Before the
Federal Trade Commission
Washington, D.C. 20580

In the Matter of	)	
	)	
CAN-SPAM Act Rulemaking	)	FTC Project No. R4110008
	)	

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc., by its attorneys, hereby files these comments in response to the Federal Trade Commission's (the "FTC" or "Commission") Advanced Notice of Proposed Rulemaking in the above-captioned proceeding.[1] Congress has given the Commission an important role in ensuring that the CAN-SPAM Act[2] accomplishes the twin goals of (1) protecting the public from the use of deceptive practices by senders of unsolicited commercial emails ("UCE") and (2) giving consumers a mechanism to opt-out of future marketing efforts by companies using commercial email strategies.[3] Nextel urges the Commission to continue Congress's measured approach to accomplishing these goals by adopting reasonable

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[1] Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, *Advance Notice of Proposed Rulemaking*, Project No. R4110008, 69 FR 11776 (rel. March 11, 2004) (the "ANPRM").

[2] Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699 (2003) (the "CAN-SPAM Act" or the "Act").

[3] The Senate report for S. 877 lists four major purposes of the CAN-SPAM Act: (i) to "prohibit senders of electronic mail (e-mail) for primarily commercial advertisement or promotional purposes from deceiving intended recipients or Internet service providers as to the source or subject matter of their e-mail messages;" (ii) to "require such e-mail senders to give recipients an opportunity to decline to receive future commercial e-mail from them and to honor such requests;" (iii) to "require senders of unsolicited commercial e-mail (UCE) to also include a valid physical address in the e-mail message and a clear notice that the message is an advertisement or solicitation;" and (iv) "to prohibit businesses from knowingly promoting, or permitting the promotion of, their trade or business through e-mail transmitted with false or misleading sender or routing information." S. Rep. No. 108-102 at 1 (2003).

implementing regulations that take due account of both consumers' and companies' needs and rights to communicate with one another in the practical context of modern commercial and marketing relationships. Accordingly, Nextel urges the Commission to (1) formulate easily discernable, objective criteria for determining the "primary purpose" of commercial email that will allow advertisers, consumers, and the Commission to gauge compliance without room for doubt; (2) adopt a construction of the statutory term "sender" that concentrates on the party who actually creates the content in a commercial email and decides to whom it will be sent; and (3) provide a 30-day period for companies to process and honor consumer do-not-email requests, similar to the 30-day period provided for telemarketers to scrub against the FTC's Do-Not-Call registry under the Telemarketing Sales Rule ("TSR"). Each of these approaches will help provide the certainty necessary for successful compliance with the CAN-SPAM Act by advertisers; for easy use of the statutory opt-out mechanisms by consumers; and for successful prosecution of non-compliant spammers.

BACKGROUND

Nextel operates a nationwide digital mobile communications network that provides more than 12 million customers with an array of fully-integrated, all-digital wireless services, including digital mobile telephone service, two-way radio service, and mobile messaging. Nextel also offers its customers a bundle of wireless Internet services, including advanced Java-enabled business applications. Using Nextel's Internet-enabled handsets, Nextel customers can search the Web, send and receive email, and access office email accounts, events and calendar lists.

The speed and ease of email use has become increasingly important to Nextel's customers, and Nextel accordingly has a vested interest in ensuring that email communications

remain fast, reliable, and convenient. Towards that end, Nextel fully supports the goals of the CAN-SPAM Act and will continue to take all steps necessary to ensure that its own email advertisements comply fully with the Act's requirements.[4] Nextel maintains a "Do-Not-Email" database, just as it does a Do-Not-Call database, and it expends considerable resources to honor the requests of consumers who do not wish to be contacted by email for commercial purposes.[5] At the same time, however, legitimate commercial email provides an effective, relatively low-cost means for companies like Nextel to communicate with existing and new subscribers in today's challenging economic climate. Such communications are not only useful to many consumers, they are a constitutionally-protected exercise of companies' First Amendment right to use commercial speech to reach the public.[6] Accordingly, the Commission should adopt clean-cut implementation standards under the Act that are faithful to Congress's measured

[4] The CAN-SPAM Act also recognizes that network service providers such as Nextel have the right to establish policies to prevent others from sending UCE to their customers via unauthorized access to their networks. By preserving state law tort remedies for such trespasses, Congress empowered network operators to reduce the flow and impact of unwanted commercial email that degrades network performance and clogs the inboxes of valued customers. Network operators have the right reserved in the Act to filter such unwanted email and to enforce their policies against such abuses regardless of whether the email complies with the form and format requirements of the Act.

[5] For example, Nextel uses only trusted third party vendors to send commercial emails on its behalf and contractually requires such vendors to comply in all respects with the CAN SPAM Act. In addition, Nextel has invested considerable resources to develop software applications for its Sales and Marketing employees to quickly and easily "scrub" all commercial emails against its master Do-Not-Email list.

[6] *See, e.g., Central Hudson Gas and Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980) (requiring regulation of commercial speech to be reasonably tailored to further an important government interest); *Aronson v. Bright-Teeth Now L.L.C.*, 57 Pa. D. & C. 4th 1, at 11 (2003) (holding that the Telephone Consumer Protection Act does not apply to commercial email, in part because such application would raise First Amendment concerns and Congress created no record supporting a ban on unsolicited commercial email in enacting the statute).

approach of preventing abusive email practices while providing clear guidelines and support for legitimate commercial communications between companies and consumers.

DISCUSSION

I. THE COMMISSION SHOULD RESPECT THE BALANCE THAT CONGRESS STUCK BY CRAFTING IMPLEMENTING REGULATIONS THAT PROTECT CONSUMERS WITHOUT CREATING UNREASONABLE BURDENS ON LEGITIMATE EMAIL COMMUNICATIONS.

As Congress recognized in crafting the Act, anti-spam legislation must distinguish between legitimate and illegitimate uses of commercial email.[7] Congress also was aware that commercial emails can provide value to consumers by informing them of products, offers, and options about which they otherwise might not be aware.[8] Because technological advancements have allowed electronic mail to become a low-cost vehicle for such communications, companies now are able to provide more information to consumers while passing on less marketing and overhead costs.[9] Congress did not design the CAN-SPAM Act to outlaw UCE, but rather the

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[7] *See* S. Rep. No. 108-102 at 2, 19, 20, 22 (2003) (distinguishing between legitimate and illegitimate uses of commercial email).

[8] *Subcommittee on Crime, Terrorism, and Homeland Security Legislative: Hearing on H.R. 2214 the "Reduction In Distribution of Spam Act of 2003"* (Statement of the Honorable Howard Coble) ("Businesses also use email, much like the regular mail, to market their products and services. In fact, email marketing is viewed by many as a necessary and valuable component of electronic commerce. The market efficiencies that the Internet can provide consumers is facilitated by notices, specials, discounts, and other offers that are immediately accessible to a large number of prospective customers unbounded by geography. Furthermore, new Internet technologies can better target offers to those potential buyers with the greatest likely interest while avoiding those with little interest. We should not lose sight of all these benefits as we grapple with the downside.); *id.* (Remarks of the Honorable Bob Goodlatte) ("If you take the ability of legitimate businesses to share information with consumers out of the process by requiring the consumer find them first, and opt-in to the process, then you are taking the information out of the most important vehicle for sharing information of the information age, the Internet, and therefore, I think that is a bad approach.") (available at http://www.house.gov/judiciary/coble070803.htm).

[9] *See id.* (Statement of Representative Coble).

unsavory practices that the Act specifically prohibits, *i.e.*, sending UCE with deceptive sender information or subject lines.[10] In doing so, Congress sought to strike a reasonable balance between the need to protect consumers from abusive spamming tactics and the need to protect the First Amendment commercial speech rights of legitimate email advertisers.[11] Accordingly, the Commission should eschew interpretations of the Act's provisions that would unduly burden legitimate providers of commercial email, and should strive to adopt tailored rules that provide clean, workable guidelines that take due account of the rights and business needs of legitimate email marketers.

Moreover, the Commission must be careful to interpret the Act in a way that is tailored to its ultimate intent, namely, to protect consumers from the negative effects of deceitful and

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[10] *See id.* (Remarks of the Honorable Richard Burr) ("I think it also explains the difficult balance that we try to reached [sic] with this legislation. We are not here to interpret what should go through or shouldn't go through. We are here to be a little more specific on legal and illegal. We are here to design some rules that everybody understands. But to protect the rights of those businesses who use this as a valuable business tool.") (discussing forerunner legislation to CAN-SPAM Act) (emphasis added). *See also* Press release, Schumer Addresses First-Ever FTC "Spam" Summit Today (April 30, 2003) (available at http://www.senate.gov/~schumer/SchumerWebsite/pressroom/ press_releases/PR01658.html) ("I should add that if you are a legitimate company, you have nothing to fear from this legislation. Indeed, I believe you should get on board as one of its chief advocates because right now, people are so frustrated at the junk email bombardment that they delete legitimate commercial email as if it were spam. Implementing these rules means it is more likely your message will be read.") (discussing forerunner legislation to the CAN-SPAM Act).

[11] *Subcommittee on Crime, Terrorism, and Homeland Security Legislative: Hearing on H.R. 2214 the "Reduction In Distribution of Spam Act of 2003"* (Remarks of the Honorable Richard Scott) ("I also want to take a close look at the bill as we mark it up to be sure that we define our narrowly targeted—that we define the problem narrowly tailored enough to make sure that we don't trample on the Constitution. Even commercially sponsored e-mail does have some first amendment protection. Just because e-mails come from a business doesn't mean that the content is unprotected. *So we want to make sure that what we are targeting is the unprotected speech under the First Amendment*.") (emphasis added) (discussing forerunner legislation to the CAN-SPAM Act) (available at http://www.house.gov/judiciary/coble070803.htm).

fraudulent email practices.[12] The Commission should avoid adopting an over-inclusive definition of UCE or mandating an opt-out process that is more difficult or time-consuming than necessary to accomplish the purposes of the Act.

II. THE COMMISSION SHOULD ADOPT EASILY DISCERNABLE AND OBJECTIVE "PRIMARY PURPOSE" STANDARDS.

The CAN-SPAM Act defines commercial electronic mail messages as messages "the primary purpose of which is the commercial advertisement or promotion of a commercial product or service."[13] Congress intended the definition of "commercial email" to cover "marketing emails," but it also intended to exempt emails "that ha[ve] a primary purpose other than marketing, even if [they] mention[] or contain[] a link to the website of a commercial company or contain[] an ancillary marketing pitch."[14] The Act directs the FTC to issue regulations that define the relevant criteria for distinguishing between these two types of emails.[15]

Congress correctly recognized that not every email that contains an advertisement should be considered to have a "primary purpose" of commercial solicitation. Many emails incidentally contain advertisements or provide information to consumers that may bear on their future commercial choices, but the main function of those emails is not necessarily to solicit a sale or an upgrade. Such emails include newsletters and industry development updates. In many cases, emails of this type are sent to recipients who have requested information from the sender or are receiving them as a membership benefit or based on a subscription or other ongoing relationship.

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[12] S. Rep. No. 108-102 at 1 (2003).

[13] CAN-SPAM Act, § 3(2)(A).

[14] S. Rep. No. 108-102 at 14 (2003).

[15] CAN-SPAM Act, § 3(2)(C).

Regulation of such emails as UCEs would interfere with relationships and communications that are beneficial and informative in nature and are unlikely to offend the recipient. Accordingly, these "mixed purpose" emails should not be regulated as UCEs despite the fact that they contain and possibly are supported by paid advertisements.

To distinguish between "primary purpose" email solicitations and "mixed purpose" emails that incidentally contain advertisements, the Commission should adopt objective criteria that enable advertisers, consumers, and the Commission to easily distinguish between regulated and unregulated commercial emails. The Commission has suggested several potential criteria for determining whether emails are commercial or noncommercial, including: (1) the sender's identity; (2) whether the commercial aspect of the email financially supports the other aspects of the email; (3) whether the commercial content of the email is "more than incidental;" and (4) whether, based on the "net impression" of the email, it should be considered primarily commercial in purpose.[16] Although some of these tests are facially objective, none of them would accurately or reliably accomplish Congress's intention of regulating only commercial emails that are primarily directed at advertising a product or service.

A. The Sender Identity Test.

The identity of the sender should not affect the determination of whether an email is regulated as an UCE under the CAN-SPAM Act. Such a test would fly in the face of the Act, the First Amendment and public policy.

First, there is no statutory basis or authority for the Commission to regulate senders of email messages differently based on their identity. There is no evidence in the text or legislative

[16] ANPRM at 16-17.

history of the CAN-SPAM Act indicating that Congress intended to distinguish between "commercial" and "non-commercial" email senders. Unlike the Telephone Consumer Protection Act ("TCPA"), which exempts certain communications sent by tax-exempt, non-profit organizations while regulating similar communications from other senders,[17] the CAN-SPAM Act contains no such distinction. Congress knew how to regulate marketing communications on the basis of the sender's identity, but chose not to do so under the CAN-SPAM Act. To the contrary, Congress drafted the provisions of the Act to apply to all senders of commercial emails,[18] and focused on the "primary purpose" of the message – not the identity of the sender – to define "commercial electronic mail messages" that are subject to regulation under the Act.[19] The Commission's conversion of this "primary purpose" test into a "sender identity" test would subvert the role and the will of Congress in crafting the Act.[20]

Second, declaring an email to be commercial or noncommercial based on the identity of the speaker would run afoul of the First Amendment. As the Supreme Court noted in *Greater New Orleans Broadcasters Association v. U.S.*, "Even under the degree of scrutiny that we have applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First

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[17] Telephone Consumer Protection Act of 1991, Pub.L. 102-243, 105 Stat 2394, at § 3(a) (1991); *see also* 47 U.S.C.A. § 227(a)(3).

[18] For example, the criminal provisions of Section 4 of the Act apply to "[w]hoever" fraudulently uses another's computer to send spam, while the criminal provisions of Section 5 apply to "any person" that initiates a commercial email with false header information. CAN-SPAM Act, § 4, 5.

[19] *Id.*, § 3(2)(A).

[20] *See, e.g., National Public Radio v. FCC*, 254 F.3d 226 (D.C. Cir. 2001) (agency cannot ignore plain language of statute to accomplish legislative aims expressed in separate related statute).

Amendment."[21] A regulation that distinguished commercial emails based on the identity of the sender rather than the content of the email would have the precise result of "selecting among speakers conveying virtually identical messages." Because there is no indication that Congress intended to make such a distinction and no congressional finding that commercial emails sent by for-profit businesses are in any way more intrusive than those sent by non-profit entities, the Commission should avoid introducing the significant constitutional issues that a sender identity test would create.[22]

Finally as a practical and policy matter, there is no reliable way to determine, based solely on the identity of the sender, whether emails that sender provides are commercial in purpose. For example, if a non-profit public advocacy organization sought to advertise its publications or t-shirts through email, those emails would be every bit as commercial as emails advertising the same types of products sent by a for-profit sports league or shoe company. Such email solicitations to consumers should not be exempt simply because those transactions are not undertaken for a profit. Conversely, a sender identification test presumably would have the unfair result of improperly converting all email communications from for-profit companies that are not "transactional or relational" in nature into UCEs, even when those messages are not

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[21] 527 U.S. 173 (1999) (citations omitted) (striking down federal statute that distinguished between virtually identical casino advertising when carried out by Indian as opposed to non-Indian casino owners).

[22] *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001) ("[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority."); *see also INS v. St. Cyr*, 121 S. Ct. 2271, 2279 (2001) ("when a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result"); *Jones v. United States*,

directed towards soliciting a sale. Moreover, while these senders could recoup the costs of regulatory compliance for messages that are sale solicitations, they could not recoup these costs on purely public interest or informational emails that nevertheless would be subject to commercial email regulations. Accordingly, the sender identification test would have the perverse effect of encouraging for-profit entities to limit their emails to sale solicitations, and to forego sending public interest messages or providing general information that is useful and beneficial to consumers. These results would disserve both consumer interests and congressional intent. Adoption of a sender identity test thus would be contrary to both the law and public policy.

B. The Financial Support Test.

The Commission asks if "the issue of whether the commercial aspect [of an email] provides financial support for non-commercial content provide[s] relevant criteria to help determine the primary purpose of an email."[23] Such a "financial support" standard would be inappropriate because it would create skewed results whereby two emails that are nearly identical in noncommercial and commercial content could be subject to completely different rules depending on whether one was paid for by advertising. If, for example, a company emails a newsletter to a select group of businesses about industry developments, the question of whether or not a recipient objects to receiving it is highly unlikely to revolve around whether the newsletter was or was not supported by advertising. Under a "financial support" test, however, identical emails would be treated differently based on whether or not they incidentally contained

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529 U.S. 848, 851 (2000) ("constitutionally doubtful constructions should be avoided where possible").

[23] ANPRM at 17.

advertisements that provided financial support to the sender's ability to provide the email. These arbitrary results would hardly comport with consumers' interest in being free of unwanted email commercial solicitations and, again, would be more likely to chill speech that is desired by and useful to consumers than it would be to reduce the amount of unwanted spam.

Moreover, determining whether the advertising in an email "financially supports the other aspects of the email" is neither as simple as it sounds, nor likely to achieve Congress's desired ends. For example, if a trade organization emails a newsletter that also contains promotional information regarding various products, the advertising does not necessarily "financially support" the sending of the email. The trade organization might pay for its newsletters through member dues and allow some of its members to advertise for free as an added benefit of membership. Thus, even if the trade association's newsletters were comprised largely of advertisements, the association would not have to give consumers the choice to opt-out of receiving them, so long as the trade association did not rely on financial support from such advertisements.

Not only would the proposed "financial support" standard create irrational results, it also would chill advertiser support for informational emails that might not be sent but for advertiser support. Companies often provide advertiser support for charitable, public interest, and other non-commercial communications to further community interests. It would make little sense to classify these emails as primarily commercial in nature merely because they are advertiser supported. Certainly Congress and the Commission have no public policy interest, nor is there a governmental basis for hindering such First Amendment expressions.

C. The "More Than Incidental" Test.

The Commission also asks whether the primary purpose of an email message should be determined by asking whether the commercial content is "more than incidental" to the email.[24] By common sense and by definition, a thing is not "primary" if it is merely "incidental" or only slightly more than incidental.[25] Courts have recognized that where Congress uses the term "primary" or "primarily," it intends to denote overwhelming rather than incidental importance.[26] Thus, adopting a "more than incidental" standard would not be logical given the plain language of the Act, which requires the commercial purpose to be "primary" to subject a message to UCE regulation.[27]

Without an objective standard to determine where "incidental" ends or where "primary" begins, a "more than incidental" standard would only lead to the type of uncertainty that will force legitimate businesses to "err on the safe side" by refraining from sending emails likely to benefit consumers, while doing nothing to prevent the abusive spam techniques with which Congress was primarily concerned. Compliance costs and liability risks for legitimate companies would increase, thereby chilling constitutionally-protected commercial speech.

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[24] *See id.*

[25] *See* The American Heritage Dictionary of the English Language, Third Edition (1996) (defining "primary" to mean "First or highest in rank, quality, or importance"); and Black's Law Dictionary (1983 edition) (defining primary to mean: "First; principal; chief; leading. First in order of time, or development, or in intention.").

[26] *See, e.g.*, *In re Pedigo*, 296 B.R. 485, 490 (Bankr. S.D. Ind. 2003) (noting that term "primarily consumer debt" in Bankruptcy Act generally has been held to mean greater than 50% of the debt is consumer debt) (citing *In re Stewart*, 175 F.3d 796 (10th Cir. 1999) ("primarily" means over 50% of debt); *In re Kelly*, 841 F.2d 908, 913 (9th Cir. 1988) (holding that when "more than half ... of the dollar amount owed is consumer debt, the statutory threshold is passed").

[27] *Malat v. Riddle*, 383 U.S. 569, 571 (1966) (holding that terms in statutes should given their everyday meaning and interpreting the word "primarily" to mean "of first importance or rank").

Such a subjective test also would force the Commission and the courts to waste their enforcement resources on scrutinizing and performing fine balancing tests on emails from legitimate marketers, instead of concentrating their energy on eradicating spammers. In short, not only would adoption of the subjective "more than incidental" standard be contrary to the plain language of the Act, it also would disserve the public interest.

D. The Net Impression Test.

The ANPRM states that the Commission is also evaluating whether it should incorporate into the CAN-SPAM Act's primary purpose standard the "net impression" analysis employed by the Commission to assess the adequacy and truthfulness of disclosures and representations made in general advertising materials.[28] Any form of "net impression" test would be inappropriate for determining the primary purpose of an email because that test focuses on consumer perception to determine whether advertising claims are misleading. While such a test is appropriate for evaluating deceptive speech, which is not protected by the First Amendment,[29] it is inappropriate for determining the commercial or noncommercial nature of email communications that are entitled to First Amendment protection.

Under the Commission's "net impression" analysis, if the overall impression produced by an ad is likely to mislead reasonable consumers, the ad is deceptive and violates Section 5 of the FTC Act.[30] The Commission evaluates the overall impression created by an ad, including the ad itself, the nature of the claim being made, and the transaction or course of dealing to which the

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[28] ANPRM at 17.

[29] *See Central Hudson*, 447 U.S. at 563-64 (citations omitted) (to gain First Amendment protection, commercial speech must be both lawful and not misleading).

[30] *See FTC Policy Statement on Deception*, 103 F.T.C. 110, 166 (1983); 15 U.S.C.A. § 45.

ad relates.[31] The focus of the inquiry is not on whether the purpose of the advertisement was to deceive, but rather, on whether a reasonable consumer would be deceived.[32] It is logically necessary to focus on consumer impression because the purpose of Section 5 is to protect consumers from harmfully misleading advertisements, and because Section 15 of the Act directs the Commission to evaluate the advertisement by taking into account "representations made or suggested" as well as "the extent to which the advertisement fails to reveal [material] facts."[33] In effect, the FTC act instructs the Commission to evaluate the advertisement as a viewer would.

The CAN-SPAM Act directs the Commission to undertake a fundamentally different inquiry by focusing on the sender's purpose in transmitting the email,[34] not the impression the email makes on the recipient. The protection of consumers in the deceptive advertising context requires that the FTC be furnished with a flexible and relatively subjective weapon to ferret out deceptive commercial speech. In the commercial email context, however, the Commission is regulating constitutionally protected speech,[35] and it is therefore incumbent upon the Commission to fashion more sensitive tools for determining which messages are subject to government regulation and which are not. It is also essential that the Commission give advertisers fair notice of what will be considered commercial emails and what will not. The uncertainty engendered by a subjective "net impression test" would chill legitimate commercial speech, increase businesses' compliance costs and expose them to unnecessary risk of

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[31] *See id.* at 172.

[32] *See id.* at 170.

[33] 15 U.S.C.A. § 55.

[34] *See* CAN-SPAM Act, § 3(2); *see also* S. Rep. No. 108-102 (explaining definition of commercial email). Several other sections of the Act also concentrate on the motivation of the sender of a commercial email in various ways. *See* CAN SPAM Act, §§ 4(a), (b), 5.

[35] *Supra,* n.6.

prosecution and liability. Such a course also would lead the Commission to an unnecessary expenditure of its administrative resources.

Add to these deficiencies the fact that determining the "net impression" created by an email communication would inevitably be much more complicated than determining the net impression created by a print or television advertisement. The question of what consumers see and the impression an email makes will vary depending on the size of the window it is viewed in, whether the email is opened or merely viewed in a "preview pane," whether the recipient scrolls through all content in the email, whether the recipient takes advantage of hyperlinks provided in the email, etc. Focusing on the sender's purpose in disseminating the email avoids these concerns and places the emphasis where it belongs: on the contents of the email and the extent to which it represents a primarily commercial effort on the sender's part.

The better way to reliably determine a sender's purpose in transmitting an email is to develop straightforward objective standards for determining which emails are subject to regulation. What flexibility the Commission loses in discarding the subjective "net impression" test, it will gain in compliance by advertisers that have a clear idea about precisely what they can and cannot do under the Commission's regulations.

An objective test also will offer consumers precisely the level of protection from unwanted emails that Congress intended. By regulating only commercial emails and by giving consumers the right to opt out from receiving future commercial emails from certain senders, Congress sought to balance the rights of consumers with the rights of businesses that attempt to reach consumers through email. Congress evinced no intent to attempt to protect consumers from emails the primary purpose of which is not to advertise or solicit business, and the

Commission should not adopt a standard that gives advertisers and businesses no clear guidance as to when their email communications will be regulated.

In lieu of the unreliable "net impression" test, the Commission should adopt an objectively verifiable standard whereby an email's "primary purpose" is deemed "commercial" if (1) more than fifty percent (50%) of the content of the email consists of commercial advertisements and (2) the advertisements appear in the first window of email text. The first part of this test would be based on the entire contents of an email. If more than 50% of an email message's content consists of advertisements, part of which are on the first window, then the email would be considered a UCE subject to the requirements and prohibitions of the Act. This application of the "primary purpose" standard would be consistent with the courts' holdings that the term "primary" means more than 50%.[36]

In addition, the Commission should deem noncommercial any emails that contain greater that 50% advertising content, but which do not contain any commercial content in the first window of email text, presuming a window size that is maximized to occupy the full screen. In other words, if an email recipient must scroll down to the second full window of email text (or approximately the 22d line) before viewing any commercial content of an email, the primary purpose of the email should be deemed noncommercial, even if more than 50% of the email's entire contents consists of advertising or promotional content. This test would ensure that longer email newsletters and communications consisting first and foremost of non-advertising content are not subject to the CAN-SPAM Act's regulations, which are designed for emails that are pure commercial solicitations.

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[36] *See* n. 26, *supra* (citing cases).

This test also would provide a workable and easy to apply standard that would facilitate effective compliance and enforcement. By adopting these objective criteria, the Commission would create standards that are easily intelligible to consumers and advertisers alike. Moreover, these standards would greatly simplify enforcement because it would be clear immediately to consumers and investigators whether particular emails violate the test.

III. THE COMMISSION SHOULD CONSTRUE THE TERM "SENDER" TO APPLY ONLY TO PARTIES WITH DIRECT CONTROL OVER EMAIL TRANSMISSIONS.

The Commission also has requested comment on how to determine which party is the "sender" of email messages that contain advertisements for multiple companies.[37] Congress' intent was to regulate the party who controls, either directly or through its agents, the dissemination of commercial email.[38] The Commission's request for comments reflects widespread concern that compliance with the Act's disclosure and opt-out requirements would become highly costly, cumbersome and confusing if each and every entity whose products were advertised in such an email was treated as the "sender" of the email. Under such an approach, the address and opt-out information for every advertiser might have to be included in the message, and the email might not be sent at all if the potential recipient had opted-out from receiving commercial emails from even one of these advertisers. Given the burdens and

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[37] ANPRM at 23.

[38] *See* S. Rep. No. 108-102 at 16 (2003)(defining "sender" as "a person who initiates a commercial e-mail and whose product, service, or Internet web site is advertised or promoted by the message. Thus, if one company hires another to coordinate an e-mail marketing campaign on its behalf, only the first company is the sender, because the second company's product is not advertised by the message.").

confusion that both consumers and companies would suffer from such an approach, the Commission should construe the statute carefully to avoid such a result.

A. Limiting the Number of "Senders" or Each Email Best Reflects Customers' Expectations and Eases Customer Use of Opt-Out Mechanisms.

The main import of the statutory term "sender" is that it determines which party must provide physical address and opt-out information in the body of the UCE and ensure that consumers' opt-out requests are honored. The purpose of these requirements is to allow the consumer to request that the sender cease sending him/her such commercial emails in the future. Accordingly, it is essential that the Commission deem the "sender" of an email to be that party or those parties that a recipient would be most likely to hold responsible for a particular UCE. In most cases, that party will be the one responsible for developing the recipient list, the content, and the disclosures contained in the email. For example, if an airline sends out a UCE announcing its "fare of the month" to its customer base, and that email also contains in a sidebar an advertisement for a rental car company and a hotel chain, the recipient is most likely to hold the airline responsible for the email.

Defining each advertiser mentioned in an email as a "sender" within the meaning of the Act would have several negative effects for consumers. First, because the Act requires that opt-out email and physical addresses must be contained in each email for each sender,[39] a broad interpretation of the term "sender" would result in the inclusion in many emails of numerous physical addresses and opt-out links, leading to unnecessarily lengthy messages, and unavoidable consumer confusion and frustration. Congress intended opt-out information to be prominent, but in an email where many "senders" have included this information, nothing would be truly

[39] CAN-SPAM Act, § 5.

prominent, and consumers would be forced to waste time sorting through a confusing maze of addresses to opt-out. To add insult to this consumer injury, multiple opt-out addresses would mean that consumers are more likely to make mistakes in the opt-out process. As a result, the consumer might end up receiving commercial emails from unwanted sources, while losing access to desirable non-commercial and commercial information, discounts and offers from other sources. None of these results are consistent with the simplified opt-out process that Congress created. Second, requiring every company mentioned in the email to coordinate their respective Do-Not-Email lists and processes would lead to increased delay and potential errors in honoring consumers' do-not-email requests. The resultant costs in error and delay, monetary and human resources, ultimately would be borne by consumers – the same consumers whom Congress sought to protect from unnecessary costs when it enacted the CAN-SPAM Act. Third, if a consumer previously had opted-out from receiving commercial emails from one company mentioned in a multiple-advertiser email, and that opt-out then was deemed to block the transmission of the multiple-advertiser email, then the consumer could lose the opportunity to obtain useful information, discounts and offers from other advertisers included in the same message. Finally, a broad definition of "sender" would force companies to share their email customer and opt-out lists broadly – a practice which Congress and the FTC rightly discourage because it leads to the wide dissemination of consumers' information and may result in further proliferation of spam.[40]

[40] *See*, *e.g.*, 47 U.S.C.A. § 221 (restricting use of customer proprietary network information and customer lists except for certain prescribed circumstances); 47 C.F.R. § 64.1200(d)(3) (restricting sharing of company-specific do-not-call lists).

Conversely, if the Commission interprets the term "sender" to apply only to the party that compiles the email address list and directs its dissemination, then recipients will be given the opt-out opportunities that Congress intended, *i.e.* the ability to opt-out of future mailings from the party directly providing the offending UCE. Further, recipients will know whom to contact (via one postal address) if they have privacy-related questions or concerns.

B. The Mere Presence of an Advertisement in a UCE Does Not Make A Party a "Sender."

Under the CAN-SPAM Act, UCEs must contain electronic and physical address information from the "sender" that allows recipients to opt-out of future UCEs from that "sender."[41] The Act defines "sender" as "a person who initiates such a message and whose product, service, or Internet web site is advertised or promoted by the message."[42] In turn, the Act defines "initiate" to mean "to originate or transmit [commercial electronic mail] or to procure the origination or transmission of such message . . ."[43] Finally, the Act defines "procure" to require a party to "intentionally [] pay or provide other consideration to, or induce another person to initiate such a message on one's behalf."[44] Thus, a party is deemed a "sender" if (1) it sends or directly pays another to send a particular commercial email and (2) its products are advertised thereby. The essential element of the "sender" designation is that the company exercises direct control over whether the email is sent and the contents thereof.

One important aspect of this definition of "sender" is that the mere presence of a company's advertisement in a commercial email is not enough to make that company a "sender"

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[41] CAN-SPAM Act, § 5.

[42] *Id.*, § 3(16).

[43] *Id.*, § 3(9).

[44] *Id*, § 3(12).

of the email for the purposes of the Act. To be a "sender," a party must initiate an email – *i.e.* send it – *and* its products must be advertised thereby.[45] Accordingly, under the plain language of the Act, a company that does not exercise direct control over the transmission of an email message is not a "sender" of the email.

For example, many modern advertising partnerships involve agreements whereby a company or association agrees to include a second company's logo or other advertising material in commercial emails that the first company or association provides to its customer or member recipients. The second company may provide promotional information for inclusion in the first company's emails, but it is the first company that controls the list of recipients, as well as the composition and the dissemination of these emails.

It is also common for companies to send out informational newsletters that contain advertisements for multiple companies. For instance, an association might send an email newsletter to all of its members which contains news of developments that would be important to the membership, coupled with offers and discounts for products that the association presumes its members might find useful. These types of relationships are also common in the travel and sports industries. An example might be a commercial email from a sports league that also contains advertisements for the league's sponsors. In this example, only the sports league should be considered a "sender" under the Act, because in order to be considered a sender, a party must initiate the email; in cases like those described, the league's sponsors do not control the list of recipients and the decision whether and when to send the email.

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[45] *See* S. Rep. No. 108-102 at 15, 16. (defining the term ''initiate'' to mean " to originate or transmit, or procure the origination or transmission of, such an e-mail message; and the term "procure" to mean "intentionally to pay or induce another person to initiate the message on one's

It is the entity composing and sending the email that controls which companies' products and services may be advertised and, perhaps most importantly, to whom and when it sends such communications. This company has direct relationships with the recipients[46] and is the party best equipped (1) to ensure address and subject heading information is accurate; and (2) to monitor, obtain, and comply with its recipients' request to receive or opt out of such commercial messages. Accordingly, it is most logical to place the statutory designation "sender" on this party, and not on any party that does not control the recipient list, the content and the dissemination of emails that include multiple advertisers.

At a minimum, the Commission should clarify that (a) multiple-advertiser emails need not be scrubbed against the Do-Not-Email list of every advertiser included in the email, but must be scrubbed against the Do-Not-Email list of the party that creates the email and directs its dissemination; (b) this party must honor the opt-out requests of recipients of the multiple-advertiser email that it transmits, but the request does not apply to every advertiser included in the email; and c) this party's postal address is the only one that must be included in the email. Such clarification is essential to avoid forcing every advertiser included in the email to engage in coordination of their respective Do-Not-Email lists and processes, with its consequent costs, delay, error and frustration for consumers and businesses alike.

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behalf, while knowingly or consciously avoiding knowing the extent to which that person intends to comply with this Act.")

[46] *See, e.g.*, S. Rep. No. 108-102 at 16 (2003).

IV. THE COMMISSION SHOULD CLARIFY THE EXTENT OF THE "TRANSACTIONAL OR RELATIONSHIP MESSAGE" IN THE CONTEXT OF EXPIRING CUSTOMER ACCOUNTS.

The act exempts from UCE regulation messages that are transactional in nature or part of certain types of customer relationships.[47] In particular, the Act exempts messages that "provide notification concerning a change in the terms of; notification of a change in the recipient's standing or status with respect to; or at regular periodic intervals, account balance information or other type of account statement with respect to a subscription . . . or comparable ongoing commercial relationship."[48]

In many cases, when providing these types of account or subscription updates, particularly as a subscription nears termination, companies will include information encouraging customers to resubscribe or otherwise continue receiving a product or service. The Commission should confirm that including these types of communications in transactional or relationship emails does not convert the emails into regulated UCEs requiring inclusion of full opt-out information. In other words, the Commission should clarify that all messages regarding upcoming account termination fall under the Section 3(17)(A)(iii) exemption, even if they encourage resubscription. Consumers have a strong interest in receiving information from their service providers regarding discount offers, service improvements, alternative purchase plans, etc. before they must make service renewal and purchase decisions. Furthermore, this result would be fully consistent with Section 3(17) of the Act and would have no practical negative effect on customers because if the customer does not resubscribe, any commercial email sent to

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[47] *See* CAN-SPAM Act, § 3(17).

[48] *See id.*, § 3(17)(A)(iii).

the customer thereafter would fall outside the Section 3(17) exception and would be required to comply with all UCE regulations.

V. THE COMMISSION SHOULD ESTABLISH A 30-DAYPERIOD FOR PROCESSING OPT-OUT REQUESTS.

The Act provides that senders that receive opt-out requests must honor those requests within 10 days,[49] but gives the Commission the authority to modify this time period if doing so (1) would not undermine the Act's prohibitions of deceptive sender or subject information; and (2) would maintain sufficient protection of the interests of the senders and recipients of commercial email.[50] The realities of modern advertising relationships support the establishment of a 30-day time period to permit companies to process do-not-email requests. Such a standard also would be consistent with the 30-day period established by the Commission for companies to honor do-not-call requests by scrubbing against the Commission's Do-Not-Call registry.

In today's competitive environment, mass advertising is an important and cost-effective means of achieving commercial success. Reaching the maximum number of potential customers requires businesses to employ a variety of marketing strategies and necessitates varied commercial relationships with numerous different advertisers. Strategies such as out-sourcing of marketing functions and development of marketing partnerships enhance the ability of companies such as Nextel to efficiently communicate information about their products and services to current and prospective customers, which is essential for long term company growth. Even presuming that the Commission adopts the definitions of "primary purpose" and "sender" advocated in Sections II and III above, processing opt-out requests directed towards a company,

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[49] *See id.*, § 5(a)(4)(A)(i).

[50] *See id.*, § 5(c)(1). ANPRM at 8-9.

its affiliates, representatives, distributors and agents still requires a great deal of coordination that is very difficult to complete in 10 days.

The Commission should take account of these difficulties and extend the period permitted for opt-out processing to 30 days. Extending this time period would aid the compliance efforts of legitimate businesses, and it would reduce the possibility of violations that otherwise might take place despite good faith efforts to comply with opt-out requests. The advertising industry still is developing industry standards for processing email opt-out requests and there are currently no guidelines in place to ensure processing within the 10-day window.

Most important, extending the opt-out processing period to 30 days would not undermine the purposes of the Act. Giving companies acting in good faith sufficient time to process opt-out requests would not encourage the increased dissemination of email with fraudulent sender or subject information, nor would it subject recipients to an appreciable volume of additional UCEs. Extending the compliance window would ease enforcement efforts because federal agencies would be freed to concentrate on catching egregious spammers rather than prosecuting companies making a good faith effort to comply with the Act. Finally, 30 days is not an excessively long period to provide for companies to process and honor the opt-out requests of consumers. The Commission found 30 days to be an appropriate time period for companies to scrub against the Commission's Do-Not-Call registry and honor such consumer opt-out requests.[51] It is entirely consistent for the Commission to adopt the same standard for companies to honor consumers' opt-out from the receipt of commercial emails.

[51] 16 C.F.R. § 310.4(b)(3)(iv).

CONCLUSION

As a provider of Internet and email services to consumers, Nextel has a strong interest in ensuring the success of the CAN-SPAM Act and the end of the spamming scourge. The way to accomplish that is not by punishing legitimate email marketers as proxies for the spammers that are causing the myriad problems that prompted Congressional action. The Commission should guard against rules that cause it to punish good-faith advertisers while making it no easier to catch the egregious spammers that are the object of the Act. Towards these ends, Nextel respectfully requests that the Commission adopt the regulatory proposals contained herein.

Respectfully submitted,

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