



U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

September 11, 2003

The Honorable John McCain
Chairman
Committee on Commerce, Science, and Transportation
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Administration on S. 877, the "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003" ("CAN SPAM"). The Administration supports Senate passage of S. 877, although we have some concerns which we discuss below. We regard S. 877 as an important first step in helping consumers and businesses to combat unsolicited commercial e-mail, better known as "spam," and applaud the Congress' efforts to pass legislation that helps to address this problem. The Administration agrees with the finding in section 2(a) of the bill that the problems with spam "cannot be solved by Federal legislation alone" and "the development and adoption of technological approaches and the pursuit of cooperative efforts with other countries will be necessary as well." To complement legislation, the Administration is conducting research into short- and long-term technological solutions and is convening discussions with the private sector and academia to fight spam.

The following comments, while not exhaustive, indicate the Administration's views on many of the strengths of the bill, as well as suggestions for measures intended to help consumers and businesses combat the inefficiencies and potentially harmful effects of deceptive and misleading spam. The bill would help to address some of the problems associated with the rapid growth and abuse of spam by establishing a framework of administrative, civil, and criminal enforcement tools targeted at spam, and by providing consumers with options to reduce the volume of unwanted commercial e-mail they receive. The bill would also establish important "rules of the road" for civil enforcement by the Federal Trade Commission ("FTC"), other Federal agencies, State attorneys general, and Internet service providers ("ISPs") as well as create new criminal penalties to assist in deterring the most offensive forms of spam.

Civil Protections: The Administration generally supports the bill's civil provisions that protect recipients of commercial electronic mail, including the prohibitions on using false transmission information, sending e-mail to "harvested" addresses, and retransmitting spam messages through an unlawfully accessed computer system or network. However, the Administration believes that it would be desirable for both policy and constitutional reasons for section 5 of the bill to include a materiality requirement for false or misleading header information, as is included in the

criminal provision addressing false or misleading header information found in section 4. The term “materially” should be defined to include fraudulent headers that are material to the ability of an entity having enforcement power under the bill to locate or investigate the initiator or sender of the message.

Consumer Choice: The Administration supports the pro-consumer provisions in section 5(a) of S. 877 that recognize the importance of maintaining good consumer relationships. Under the bill, consumers would have an option to choose not to receive any further unsolicited e-mail messages from a sender. Any bill must continue a careful balancing of the desire for consumers to deter commercial e-mail with the benefits that accrue from communicating to consumers the availability of potentially desirable products and services. The Administration notes, for example, that the time frame for implementation of a consumer's request to not receive further unsolicited e-mails may merit further consideration to ensure its practicability, given the disparate sizes of companies using the Internet and particular circumstances.

Statutory Caps/Class Action Suits: The Administration also supports the bill's provisions to cap statutory damages and keep such limits consistent for both ISPs and States, but believes statutory damages should be capped for all offenses, including those under section 5(a)(1) – sending e-mail with false or misleading headers. Without caps in all instances, the Administration is concerned not only that legitimate e-mail marketers may be unduly penalized with large statutory damage judgments for inadvertent violations, but also that even the prospect of uncapped damage judgments could have a chilling effect on legitimate electronic commerce. In addition, the Administration supports adding a provision to the bill that would prohibit class action suits, similar to section 104 in H.R. 2214, the “Reduction in Distribution of Spam Act of 2003.”

Enforcement Authority: The Administration supports the bill's proposal to provide the FTC, other Federal functional regulators, State attorneys general, and ISPs with civil enforcement authority. The Administration believes the bill should maintain the existing regulatory authority of the Federal functional regulators regarding their respective regulated institutions.

Rulemaking Authority: The Administration supports granting the enforcement agencies in subsections 7(a) and (b) rulemaking authority to give them the necessary flexibility to respond quickly to evolving spammer techniques for which they have primary regulatory authority. The Administration also encourages the Senate to provide the FTC with the flexibility to obtain injunctive relief or issue administrative cease-and-desist orders without having to prove “knowledge” in a manner that preserves the FTC's existing authority under the FTC Act in respect of these actions.

Criminal Violations/Sanctions: The Administration supports the bill's proposal to criminalize spam that contains a header that is materially false or materially misleading. The Administration also supports adding a provision to the bill to make spam containing unmarked pornography a criminal offense. The Administration supports triggers for felony treatment similar to those

proposed in section 2(a) of S. 1293, the "Criminal Spam Act of 2003." The Administration believes these triggers would permit felony punishment for appropriately egregious offenders without imposing an effectively insurmountable burden of proof upon the Government.

The Administration supports the concept, advanced in S. 1293, that would direct the United States Sentencing Commission to consider sentencing enhancements for convicted spammers that have additionally obtained e-mail addresses by harvesting. In fact, we support a sentencing enhancement for using automated tools either to collect or to generate e-mail addresses used in the offense. The Administration also supports adding sentencing factors similar to those found in section 624(b) of H.R. 2214.

State Preemption: The Administration supports appropriate preemption of State laws that affect spam. It is important that in the criminal law arena, States are able to bring their criminal law enforcement resources to bear to combat fraudulent and unmarked pornographic spam. It is also important to provide greater certainty in interstate commerce for enterprises currently facing a wide divergence in State civil law and enforcement, while providing appropriate remedies for consumers.

Constitutional Issues: The Administration has a serious question about section 7(b)(6)'s consistency with principles of constitutional federalism and recommends that it be amended to clarify that State officials' authority to enforce the provision is permissive, not mandatory. Indeed, we presume that the drafters likely intended the current language to permit, but not to require State agencies to enforce the bill's provisions. Nevertheless, we believe that it is important to change the language to make this absolutely clear. In addition, the Administration believes that to the extent that provisions in the bill purport to require Executive branch agencies to provide Congress with legislative recommendations, they run afoul of the Constitution's Recommendations Clause. Therefore, sections 9 and 10 should be made precatory or amended to require only recommendations that the President considers "necessary and expedient."

Technical Definitions: The Administration believes the bill's definition of a "commercial electronic mail message" in section 3(2)(A) should be broadened to cover messages "a principal purpose" of which are commercial. Thus, the Administration suggests the definition read as follows: "The term 'commercial electronic mail message' means any electronic mail message a principal purpose of which is the commercial advertisement or promotion of a commercial product ..." This change would help to ensure that the majority of spam messages are covered while still excluding obviously non-commercial messages.

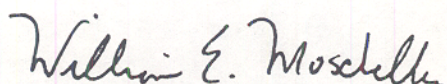
The Administration also believes the definition of "sender" in section 3(17) should be edited to state the following: "The term 'sender,' when used with respect to a commercial electronic mail message, means a person who initiates said message." It is not uncommon today for a spammer to advertise somebody else's products and services

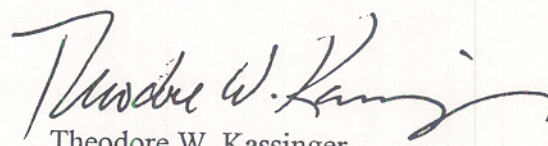
on their own initiative in order to obtain revenues from commissions. Such a spammer would not be advertising his or her own products, services or web site, and would therefore not be covered under the bill's original definition of sender. Separately, the Administration supports expanding the definition to include a successor's interest, as is done in H.R. 2214.

The Administration notes that there may be reasons to treat recipient e-mail address information differently under the law than other header information and would be willing to provide technical advice to the Congress on this point.

The Administration applauds the Senate Commerce Committee for reporting this bill in a timely manner and looks forward to working with the Congress to enact legislation this year to help combat spam. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,


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Theodore W. Kassinger
General Counsel
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cc: The Honorable Ernest F. Hollings
Ranking Minority Member
Committee on Commerce, Science, and Transportation

The Honorable Conrad Burns
Chairman
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The Honorable Orrin G. Hatch
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The Honorable Patrick J. Leahy
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