy concern to consumers. However, we urge the Commission to make the following clarifications and modifications to the rule, which we believe are necessary and appropriate.

1. Insurance-Agent Contacts Should be Considered “Transactional or Relationship Messages”

In comments regarding the Commission’s CAN-SPAM Rulemaking Project No. R411008 submitted in April of 2004, NAIFA urged the Commission to affirm the Act’s treatment of

insurance agent-customer messages as “transactional or relationship messages” under the rule, despite the fact that the customer pays the premium to the insurer, not the agent. NAIFA thanks the Commission for clarifying in the Notice that when an insurer uses an agent to sell policies, a message confirming the transaction would qualify as a transactional or relationship message under 7702(17)(A)(i) of the Act whether it comes from the insurer or the selling agent.

Although this is a positive development, because the purchase of an insurance product is a beginning, rather than an end, to a relationship between the insurance agent and customer, we reiterate our request that the Commission affirm the Act’s treatment of insurance agent-customer messages as “transactional or relationship messages” *in the rule itself*. Information submitted by insurance agents to their customers is essential to helping customers evaluate their options and make informed decisions both before and after the purchase of a product. The continued flow of information between agent and customer following the confirmation of a transaction is necessary to allow the agent to fulfill its legal duties to the customer and keep the customer informed about the products and options such as renewal and replacement of policies. NAIFA urges the Commission to modify the rule such that agent-customer emails are explicitly listed as a category of “transactional or relationship messages.” Failure to explicitly exempt such communications will chill the ability of insurance agents to properly communicate important information to their customers via electronic mail, which is arguably the most important, efficient, and effective mode of communication available.

2. “Forward-to-a-Friend” Email Communications Cannot Be “Induced” in the Absence of Payment or Other Consideration

NAIFA commends the Commission for clarifying that a company is engaged in a “routine conveyance” when it simply offers a mechanism on a Web site for forwarding and someone other than the seller identifies the recipients or provides their addresses. Nonetheless, we urge the Commission to reconsider its decision to treat as a “sender” any person that affirmatively acts or makes an explicit statement designed to urge another to forward a message, even if no payment or other consideration is provided in exchange. The term “induce,” as used in the definition of the term “procure,” and thus of “sender,” under the Act, was included by Congress to prevent commercial service providers from evading classification as “senders” by sending messages for free. Congress did not intend the definition of “sender” to encompass “forward-to-a-friend” messages and did not subject such messages to the Act. Messages, when sent by consumers who are not provided any consideration, cease to be for “commercial purposes” and become personal messages from the individual to his or her friends or family. Therefore, we urge the Commission to make clear that, unless the forwarding individual is actually paid or provided other consideration, forward-a-friend emails have not been “induced” are not subject to the Act.

Further, we urge the commission to exempt email 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. Referrals are a key component of the insurance business. Satisfied customers have personal knowledge of the needs and wishes of their friends and family, and thus, their referrals are likely to be well-received and appreciated. Direct contact with persons

who have been referred by friends and family benefits consumers and agents alike, and is a relatively unobtrusive form of commercial activity. The Commission should permit this practice to continue unabated.

3. Adopt a *De Minimis* Exception

NAIFA's April, 2004 comments urged the Commission to set a common sense threshold exempting businesses that send a small number of commercial emails. Currently, the proposed rule extends to any company that sends commercial email messages or transactional or relationship messages, regardless of the company's size. We once again urge the Commission to add a *de minimis* exception to the rule. Many insurance agencies are small or very small businesses with only a handful or, in some cases, only one employee. Some agencies infrequently communicate through commercial electronic mail messages with individuals with whom they do not already have a commercial relationship. Requiring these agencies to comply with all of the same regulations as senders of large volumes of email messages places an unjustified burden on small business. We urge the Commission to create a *de minimis* exception to prevent the unreasonable, burdensome application of the rule to small and very small businesses that send a small number of unsolicited emails.

4. Clarify the Meaning of "Control" in Single-Sender Criteria

NAIFA supports the Commission's efforts to create criteria for identifying a single "sender" responsible for compliance with the Act in situations where multiple persons' products or services are advertised in one email message. The Commission's proposed rule provides that if only one person is both within the Act's definition of "sender" and meets one of the following criteria, that person will be deemed the single "sender" for purposes of the Act: (i) the person controls the content of the message, (ii) the person determines the electronic mail addresses to which such message is sent; or (iii) the person is identified in the "from" line as the sender of the message.

We believe, however, that the proposed criteria does not provide sufficient guidance to establish who is the sender in multiple advertiser situations unless the meaning of "control" is clarified or the "control" criteria is removed. While it will be clear whether one party determines the email addresses to which the message is sent or is identified in the message's "from" line, it may be difficult to determine whether one party is in "control" of email content. For example, one party may draft, design, and have ultimate say over the email's contents, yet another party may provide input and/or approve of their ad copy in a message. In such a situation, both parties could be viewed as "controlling" content.

We urge the Commission to develop criteria for identifying "control" over the content of a message. For example, the party that has ultimate power to determine the content could be considered the party having "control." Alternatively, NAIFA believes that the criteria would be equally effective if the Commission removes control over content as single-sender criteria altogether.

5. Allow Single-Senders to be Determined by Contract

NAIFA requests that the Commission allow one or more persons advertising products or services in a single email to determine who will be the “sender” responsible for compliance with the Act by contract, provided that the designated person would qualify as a single-sender under the rule’s criteria. This would allow insurers and agents, for example, to work together to manage the opt-out process in an efficient manner for policyholders with whom both communicate.

6. Allow Senders at Least 10 Business Days to Effectuate Opt-Outs

The Commission proposes to reduce the amount of time in which senders must effectuate opt-outs from 10 business days to three business days. NAIFA strongly urges the Commission to reconsider this decision, and suggests that the only reasonable change to the time period would be to extend the period beyond 10 days.

The majority of companies cannot reasonably be expected to process and effectuate large numbers of opt-out requests within three days of receipt. In many cases, multiple parties are involved in sending commercial email. In such situations, time is required to coordinate opt-outs.

Putting aside the issue of whether the proposed change is reasonable, it is clear that the change is unnecessary and unwarranted. There is no evidence that the current 10 day requirement is insufficient, and no justification for requiring companies to bear the extra burden and expense of complying with a three day time period. In fact, nearly half of consumers commented that 10 business days is an appropriate time period for processing opt-out requests. 70 Fed. Reg. at 25442. Congress itself expressed its belief that 10 days is an appropriate time period for effectuating opt-outs in the Act itself. The Commission is given the authority to extend or shorten this time period only if it determines that a different time period would be more appropriate after taking into account the purposes of 15 U.S.C. § 7704(a), the interests of recipients of commercial email, and the burdens imposed on senders of lawful commercial email. Taking these factors into consideration, however, there is no basis in the record for making a determination that a shorter time period would be more appropriate. The Commission has itself noted that comments claiming that a shorter time period is needed to prevent “mail bombing” were “not supported by factual evidence that such practices actually occur, or that these practices would be eliminated by a shorter processing period.”

Advocates of a shorter time period have not presented facts supporting a determination that a shorter time period would be appropriate, and, therefore, the Commission should not shorten the 10 day time period for effectuating opt-outs that was prescribed by Congress.

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NAIFA appreciates the Commission's efforts to develop a reasonable, effective rule to implement the CAN-SPAM Act that will represent fair and logical resolutions of issues that have been the subject of debate during these comment periods. We appreciate the opportunity to comment and respectfully request that you revise the proposed rule in conformity with our comments and the comments submitted by the American Council of Life Insurers (ACLI), which we support.

Thank you for your consideration.

Sincerely,

/s/ William R. Anderson

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NAIFA