



NATIONAL AUTOMOBILE DEALERS ASSOCIATION
8400 Westpark Drive • McLean, Virginia 22102
703/821-7040 • 703/821-7041

Legal & Regulatory Group

March 31, 2004

Via E-Mail

Federal Trade Commission
Office of the Secretary
Room 159-H
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: CAN-SPAM Act Rulemaking, Project No. R411008
National Do-Not-E-Mail Registry

Dear Sir/Madam:

The National Automobile Dealers Association (“NADA”) submits the following comments in response to the Federal Trade Commission’s (“FTC” or “Commission”) Advanced Notice of Proposed Rulemaking (“ANPR”) requesting comment on the report the FTC must submit to Congress concerning “a plan and timetable for establishing a nationwide marketing Do-Not-E-Mail registry.” 69 Fed. Reg. 11,778 (March 11, 2004).

NADA represents approximately 20,000 franchised automobile and truck dealers who sell new and used vehicles and engage in service, repair and parts sales. Our members employ more than 1.1 million people nationwide. A significant number of our members are small businesses as defined by the Small Business Administration. Accordingly, NADA is particularly focused on regulatory changes that may increase the regulatory burden that exists for small businesses.

NADA wishes to briefly comment on the anticipated burden of complying with a National Do-Not-E-Mail Registry and the need for the Commission to analyze the effectiveness of the recently-enacted CAN-SPAM Act restrictions before moving forward with the development of a National Do-Not-E-Mail Registry.

Anticipated Burden

Our members increasingly rely on e-mail messages to communicate product and service information to their customers. This generally is due to: (i) their customers’ increasing use of e-mail as a standard means of communication, and (ii) their need to communicate by e-mail since the creation of the National Do-Not-Call (“DNC”) rules adopted by the FTC and the Federal Communications Commission (“FCC”) has severely limited their ability to reach their customers by telephone.

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Based on our members' experience in attempting to comply with the National DNC rules, we believe a National Do-Not-E-Mail Registry similarly would impose an enormous burden. As stated in our comments responding to other recent FTC rulemakings, our members typically are small or mid-size entities that lack the in-house apparatus and expertise necessary to develop programs and procedures to comply with new federal regulatory requirements. Consequently, they frequently must retain the services of vendors that develop compliance products for the various requirements. This can be very costly as it pertains to a single new regulatory requirement and prohibitively costly as it pertains to multiple new requirements (*see, e.g.*, the FTC Privacy Rule, FTC Safeguards Rule, FTC and FCC National DNC rules and the forthcoming FTC rules implementing the CAN-SPAM Act and the FACT Act). Nevertheless, to ensure they are in compliance with the National DNC rules, the company-specific DNC rules, any applicable state DNC restrictions and the FCC restrictions on fax advertisements, many dealers have expended considerable sums to obtain necessary compliance products. We anticipate this also will occur with any forthcoming National Do-Not-E-Mail rules. Consequently, when the Commission assesses whether this requirement will have "any disparate impact on small businesses," 69 Fed. Reg. 11,782, it should recognize that many small businesses will spend considerable sums retaining vendor support services in order to comply with this new requirement.

Need for a National Do-Not-E-Mail Registry

The ANPR focuses on the *technical aspects* of developing a National Do-Not-E-Mail Registry as opposed to the *need* for such a registry. Nevertheless, we wish to briefly note that it is premature for Congress and the Commission to conclude that a National Do-Not-E-Mail Registry is necessary to protect consumers from unwanted commercial e-mail messages. Before the Commission promulgated its National DNC rules, it concluded that "the company-specific approach is seriously inadequate to protect consumers' privacy from an abusive pattern of calls placed by a seller or telemarketer." 68 Fed. Reg. 4,631 (Jan. 29, 2003). Because Congress only recently enacted the CAN-SPAM Act and the Commission has not had an opportunity to either promulgate implementing regulations or analyze their effectiveness, the Commission should set aside adequate time for this to occur in its plan and timetable for establishing a National Do-Not-E-Mail Registry. This will ensure businesses are not forced to engage in costly measures to comply with a National Do-Not-E-Mail Registry before the Commission concludes that such a registry is necessary to protect consumers from unwanted commercial e-mail messages.

It should be noted that the characteristics of e-mail messages and certain requirements contained in the CAN-SPAM Act should preclude several of the problems consumers encountered with the company-specific DNC rules. Unlike telephone solicitations, recipients of e-mail solicitations do not need to interact with the seller to request that they no longer be contacted. Recipients of commercial e-mail messages also have a means of identifying the subject matter of the message before being presented with it. Specifically, section 5(a)(2) of the CAN-SPAM Act prohibits deceptive and misleading subject headings. In addition, section 5(a)(3) of the CAN-SPAM Act

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requires senders of commercial e-mail messages to clearly and conspicuously display a return e-mail address, or other Internet-based mechanism, that permits recipients to opt-out of receiving future commercial e-mail messages from the sender. This affords recipients a simple and convenient means of expressing their opt-out preferences and, unlike verbal requests over the telephone, allows them to easily record their electronic opt-out requests and produce them for enforcement purposes. The Commission thus should allow sufficient time to test the effectiveness of the CAN-SPAM Act restrictions when it submits its timetable to Congress for establishing a National Do-Not-E-Mail Registry.

NADA appreciates the opportunity to comment on this matter.

Sincerely,

Paul D. Metrey
Director, Regulatory Affairs