



Nonprofit Publisher
of Consumer Reports

May 17, 2004

Marlene H. Dortch
Secretary
Federal Communications Commission
236 Massachusetts Avenue, N.E. Suite 110
Washington, D.C. 20002

RE: Notice of Proposed Rulemaking (NPRM), Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN SPAM Act);
CG Docket No. 04-53

Reply Comments of Consumers Union

Dear Ms. Dortch:

Pursuant to the Notice of Proposed Rulemaking (NPRM), published on March 31, 2004 regarding implementation of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN SPAM Act), Consumers Union submits the following reply comments.

Consumers Union, the nonprofit publisher of *Consumer Reports*, supports the comments of the National Association of Attorneys General and the joint filing of Consumer Action, Consumer Federation of America, and the National Consumers League filed April 30, as well as the comments submitted by several individual consumers seeking Commission action to control spam on wireless phones.

Consumers Union has been active in educating consumers about how to protect themselves from spam through our publications and online service. Consumers Union's public policy advocacy has supported efforts to curtail and end unsolicited commercial email. Consumers Union has also been at the forefront of consumer education and advocacy regarding wireless phone service, through our publications and our campaign, www.EscapeCellHell.org, which seeks to improve the wireless phone market for consumers.

The nagging problem of spam is moving from consumers' computers to cell phones and other wireless devices. Consumer Reports' August 2003 cover story, "Stop

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Spam,” called wireless devices spam’s “new frontier.” As wireless service providers seek to increase their revenues by selling consumers more and more services—such as text messaging, internet access, and features such as handsets that receive graphics and photos—the potential for spam has likewise escalated.

Usage of text messages and internet access on cell phones in the U.S. is growing, yet lags behind Europe and Asia—regions which have already experienced a deluge of wireless spam and have already taken steps to combat it. In Japan it was estimated as many as 80 percent of text messages were spam.¹ Korea recently enacted a regulation requiring commercial advertisers to obtain consent before sending messages.²

If anything could be worse than the spam we see daily in our email inboxes, it would be wireless spam, which generally comes with an annoying beep and a per message price tag of as much as 10 or 15 cents per message. Consumers Union supports the efforts of Congress and the FCC to head off wireless spam before it spirals into a costly problem for the over 160 million U.S. consumers using cell phones and millions of others using other types of wireless devices, such as pagers.

Consumers Union endorses the comments submitted by the Consumer Federation of America (Consumers Union is a member of CFA), Consumer Action and the National Consumers League and the comments submitted by the National Association of Attorneys General. In addition, we submit the following replies to the following three issues:

The Act Is Clear That For Mobile Devices, Consumers Must Opt-In To Receiving Messages, On A Sender By Sender Basis.

Consumers Union did not support the use of “opt-out” for email spam under the CAN SPAM Act. The CAN SPAM provisions regarding unsolicited commercial email are far from as effective as they would be had Congress adopted an “opt-in” requirement. As the NAAG comments outline in detail, Section 14(b)(1) of the CAN SPAM Act, requiring “express prior authorization” with regard to mobile service commercial messages (MSCMs) can only be interpreted as requiring an explicit opt-in. Moreover, an opt-out approach is even more unworkable for cell phones and other wireless devices than it is for messages received via computer—both logistically and because with mobile devices consumers will incur charges both to receive the unwanted message and to reply to an “opt-out.”

Express prior authorization as required by the law should be in writing, signed by the consumer (including electronic signature) and include clear disclosures. Once authorization is obtained, MSCMs should have the same disclosures as other commercial messages, including the identity of sender and the right to opt out of further messages.

¹ “Hanging up on wireless spam”, Forbes.com, June 6, 2003, www.forbes.com/2003/06/04/cx_ah_0604spam.html

² “Cell phone spam on its way out,” The Korea Herald, October 10, 2003, www.koreaherald.co.kr.

All Mobile Service Commercial Messages (MSCMs) Sent To Wireless Devices, Regardless Of The Technology Used And Including SMS And “Short Code” Messages, Should Be Covered By The FCC’s Rules Implementing The CAN SPAM Act.

Comments filed the cell phone industry, including T-Mobile USA (pp. 4-7) and The Cellular Telecommunications and Internet Association (CTIA) suggest that SMS and short code messages should not be covered by these rules. T-Mobile argues so-called “traditional” SMS messages sent between phones and “web-based” SMS sent via the Internet are both exempted from the Act. CTIA further suggests that even if SMS and short code should be considered an MSCM by the Commission, there is no need to apply the anti-spam rules because the industry would itself police abuse of these messages.

Consumers Union agrees with the NAAG and the other consumer organizations that all unsolicited commercial messages sent to wireless devices should be treated in the same manner under the Act. If the Commission exempts SMS and short code it will create a loophole through which spam will flow to consumers’ cell phones. Including SMS in the definition of MSCM would not inhibit the use of this popular service for calls between family and friends, as those communications are not *commercial* in nature and thus do not fall under the definition of MSCM. Yet commercial senders can and do use SMS to send unsolicited messages, causing the same annoyances and costs to consumers as email sent to wireless phones. The Commission should reject the cell phone industry’s suggestion to exempt any type of unsolicited commercial message sent to a wireless device, including SMS and short code, from the CAN SPAM Act.

Commercial Mobile Service (SMRS) Providers Should Not Be Treated Differently From Other Senders And Should Be Required To Get Prior Approval To Send Messages To Their Customers.

Exempting CMRS providers from CAN SPAM would both create another loophole in the consumer protections envisioned by the Act and give CMRS providers an unfair advantage over other senders of commercial messages. While other senders would have to get express prior authorization, CMRS providers would be permitted to send marketing messages to customers without prior authorization, subject to the same “opt-out” provisions as email spam.

Verizon suggests the Commission should exempt wireless carriers from the opt-in requirement as long as carriers do not charge consumers for receiving messages from their carrier (p. 12). The promise that such messages would be cost-free to the consumer is insufficient justification for exempting mobile service providers from obtaining “opt-in” permission from customers. Carriers, by their own admission, are intending to send their customers marketing messages that fall outside the exception of “transactional or relationship messages.” In its comments Cingular (p. 10) states, “Carefully designed promotional messages inform customers of new service offerings and provide a

convenient means for customers to subscribe to such services.” Free or not, marketing messages from wireless carriers – and presumably their affiliates as well – create the same type of nuisance as does spam received over a computer.

Consumers Union appreciates the opportunity to submit comments on this important rulemaking. We urge the Commission to adopt a rule which give consumers the maximum protections against unwanted, and costly, wireless “spam.”

Respectfully submitted,

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