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April 20, 2004

Hon. Timothy J. Muris, Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW.
Washington, DC 20580
(submitted electronically)

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

Chairman Muris:

On behalf of the 600,000 small businesses represented by the National Federation of Independent Business (NFIB), we are offering comments on the advanced proposal for new regulations being promulgated under the CAN-SPAM Act of 2003, which took effect January 1, 2004. The Advanced Notice of Proposed Rulemaking (ANPRM) was published in the Federal Register on March 11, 2004.¹

Because these regulations are at the early stage of development, NFIB's comments will primarily focus on ensuring that as the regulations are further developed, that small business impacts are taken into consideration. While there are a myriad of small business viewpoints on the subject, there are two attitudes that stand out: there are those small businesses that rely on mass e-mailing for their business, and there are those small businesses that use e-mail regularly in their business day and find the receipt of "spam" to be a time consuming nuisance. Whatever regulations are created should be done to protect the latter without needlessly harming the former.

We are encouraged that the Federal Trade Commission (FTC) has stated that it will undertake an initial regulatory flexibility analysis (IRFA) as required by law. We urge 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 working with the stakeholder communities. Because of small businesses' substantial use of e-mail, implementation of the CAN-SPAM Act stands to have significant economic impacts on small businesses across many different industries.

¹ 69 Fed. Reg. 11776

We specifically urge FTC to pay special attention to the following areas:

- 1) The impact of a narrow definition of a “pre-existing business relationship,” including how that definition might affect e-mail that is transactional in nature but also may contain a solicitation for future business;
- 2) The possibility, as has occurred under the stringent rules governing faxes between businesses and their customers, that the system of reward for those who claim harm from “spam” might generate a “cottage industry” in predatory litigation;
- 3) How small businesses could be implicated if third parties use their company names or their products without their knowledge or prior approval in e-mail ruled to be “spam.”

We appreciate the opportunity to comment on this ANPRM. If you have any questions do not hesitate to contact me. My telephone number is (202) 314-2032.

Thank you again.

Sincerely,

//S//

Andrew M. Langer
Manager, Regulatory Policy

AML/slf