

**Comments to the Federal Communications Commission  
From Consumer Action, Consumer Federation of America, and the  
National Consumers League  
In the matter of Rules and Regulations Implementing  
The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003  
CG Docket No. 04-53  
April 30, 2004**

**Introduction**

The National Consumers League (NCL) is a nonprofit advocacy organization founded in 1899 to identify, protect, represent, and advance the economic and social interests of consumers and workers. Since 1971, the nonprofit organization Consumer Action (CA) has served consumers nationwide through complaint referral, education, and advocacy. Consumer Federation of America (CFA), established in 1968, is a nonprofit association of 300 consumer groups that seeks to advance the consumer interest through research, advocacy, and education. We are pleased to provide our views on the issues related to protecting consumers from unwanted mobile service commercial messages

Congress correctly noted that recipients of unsolicited commercial electronic messages, commonly referred to as spam, incur costs in time and money to store, access, review and discard them. In the case of spam directed to mobile service devices, unwanted messages also use up minutes that recipients have paid for.

We lament the fact that Congress did not take an “opt-in” approach for all electronic commercial messages, regardless of whether they are sent to personal computers or other devices. This would have given consumers the full measure of privacy protection they want and would have made the job of the Federal Communications Commission (FCC) much easier. However, since the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act) does make a distinction, providing stronger protection for consumers from unwanted mobile service commercial messages, the FCC should adopt regulations that

clearly implement the desire of Congress to bar unsolicited mobile service messages unless consumers have given prior express authorization to receive them.

### **Definition of messages transmitted directly to commercial mobile service devices**

#### **The means of transmission shouldn't matter**

We agree with the FCC that the specific transmission technique used to deliver the message to the subscriber's wireless device does not matter; the impact on the recipient is the same regardless of how the message is transmitted to an electronic mail address that the mobile service provides to the subscriber. The definition of mobile service commercial messages should include both text messages directed to wireless devices through the use of the telephone number assigned to them and messages initially sent through the Internet as electronic mail messages and converted by the service provider into an SMS message associated with the telephone number. Again, the impact on the subscriber is the same in either case.

#### **Messages that consist of graphics or images should be included**

The definition should also include commercial messages that consist of graphics or images, since these could be used as links to a Web site soliciting the recipient's business.

#### **Messages should be exempt if forwarded by recipients to their own mobile devices**

We also agree with the FCC that the definition should not include messages that the recipient has taken affirmative steps to forward from a computer to his or her own mobile device. In this case, the recipient is making a conscious decision to transfer those messages. However, the FCC should take care not to open up a huge loophole by exempting all forwarded messages. Many marketers deliberately encourage people to initiate electronic commercial messages to others on their behalf. Those messages should fall within the definition when they are sent to wireless devices.

## **Ability to avoid receiving mobile service commercial messages**

### **Commercial messages should not be sent without prior express authorization**

Section 14(b) of the CAN-SPAM Act requires the FCC to protect consumers from unwanted mobile service commercial messages. It further provides that the rules promulgated by the FCC should enable consumers to avoid receiving such messages unless they have given the sender express prior authorization.

We think that the intent of Congress is very clear; wireless subscribers should not be sent commercial messages unless they agree in advance to receive them, and the FCC regulations should implement the protection that Congress has provided to wireless subscribers in that regard. We strongly disagree with the FCC's conclusion that in order to attain this protection, consumers must take affirmative action to decline receiving mobile service commercial messages in the first instance.

As the FCC notes, Congress clearly intended to provide *greater* protection from commercial electronic mail messages to wireless subscribers than to other consumers. The FCC's interpretation would place wireless subscribers in the *same* position as consumers in general, obliging them to "opt-out" if they do not want to receive such messages. This defies logic and does not comport with the intent of the statute.

Section 14 (a) (3) of the CAN-SPAM Act, under which the FCC may consider whether to allow subscribers to indicate a desire not to receive *future* mobile service commercial messages at the time of subscribing to the mobile service, *only* applies to messages from the mobile service providers themselves, not from other senders, and *only* if the FCC decides that mobile service providers should be treated differently than other senders. This section should not be construed to mean that the FCC could adopt regulations that would enable *all* senders to send commercial

messages to wireless subscribers unless those subscribers indicate that they do not want to receive them.

### **Mobile services should not be treated differently than other senders**

We see no reason why consumers' rights not to receive mobile service commercial messages without their prior express authorization should be diminished in regard to messages from their mobile service providers. The CAN-SPAM Act already provides an exception for "transactional and relationship" messages. Messages that fall outside this scope intrude on consumers' privacy, no matter whether they are from their mobile service providers or other businesses. If mobile providers wish to send subscribers such messages, they can easily ask for their express prior authorization to do so.

### **Express prior authorization should be in writing, signed by the consumer**

The FCC seeks comment on the form and content of the "express prior authorization" required in order to send mobile service commercial messages to consumers. The definition of "affirmative consent" under the CAN-SPAM Act should not be used as the basis for determining what constitutes "express prior authorization." If Congress had intended that, it would have used the term "affirmative consent" in Section 14. Again, Congress intended to give mobile subscribers *greater* protection than consumers in general in regard to receiving electronic commercial messages.

The FCC regulations under the Telephone Consumer Protection Act regarding unsolicited facsimile transmissions may be helpful to use for guidance here. Section 64.1200(a)(3)(i) provides that a fax advertisement is not "unsolicited" if the recipient has given prior express invitation or permission as evidenced by a *signed, written statement* clearly indicating his or her consent. The FCC added the requirement for a signed, written statement to the regulations last year because of abuses that illustrated the need to better document "prior express invitation or

permission.” This is a higher standard than “affirmative consent.” NCL believes that this standard should also apply to mobile commercial service messages and that the FCC regulations should require signed, written evidence of the consumer’s express prior authorization.

**The burden of determining if messages are being sent to wireless devices should not be on the subscribers**

The FCC notes that there appear to be a variety of mechanisms that could allow a sender to reasonably determine that a message is being sent to a wireless subscriber. We do not have the technical expertise to recommend which mechanisms might work best. Whatever mechanisms are ultimately used, however, we believe that the burden must be placed on the sender and/or the mobile service provider to deploy them, not on the consumer.

**General requirements of the CAN-SPAM Act**

**Mobile commercial service messages should provide the same disclosures as other electronic commercial messages**

Important disclosures required by the CAN-SPAM Act such as the identity of the sender, the consumer’s right to opt-out at any time from receiving further messages from the sender, and the sender’s valid postal address must be clearly and conspicuously conveyed in the message, regardless of whether it is sent to a computer or a wireless device. The fact that this information may take up the entire initial portion of the message that is viewed is not a problem from a consumer standpoint, since this information is very important. The sender has the choice of transmitting the solicitation to a mobile device or soliciting the consumer in another way.

**Mobile commercial service messages should provide the same opt-out mechanisms as other electronic commercial messages**

The intent of the CAN-SPAM Act is to enable consumers to easily exercise the right not to receive further messages. That is why a functioning return email address or other Internet-based mechanism must be provided for that purpose, rather than simply instructing the consumer to write or call to make the request. The FCC should ensure that mobile subscribers are just as easily able to opt-out of future messages as other consumers, without having to take additional steps to do so.

**Conclusion**

NCL, CA and CFA appreciate the opportunity to provide views from the consumer perspective on some of the important issues that the FCC must decide in this rulemaking. The FCC should keep the consumer's right to be protected from unwanted commercial electronic messages first and foremost in implementing the provisions of the CAN-SPAM Act as they apply to mobile devices. We look forward to working with the FCC and others to educate consumers about their rights under the regulations.

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