

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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
)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278
)	

JOINT PETITION FOR LIMITED WAIVER

The Direct Marketing Association (“The DMA”) and the E-Mail Service Provider Coalition (“ESPC”), pursuant to Section 1.3 of the Federal Communications Commission’s (“Commission”) rules, 47 C.F.R. § 1.3, respectfully request that the Commission grant a limited waiver of its mobile service commercial messages (“MSCMs”) rules, 47 C.F.R. § 64.3100, and relevant Order and Notices, for a period of 90 days, for commercial e-mail messages (“CEMs”) sent pursuant to affirmative (opt-in) consent of the recipient. The waiver will permit companies to determine which individuals with whom they communicate via e-mail have e-mail addresses associated with wireless services and devices (“wireless e-mail addresses”), whether the existing authorizations they have on file for these individuals satisfy the requirements of the MSCMs rules and, for those for whom the authorizations do not satisfy the requirements of the MSCMs rules, provide sufficient time for senders of CEMs to these addresses to obtain express prior authorization as required by the rule. Alternatively, Petitioners request that the Commission waive application of the express prior authorization requirements of its MSCMs rules to CEMs sent to individuals for whom the sender has obtained prior to March 7, 2005, the affirmative (opt-in) consent of the recipient.

On February 7, 2005, the Commission published the list of wireless domain names (“the Wireless Domain Name List” or “List”) at its web site. The Commission has provided only 30 days after publication on the web of the Wireless Domain Name List for businesses to comply initially with the new rules that prohibit the sending of MSCMs to wireless subscribers absent their express prior authorization.

As companies undertake their efforts to comply with the new rules, it has become apparent that there are a substantial number of wireless e-mail addresses associated with individuals who have asked previously to receive CEMs from the sender. These individuals could be adversely impacted by the new rules because their request to receive CEMs was not provided in the form required in the MSCMs rules for obtaining express prior authorization.

This first publication of the Wireless Domain Name List contains nearly 200 domain names, resulting in far more wireless e-mail addresses than industry anticipated. For example, seven e-mail service providers that provide e-mail services to a cross section of businesses have estimated that the compliance obligations associated with the Wireless Domain Name List will impact more than 1.74 million e-mail addresses they manage for clients.

As demonstrated below, because of the magnitude of the new obligations (as reflected in the size of the List) and the lead time that it will take for businesses to comply initially with the new rules, enforcement of the Commission’s MSCMs rules under these unique circumstances would be contrary to the public interest, and could cause customer inconvenience and economic harm. The DMA and the ESPC believe that a limited waiver of the Commission’s MSCMs rules in this instance is justified by the good cause standards established by the Commission’s rules, 47 C.F.R. § 1.3.

I. BACKGROUND

The Direct Marketing Association (www.the-dma.org) is the leading trade association for businesses and organizations interested in direct, interactive, and database marketing, which in 2003 generated more than \$1.7 trillion in U.S. sales, including \$134 billion in catalog sales and \$41 billion in Web-driven sales. In addition to catalogs and the Web, DMA members employ a wide variety of marketing media, including mail, e-mail, telephone, newspapers and magazines, interactive television, and radio, among others. The DMA's membership represents marketers from every business segment, including catalogers, Internet retailers, retail stores, nonprofit organizations, advertising agencies, financial services providers, book and magazine publishers, book and music clubs, industrial manufacturers, and a host of other vertical segments, as well as the service industries that support marketers.

The ESPC is a cooperative group of industry leaders working to create solutions to the continued proliferation of spam and the emerging problem of deliverability. Our membership provides volume e-mail delivery services to an estimated 250,000 clients — representing the full breadth of the U.S. marketplace. The ESPC is currently working on solutions to spam and deliverability concerns through a combination of legislative advocacy, technological development, and industry standards.

The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN SPAM Act”) restricted, but did not prohibit, the sending of commercial e-mail messages (“CEMs”).¹ The Act sought to strike a balance between cutting back upon the transmission of

¹ Pub. L. No. 108-187, 117 Stat. 2699 (2003), *codified at* 15 U.S.C. §§ 7701-7713, 18 U.S.C. § 1037, and 28 U.S.C. § 994.

unwanted CEMs and continuing e-mail communications between businesses, on the one hand, and their customers and other willing recipients of CEMs, on the other.

The CAN SPAM Act directed the Commission to “provide subscribers the ability to avoid receiving mobile service commercial messages sent without the subscribers’ prior consent, and the ability to indicate electronically a desire not to receive future mobile service commercial messages. Further the Act requires the Commission to consider the relationship that exists between providers of such services and their subscribers, as well as the ability of senders to comply with the requirements of the Act given the unique technical limitations of wireless devices.”²

II. GOOD CAUSE AND SPECIAL CIRCUMSTANCES WARRANT A WAIVER

Section 1.3 of the Commission’s rules permits the Commission to waive any provision of its rules upon “good cause shown.”³ Under well-established precedent, the Commission may waive its rules if “special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”⁴ In considering a waiver petition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall

² *In the Matter of Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003*, CG Dkt. No. 04-53, *Order*, FCC 04-194 (rel. Aug. 12, 2004), at ¶ 3.

³ 47 C.F.R. § 1.3.

⁴ *Northeast Cellular Tel. Co., L.P. v. FCC*, 897 F.2D 1164 (D.C. Cir. 1990).

policy.⁵ Based on these criteria, the Commission should waive its MSCMs rules in response to this Petition.

Special circumstances exist here to warrant a one-time deviation from compliance with the MSCMs rules by March 9, 2005. The Commission is in the midst of the final phase of its first-time ever implementation of new MSCMs rules, which is the stage fraught with the greatest hardship for industry. As demonstrated below, industry needs a longer lead time to comply initially with the new MSCMs rules.

Upon publication of the Wireless Domain Name List, businesses must take several steps to comply initially with the new rules that prohibit the sending of MSCMs to wireless subscribers absent their express prior authorization. At a minimum, businesses must first determine which individuals with whom they communicate via e-mail have wireless e-mail addresses. Second, for individuals with wireless e-mail addresses, businesses must determine whether they will be sending communications that fall outside of the Act's exemption for "transactional or relationship" messages. Third, for communications that fall outside of the Act's exemption, businesses must determine whether the existing authorizations they have on file for these individuals satisfy the requirements of the MSCMs rules. Fourth, for those individuals for whom the authorizations do not satisfy the requirements of the MSCMs rules, businesses either must obtain express prior authorization or remove their wireless e-mail addresses from the companies' databases. The Joint Petition focuses upon this last step and CEMs sent pursuant to affirmative (opt-in) consent of the recipient.

⁵ See Federal-State Joint Board on Universal Service, CC Dkt No. 96-45, *Memorandum Opinion and Order and Seventeenth Order on Reconsideration*, FCC 99-280 (rel. Oct. 13, 1999), at ¶ 28.

Without additional time, the effect of strict adherence to the MSCMs rules will be to limit the sending of CEMs to millions of recipients that have requested to receive such messages solely because these recipients have not provided express prior authorization in the manner required in the rules. For a list of nearly 200 wireless domain names affecting millions of e-mail addresses, 30 days from publication causes undue hardship and undercuts the effective implementation of the Commission's overall policy regarding MSCMs. For example, seven e-mail service providers that provide e-mail services to a cross section of businesses have estimated that the compliance obligations associated with the Wireless Domain Name List will impact more than 1.74 million e-mail addresses they manage for clients. They need more than 30 days to bring their operations into full compliance with the new MSCMs rules. At a minimum, enforcement of the MSCMs rules under these circumstances will prevent senders from executing their plans to ensure that current customers not experience any interruption in communications.⁶

In analogous proceedings, the Commission has found that granting industry additional time to comply initially with prior authorization requirements served the public interest. For example, in its August 2003 order amending the regulations promulgated under the Telephone Consumer Protection Act ("TCPA"), the Commission required that senders of unsolicited fax communications obtain prior express written consent from potential recipients. Prior to that rule

⁶ Part of the reason that the number of wireless e-mail addresses is so large may be that there are mixed domain names – domain names used for both wireless and non-wireless services – on the list that have been inappropriately included, resulting in a significant number of “wireless e-mail address” that should not be covered by the rule. While the Petitioners are investigating this, it would be inequitable, ineffective, and contrary to public policy if errors in the manner in which the List was compiled contributed to the interruption of CEMs requested by individuals.

change consent was implied where the sender of the fax communication had an established business relationship with the sender. Pursuant to ongoing requests, the Commission has stayed the effective date of the prior express written consent portion of the TCPA fax rule until June 30, 2005.⁷ Here, as in this prior instance, the hardship faced by industry is obtaining a specific form of consent from individuals who are otherwise expecting to receive the communication, and to obtain such consent by a specified date or interrupt the communications expected by these consumers. We believe that the Commission should similarly provide additional time for businesses to comply initially with the MSCMs rules.

Additionally, equity favors a grant of a waiver under these unique circumstances. The 30-day period contrasts unfavorably with the many months that wireless services providers had from August 2004, when the Commission released its Order regarding the need for providers to help in the compilation of the Wireless Domain Name List, for the far easier task of merely identifying which domain names are associated with wireless services they provide.

Finally, the public interest favors a grant of a waiver under these unique circumstances. Additional lead time will permit a more effective implementation of the Commission's new MSCMs rules, without disrupting service and communications with customers and other benefits associated with MSCMs that Congress intended to continue under the CAN SPAM Act.

Alternatively, for the reasons stated above, Petitioners request that the Commission waive application of the express prior authorization requirements of its MSCMs rules to CEMs sent to

⁷ See generally *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Dkt. No. 02-278, *Order*, FCC 03-230 (rel. Oct. 3, 2003).

individuals for whom the sender has obtained prior to March 7, 2005, the affirmative (opt-in) consent of the recipient.

III. CONCLUSION

The DMA and ESPC respectfully request that the Commission grant a limited waiver of its MSCMs rules for a period of 90 days for MSCMs sent pursuant to affirmative (opt-in) consent of the recipient. Alternatively, Petitioners request that the Commission waive application of the express prior authorization requirements of its MSCMs rules to CEMs sent to individuals for whom the sender has obtained prior to March 7, 2005, the affirmative (opt-in) consent of the recipient. By granting this Petition, the Commission will ensure that the policy goals of the MSCMs rules – preventing the dissemination of *unwanted* MSCMs – are served without compromising the benefits associated with MSCMs that Congress intended to continue under the CAN SPAM Act.

Respectfully submitted,



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