

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Rules and Regulations Implementing the
Controlling the Assault of Non-Solicited
Pornography and Marketing Act of 2003
Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991
CG Docket No. 04-53
CG Docket No. 02-278

ORDER

Adopted: March 24, 2005

Released: March 25, 2005

By the Acting Chief, Consumer & Governmental Affairs Bureau:

A. Introduction

1. In this Order, we amend the Federal Communications Commission's (Commission or FCC) rules addressing unwanted mobile service commercial messages to incorporate by reference new definitions adopted by the Federal Trade Commission (FTC). In adopting rules to implement portions of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act or Act), the Commission directed the Consumer & Governmental Affairs Bureau (CGB) to revise the regulations to reflect updated or amended definitions in the FTC's rules. The Act gives the FTC responsibility for making the ultimate determination of when electronic mail is to be considered "commercial" and for refining the definitions of "transactional or relationship" messages.

2. On December 16, 2004, the FTC adopted its final CAN-SPAM definitions and implementation rules, defining the criteria for determining whether an electronic message is "commercial" in nature, and refining the definition of "transactional or relationship" messages. This definition rule becomes effective on March 28, 2005. Consequently, we amend our CAN-SPAM rules to reflect the FTC's newly adopted definitions and incorporate them by reference in our rules so that our rules will reflect any further revisions the FTC makes.

1 Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 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 (CAN-SPAM Act).

2 See Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket Nos. 04-53, and 02-278, Order, 19 FCC Rcd 15927, 15952, para. 68 (2004) (CAN-SPAM Implementation Order) ("Therefore, we delegate to the Consumer & Governmental Affairs Bureau the authority to amend the rules we adopt today to ensure consistency with any rule the FTC adopts under the CAN-SPAM Act to further define 'commercial' and 'transactional or relationship' messages."). See also id. at 15955, para. 81.

3 CAN-SPAM Act, Sections 3(2)(C), 3(17)(B), codified at 15 U.S.C. §§ 7702(2)(C), 7702(17)(B).

4 See Federal Trade Commission, RIN 3084-AA96, Definitions and Implementation Under the CAN-SPAM Act, Final Rule, 70 Fed. Reg. 3110-3129 (Jan. 19, 2005), codified at 16 C.F.R. §§ 316.1-316.5 (FTC Final Rules).

5 Id.

B. Background

1. CAN-SPAM Implementation

3. Section 14 of the CAN-SPAM Act required the FCC, in consultation with the FTC, to promulgate rules to protect consumers from unwanted “mobile service commercial messages.”⁶ On August 4, 2004, the Commission released the *CAN-SPAM Implementation Order* to fulfill this directive.⁷ The CAN-SPAM Act and the Commission’s implementing rules, which mirror the Act, define a “mobile service commercial message” as a type of “commercial electronic mail message.”⁸ A “commercial electronic mail message” is in turn defined in the Act as an electronic message for which the “primary purpose” is “commercial advertisement or promotion of a commercial product or service” as defined in the Act.⁹ The Act further states that “commercial” messages do not include “transactional or relationship” messages,¹⁰ such as messages regarding product safety or security information, notification to facilitate a commercial transaction, and notification about changes in terms, features, or the customer’s status.¹¹

4. The CAN-SPAM Act gives the FTC responsibility for making the ultimate determination of the “primary purpose” of such messages, as well as the authority to modify the definition of transactional or relationship messages.¹² Recognizing this, the Commission noted that the FCC’s rules would need to be amended to cross-reference the FTC’s criteria for determining the primary purpose of “commercial” messages, and rules defining “transactional or relationship” messages.¹³ The Commission delegated authority to the Consumer & Governmental Affairs Bureau to amend the rules to reflect those changes.¹⁴

C. Discussion

1. Definition of “commercial electronic mail message”

5. The Commission’s current rules define a “commercial electronic mail message” to mean: the term as defined in the CAN-SPAM Act, 15 U.S.C. § 7702. The term is defined as “an electronic message for which the primary purpose is commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose).” The term “commercial electronic mail message”

⁶ See *CAN-SPAM Act*, Section 14, *codified at* 15 U.S.C. § 7712.

⁷ *CAN-SPAM Implementation Order*, *supra*.

⁸ The Act defines “mobile service commercial message” as a “commercial electronic mail message that is transmitted directly to a wireless device that is utilized by a subscriber of commercial mobile service ... in connection with such service.” See *CAN-SPAM Act*, Section 14(d), *codified at* 15 U.S.C. § 7712(d).

⁹ *CAN-SPAM Act*, Section 3(2)(A), *codified at* 15 U.S.C. § 7702(2)(A).

¹⁰ *CAN-SPAM Act*, Section 3(2)(B), *codified at* 15 U.S.C. § 7702(2)(B).

¹¹ *CAN-SPAM Act*, Section 3(17)(A), *codified at* 15 U.S.C. § 7702(17)(A).

¹² *CAN-SPAM Act*, Section 3(2)(C) and 3(17)(B), *codified at* 15 U.S.C. §§ 7702(2)(C) and 7702(17)(B).

¹³ *CAN-SPAM Implementation Order*, 19 FCC Rcd at 15952, para. 68.

¹⁴ *Id.*

does not include a transactional or relationship message.¹⁵

6. As noted above, the FTC issued rules interpreting the CAN-SPAM Act and providing the criteria to be used to determine the “primary purpose” of an electronic mail message.¹⁶ The FTC’s definition states:

(1) If an electronic mail message consists exclusively of the commercial advertisement or promotion of a commercial product or service, then the “primary purpose” of the message shall be deemed to be commercial.

(2) If an electronic mail message contains both the commercial advertisement or promotion of a commercial product or service as well as transactional or relationship content as set forth [elsewhere in the rules], then the “primary purpose” of the message shall be deemed to be commercial if:

(i) A recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message contains the commercial advertisement or promotion of a commercial product or service; or

(ii) The electronic mail message’s transactional or relationship content as set forth [elsewhere in the rules] does not appear, in whole or in substantial part, at the beginning of the body of the message.

(3) If an electronic mail message contains both the commercial advertisement or promotion of a commercial product or service as well as other content that is not transactional or relationship content as set forth [elsewhere in the rules], then the “primary purpose” of the message shall be deemed to be commercial if:

(i) A recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message contains the commercial advertisement or promotion of a commercial product or service; or

(ii) A recipient reasonably interpreting the body of the message would likely conclude that the primary purpose of the message is the commercial advertisement or promotion of a commercial product or service. Factors illustrative of those relevant to this interpretation include the placement of content that is the commercial advertisement or promotion of a commercial product or service, in whole or in substantial part, at the beginning of the body of the message; the proportion of the message dedicated to such content; and how color, graphics, type size, and style are used to highlight commercial content.¹⁷

7. The FTC also adopted a rule stating that the “primary purpose” of a commercial electronic mail message should be deemed “transactional or relationship,” and therefore outside of the definition of “commercial,” if the message consists exclusively of transactional or relationship content, as set forth in the FTC’s rules.¹⁸ Therefore, we amend our rules to cross-reference the FTC rules that contain the criteria for determining the primary purpose of a message under the CAN-SPAM Act.¹⁹

¹⁵ 47 C.F.R. § 64.3100(c)(2).

¹⁶ See *FTC Final Rules, supra*.

¹⁷ See *FTC Final Rules*, 70 Fed. Reg. at 3127-28, *codified at* 15 C.F.R. § 316.3(a).

¹⁸ See *FTC Final Rules*, 70 Fed. Reg. at 3128, *codified at* 15 C.F.R. § 316.3(b).

¹⁹ See 47 C.F.R. § 64.3100.

2. Definition of “transactional or relationship” message

8. In addition to defining a “commercial electronic mail message,” the Commission’s current rules define a “transactional or relationship message” to mean:

any electronic mail message the primary purpose of which is-- i) to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender; ii) to provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient; iii) to provide (I) notification concerning a change in the terms or features of; (II) notification of a change in the recipient’s standing or status with respect to; or (III) at regular periodic intervals, account balance information or other type of account statement with respect to a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender; (iv) to provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or (v) to deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.²⁰

9. In its recent rules, the FTC adopted a definition of transactional or relationship messages that does not vary from the definition found in the CAN-SPAM Act, or the Commission’s rules, which mirror the CAN-SPAM Act definition.²¹ As noted above, however, the Act allows the FTC to modify the definition of transactional or relationship messages. Therefore, we amend the FCC’s rules to cross-reference the FTC’s rules, so that the FCC’s rules reflect the FTC’s rules as they stand now and will also reflect any modifications that the FTC makes to its rules. We note for the record that the FTC provided further guidance for non-profit organizations for interpreting the definition of transactional or relationship messages.²²

D. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1-4, 222, 227 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 222, 227, and 303(r), and the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699, 15 U.S.C. §§ 7701-7713, 18 U.S.C. § 1037 and 28 U.S.C. § 994,

²⁰ See 47 C.F.R. § 64.3100(c)(2).

²¹ See *FTC Final Rules*, 70 Fed. Reg. at 3127-28, *codified at* 15 C.F.R. §§ 316.2(n) and 316.3(b).

²² Specifically, the FTC found that messages between a nonprofit organization and its members “would only be considered ‘commercial electronic messages,’ and thus subject to greater regulation than transactional messages, if (1) a recipient reasonably interpreting the subject line of the message would likely conclude that the message advertises or promotes a commercial product or service, or (2) the transactional or relationship content does not appear, in whole or in substantial part, at the beginning of the body of the message.” *FTC Final Rules*, 70 Fed. Reg. at 3112, n.29.

and the authority delegated to the Consumer & Governmental Affairs Bureau in the Commission's *CAN-SPAM Implementation Order*, FCC 04-194 (adopted August 4, 2004), this Order is ADOPTED as set forth herein, and Part 64 of the Commission's rules, 47 C.F.R. § 64.3100, is amended as set forth in Appendix A.

FEDERAL COMMUNICATIONS COMMISSION

Jay Keithley
Acting Chief, Consumer & Governmental Affairs Bureau

APPENDIX A

Final Rules

Part 64 of the Code of Federal Regulations is amended as follows:

PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS
Subpart BB – Restrictions on Unwanted Mobile Commercial Service Messages

Section 64.3100(c)(2) and 64.3100(c)(8) are revised as follows:

§ 64.3100 Restrictions on mobile service commercial messages.

(a) ***

(b) ***

(c) Definitions. For the purpose of this subpart:

(1) ***

(2) Commercial electronic mail message means the term as defined in the CAN-SPAM Act, 15 U.S.C. § 7702 and as further defined under 16 C.F.R § 316.3. ***

(3) ***

(4) ***

(5) ***

(6) ***

(7) ***

(8) Transactional or relationship message means the following and is further defined under 16 C.F.R. § 316.3: any electronic mail message the primary purpose of which is-- i) to facilitate, ***

(d) ***

(e) ***

(f) ***