

**SCHWARTZ & BALLEN LLP**

1990 M STREET, N.W. • SUITE 500  
WASHINGTON, DC 20036-3465

(202) 776-0700

FACSIMILE  
(202) 776-0720

www.schwartzandballen.com

**M E M O R A N D U M**

April 1, 2004

To Our Clients and Friends

Re: FCC Proposed Rules on Mobile Service  
Commercial Messages and National Do Not Call Registry

The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act”) requires the Federal Communications Commission (“FCC”) to adopt rules to provide subscribers of commercial mobile services with the ability to avoid receiving mobile service commercial messages on their wireless devices. Comments on the FCC proposed rule prohibiting these types of messages are due by April 30. The FCC is also requesting comments on a proposal to require telemarketers to access the National Do Not Call Registry at least 30 days before making a telephone solicitation. Comments on this proposed rule are due by April 15.

**MOBIL SERVICE COMMERCIAL MESSAGES**

The CAN-SPAM Act requires the FCC to adopt rules to provide subscribers with the ability to avoid receiving a mobile service commercial message (“MSCM”) unless the subscriber has expressly authorized such messages beforehand.

- *Definition of an MSCM.* The FCC is proposing that under the CAN-SPAM Act, an MSCM would be limited to a message that is transmitted to an electronic mail address provided by a commercial mobile radio service provider for delivery directly to the addressee subscriber’s wireless device regardless of the transmission technique used. Relationship and transactional messages would not be included in the definition of a “commercial” message.<sup>1</sup> Messages forwarded from a server or an individual’s desktop computer to his or her wireless device are not included

---

<sup>1</sup> Under the CAN-SPAM Act a “commercial” email message is a message whose primary purpose is the commercial advertisement or promotion of a commercial product or service.

## **SCHWARTZ & BALLEN LLP**

in the definition of an MSCM. The FCC is seeking comments on all aspects of its definition of an MSCM.

- *Avoiding Receipt of MSCMs.* The FCC is seeking comments on technical mechanisms that could be made available to wireless customer so that they may stop the receipt of unwanted MSCMs and on means by which wireless providers might protect customers from unwanted MSCMs.
- *Express Written Authorization.* The FCC is seeking comment on whether to prohibit all senders of commercial electronic mail from sending MSCMs unless the senders first obtain express authorization from the recipient or whether to require the subscriber to affirmatively decline to receive MSCMs at the time the subscription is initiated.
- *Electronically Rejecting Future MSCMs.* The CAN-SPAM Act requires the FCC to develop rules that allow recipients of MSCMs to indicate electronically a desire not to receive future MSCMs from the sender. The FCC is seeking comments on technical options that would allow a subscriber to withdraw or give permission to the receipt of future MSCMs from a sender.
- *Compliance with Other Provisions of the CAN-SPAM Act.* If a sender is not prohibited from sending a MSCM to an address, the MSCM must comply with the CAN-SPAM Act. The FCC is seeking comments on compliance issues that senders of such an MSCM may encounter.

### **SAFE HARBOR UNDER TCPA**

The FCC is seeking comment on whether it should adopt a limited safe harbor during which a telemarketer would not be liable for violating the rule prohibiting autodialed and prerecorded messages calls to wireless numbers once a number is changed from a wireline to a wireless service. The safe harbor is designed to address the situation where a telemarketer may not have access immediately to the information that a number is now a wireless number and thus, may call the wireless number. The FCC is also seeking comment on the appropriate safe harbor period.

### **NATIONAL DO NOT CALL REGISTRY**

The FCC is proposing to require that sellers (and telemarketers acting on behalf of the sellers) subject to the TCPA use a version of the National Do Not Call Registry obtained no more than 30 days prior to the date any solicitation is made. This is similar to the final rule the Federal Trade Commission recently adopted for telemarketers subject to the Telemarketing Sales Rule. The FTC's rule, however, requires the caller to obtain a list of telephone numbers from the National Do Not Call Registry no more than 31 days prior to making the call. The FCC is seeking comment on how this proposed rule would affect compliance with the FCC's do not call rule.

**SCHWARTZ & BALLELLP**

A copy of the proposed rules can be found on our web site -  
[http://www.schwartzandballen.com/whats\\_new.html](http://www.schwartzandballen.com/whats_new.html).

If you have any questions, please call Gilbert Schwartz, Robert Ballen or Tom Fox at (202) 776-0700.