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

In the Matter of	)	
	)	
CAN-SPAM Act Rulemaking	)	FTC Project No. R411008
	)	

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. ("Nextel"), by its attorneys, hereby submits these Comments in response to the Federal Trade Commission's (the "FTC's" or "Commission's") *Notice of Proposed Rulemaking* in the above-captioned proceeding (the "*Notice*").[1] Congress has given the Commission an important role in accomplishing the CAN-SPAM Act's[2] goals of protecting consumers from deceptive practices and allowing them the ability to opt-out of future marketing efforts in the context of unsolicited commercial emails ("UCEs").[3] In enacting the

[1] Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, *Notice of Proposed Rulemaking*, Project No. R411008, 70 Fed. Reg. 25426 (rel. May 12, 2005).

[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 accompanying the Act identifies the four major objectives 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).

CAN-SPAM Act, Congress was careful to avoid unnecessarily burdening companies that conduct commercial email marketing for legitimate purposes.[4] Accordingly, Nextel urges the Commission in further crafting its rules to continue to take into account both consumers' rights and expectations, as well the practical challenges and constraints businesses face in complying with the Act's opt-out and other requirements.

Specifically, Nextel requests that the Commission (1) clarify its proposed definition of the statutory term "sender" in the context of emails containing advertisements from multiple advertisers, such that only the party that ultimately controls the content of a UCE or determines the specific individuals to which it will be sent will be deemed a "sender" under the Act; (2) maintain the 10-day period established under the CAN-SPAM Act for companies to process and honor consumer do-not-email requests;[5] and (3) require that such do-not-email requests be honored for a period of five years by the company to which the request is made, consistent with the five-year period established by the FTC and the Federal Communications Commission for honoring do-not-call requests. Such an approach with respect to these issues will provide the

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[4] 15 U.S.C. §7704(c)(1). For example, recognizing the burdens imposed on legitimate advertisers under the Act, Congress included a safe-harbor for certain CAN-SPAM Act violations and acted to generally preempt state laws regulating UCEs. Thus, Congress recognized its responsibility to "protect those individuals who want to use email as a commercial tool in a responsible way" and noted also the "challenge to design something that allowed commerce to take place" while curtailing spam. *See Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003*, 149 Cong. Rec. H 12186, 12196 (Nov. 1, 2003).

[5] In its comments responding to the Commission's *Advanced Notice of Proposed Rulemaking*, Nextel asked the Commission to extend from 10 days to 30 days the time period for processing opt-out requests so as to allow businesses sufficient time as well as to maintain consistency with the time period provided by the Commission for honoring do-not-call requests, which has since been extended to 31 days. Although Nextel continues to believe that a longer period would be more consistent with the practical difficulties legitimate advertisers face in complying with the Act, Nextel respects the Commission's decision to adopt the 10-day period. However, Nextel urges the Commission not to further shorten the already burdensome 10-day requirement.

certainty necessary to accomplish the Act's objective of protecting the public from unwanted UCEs, while taking due account of the business realities faced by legitimate advertisers.

BACKGROUND

Nextel operates a nationwide digital mobile communications network that provides more than 17 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 email accounts, events and calendar lists.

The speed and convenience of email has become increasingly important to Nextel's customers, and Nextel accordingly has a vested interest in ensuring that email communications remain fast, reliable and free from excessive, unwanted solicitations. As such, Nextel fully supports the goals of the CAN-SPAM Act and will continue to take all steps necessary to ensure that its own email marketing campaigns comply fully with the Act's requirements. In respecting the marketing preferences of its customers and potential customers, Nextel maintains a comprehensive database and expends considerable resources to honor the requests of consumers who express their wish not to be contacted by email for commercial purposes.[6] Although any large company that sends a substantial number of commercial email must engage in extensive coordination of many different organizations, commercial email has proven an effective means for companies like Nextel to communicate with existing and potential

[6] Specifically, 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. Nextel also has invested considerable resources to develop in-house software applications that enable its Sales and Marketing employees to "scrub" all commercial emails against Nextel's Do-Not-Email database.

customers. Such communications are not only useful to many consumers, but also are a constitutionally-protected exercise of businesses' First Amendment commercial speech rights.[7] Therefore, the Commission should continue to balance carefully the rights of both consumers and businesses in implementing the Act.

DISCUSSION

I. THE COMMISSION SHOULD CLARIFY IN ITS DEFINITION OF THE "SENDER" OF A MULTI-ADVERTISER EMAIL WHAT IS MEANT BY "CONTROLLING" AN EMAIL'S CONTENT AND "DETERMINING" AN EMAIL'S RECIPIENT LIST.

In its *Notice,* the Commission acknowledged the confusion surrounding the application of the CAN-SPAM Act's requirements to an email marketing initiative where two or more marketing partners advertise their products or services in a single email. Under the current rules, it is unclear whether such an email must include a series of opt-out links and physical postal addresses (one for each advertiser) and whether each advertiser must honor prior and subsequent opt-out requests. To resolve this confusion, the Commission proposed a definition of "sender" in the context of multi-advertiser emails under which the sender obligations would only apply to a

[7] *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).

party that (1) controls the content of the message; (2) determines the electronic mail addresses to which the message is sent; or (3) is identified in the "from" line of the message.[8]

As the Commission points out, this approach should enable advertisers to use these criteria to designate a single sender. This sender would control the message's content, determine the email addresses to which the message will be sent, identify itself in the message's "from" line, and be responsible for honoring the do-not-email requests that it receives.[9] Nextel supports the Commission's efforts to provide advertisers with both guidance and flexibility in structuring their advertising relationships and implementing their email marketing strategies. As part of the FTC's effort to avoid ambiguity and confusion, Nextel also urges the Commission to make certain modifications to its proposed definition to further clarify how particular marketing practices would be interpreted under the proposed rule.

A. The Commission should clarify that a marketer does not "control" a message's content simply by exercising certain approval rights.

The Commission's first criterion – that the "sender" is the party who controls the content of the message – is both practical and consistent with the Act's overall emphasis on consumers'

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[8] The definition of "sender" is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(16), *provided that*, when more than one person's products or services are advertised or promoted in a single electronic mail message, each such person who is within the Act's definition will be deemed to be a "sender," *except that*, if only one such person is both within the Act's definition and meets one or more of the following criteria, only that person will be deemed to be the "sender" of that message:

(i) The person controls the content of such message;
(ii) The person determines the electronic mail addresses to which such message is sent; or
(iii) The person is identified in the "from" line as the sender of the message.

Notice at 10.

[9] *Id.*

expectations.[10] In particular, the party that creates and controls the message's content is likely to be the party to which a consumer reasonably would expect to direct his or her opt-out request and the party that exercises the control necessary to ensure compliance with the CAN-SPAM rules. To provide further clarity, Nextel asks that the Commission specify that only the party that ultimately controls the content of the message satisfies this criterion and expressly recognize that certain common business practices do not constitute "control" over the content of a commercial email message for purposes of determining the message's sender.

Mobile communications providers such as Nextel frequently partner with other businesses for purposes of joint marketing or cross-marketing of their products and services. Such relationships are beneficial to Nextel and its partners, as well as to consumers who may receive discounted offers or other unique promotions for third party products and services. It is common in such marketing arrangements for one party to develop the content of the communication and then present it to its co-marketing partners whose goods and services are also being advertised in the message. (In some cases, a co-marketing partner may provide an insert, containing its logo and a description of its offer, to be placed in the other party's email message.) Naturally, in these types of arrangements, advertisers generally reserve the right, by contract, to review and approve the final copy of any email that includes any mention or offer of their products and services. Such approval rights are not intended to give multiple advertisers control over the content of the message. Rather, advertisers review the messages for compliance with their marketing agreements (*e.g.*, proper placement of their ads within the message), overall

[10] For example, the Commission focused on a consumer's "net impression" as a test for determining the primary purpose of an email message containing both commercial and non-commercial material. *See* Definitions and Implementation Under the CAN-SPAM Act, *Final Rule*, 70 FR 3110 (Jan. 19, 2005).

accuracy with respect to the terms of their offers and the use of their logo, as well as to ensure the absence of objectionable content in proximity to their brands.

Nextel considers this review process critical to ensuring the accuracy and integrity of commercial marketing materials bearing its name. Advertisers should not be forced to forgo such customary approvals in order to avoid being deemed a "sender" of a multi-advertiser email. Nor should they be compelled to stop providing advertising inserts for placement in other parties' email messages for the same reason. Nextel thus asks that the Commission clarify that "control" under its proposed definition of "sender" in the multi-advertiser context means ultimate control with respect to the content of the email and the decision whether to send it, and does not include (a) the exercise or possession of contractual or similar approval rights with respect to the content of an email message, or (b) the provision of advertising inserts to be placed in another party's email message.

B. The Commission should clarify that an advertiser does not "determine" the email addresses to which a message is sent simply by establishing or selecting general criteria for the sender to use in narrowing a large pool of potential recipients.

Nextel requests that the Commission clarify the second proposed criterion in determining whether a party should be considered a "sender" in the context of a multi-advertiser email. As with all direct marketing campaigns, it is possible with commercial email for advertisers to target recipients based on a variety of demographic criteria. This approach allows companies to tailor a specific offer to a particular subset of recipients. A company like Nextel thus is able to limit its email communication to only those recipients that Nextel believes are most interested in a particular offer. For example, in partnering with a commercial airline, a mobile communications provider such as Nextel may wish to target an offer for a new international calling plan to those individuals on the airline's email recipient list who have traveled

internationally over a particular timeframe. The actual list of recipients to receive the commercial email still is determined by the airline that maintains the email address lists of its customers; however, the campaign is focused on those customers and prospective customers who are most likely to be interested in the offer.

The Commission should encourage such targeted marketing activity, because it benefits consumers as well as businesses and is consistent with the Act's overall objective of limiting unwanted commercial email. By limiting its advertising to only those people most likely to have an interest in a particular offer, Nextel and its partners are working to ensure that people less likely to be interested in such offers are less likely to receive them via email. It has been Nextel's experience that its customers and prospective customers appreciate receiving offers that are more tailored to their needs, as opposed to generic offers that have not been targeted based on the recipients' interests. There is no reason that the Commission should discourage this practice within the area of email marketing.[11] Therefore, the Commission should clarify that an advertiser does not become a "sender" under the CAN-SPAM rules solely by virtue of having specified recipient criteria in order to limit its marketing campaigns to those recipients on a marketing partner's list most likely to be receptive to the specific offer or promotion.

C. The Commission should consider the fact that a party is identified in the "from" line of a multi-advertiser email to be particularly determinative in its "sender" analysis.

The Commission's third criterion – equating the "sender" of a multi-advertiser email with the party whose name appears in the message's "from" line – is the most critical of the

[11] Whether conducting its marketing through direct mail, telephone or other channels, Nextel often uses demographic and other variables to tailor its offers to those customers of its affinity marketing partners who are most likely to be interested in a particular Nextel product or service offer.

proposed criteria because it has the most relevance to a recipient's understanding of whom to identify as the sender of an email. In the example above, a consumer who receives a message "from" an airline, and then requests not to receive future commercial email through the opt-out link in that email, would expect the airline to honor his or her request in the future. As a result, the third prong of the FTC's proposed "sender" analysis should be given the most weight because it reflects consumer expectations. Clarifying the first two prongs of the FTC's proposed three prong analysis in the manner set forth above will help to ensure that the third prong – consumers' expectations –is afforded the most emphasis.

D. The Commission should clarify that the opt-out and other requirements of CAN-SPAM do not apply to an email sent by or on behalf of an employer to its employees at the email addresses owned by the employer and subject to the employer's conditions of use.

The *Notice*, briefly noted that a third party email message marketing that party's goods and services to the employees of another company would not be considered a "transactional or relationship" message if sent on the third party's behalf rather than on behalf of the employer.[12] Nextel urges the Commission to clarify that the CAN-SPAM Act requirements, including the provision of an opt-out mechanism, do not apply to an email sent by an employer to its employees, even if that email contains commercial material of a third party partner. Otherwise, an employer would be required to maintain an opt-out list of its own employees using email addresses which the employer itself owns and controls and which the employees utilize subject to the employer's conditions of use. It is important to note that the resources used to transmit and process these email messages would be those of the employer, which thus should have the discretion to determine their transmission and receipt.

[12] *Notice* at 40.

II. THE COMMISSION SHOULD MAINTAIN THE 10-DAY PERIOD MARKETERS ARE GIVEN TO HONOR EMAIL OPT-OUT REQUESTS AND ESTABLISH A FIVE-YEAR EXPIRATION PERIOD FOR EMAIL OPT-OUTS.

The Commission proposes in the *Notice* to shorten to three business days the ten business day period currently afforded companies to honor email opt-out requests. Based on Nextel's experience, this proposal is impractical. Although Nextel is fully committed to honoring the email marketing preferences of its customers and prospects, this process often is very challenging for a large company with multiple marketing channels. Contrary to some commenters assertions,[13] the logistics involved in receiving and processing email opt-out requests are not instantaneous for the majority of larger companies, which must collect and process do-not-email requests received through a variety of channels, scrub email recipient lists provided by different sources, and transmit the scrubbed lists to multiple marketing departments, sales representatives and third-party vendors. Indeed, for the majority of its email marketing campaigns, Nextel uses trusted third party vendors both to send the email messages on Nextel's behalf and to receive and transmit any opt-out requests to Nextel's Do-Not-Email database.

A. The Commission should maintain the 10-day period established by the CAN-SPAM Act for companies to honor do-not-email requests.

In enacting the CAN-SPAM Act, Congress established a 10-day period for companies to process and honor the do-not-email requests that they receive. Congress authorized the FTC to modify that period only if the Commission finds that a different time period is appropriate to effectuate the purposes of the Act and the protection of email recipients' interests. Moreover, Congress expressly directed the Commission to consider, in contemplating any such change, "the

[13] *See id.* at 68.

burdens imposed on senders of lawful commercial electronic mail."[14] Switching to a 3-day period would require parties to revamp the processes for honoring do-not-email requests that they have expended extensive resources to establish to comply with the CAN-SPAM Act's 10-day requirement – implemented only 1 1/2 years ago – and create a new framework to process do-not-email requests and perform scrubbing for all marketing campaigns virtually instantaneously, as the *Notice* implicitly recognizes. At the same time, there is no evidence in the record that the 10-day period established by Congress has been inappropriate to effectuate the purposes of the CAN-SPAM Act or to protect email recipients' interests. Accordingly, there is no basis for the Commission to jettison the statutorily prescribed 10-day period in favor of a drastically shortened period for parties to process and honor do-not-email requests.

In fact, there are many reasons why the Commission should not reduce the current 10-day compliance period. As the Commission indicated in the *Notice*, the purpose of the opt-out provision in the CAN-SPAM Act is to protect recipients from unwanted commercial email.[15] As such, the Commission should not jeopardize the stability and effectiveness of current opt-out regimes. The *Notice*'s tentative conclusion to change the current opt-out period to 3 days would pose just such a risk. Indeed, the *Notice*'s suggestion that a change to the status quo would not create an "undue burden"[16] is inconsistent with the experience of large companies that go to great lengths to comply with the CAN-SPAM Act and the Commission's corresponding regulations.

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[14] 15 U.S.C. 7704(c)(1).

[15] *Notice* at 69.

[16] *Id.*

In today's competitive environment, dynamic 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 advertisers and vendors. Strategies such as out-sourcing of marketing functions and the development of marketing partnerships enhance the ability of companies such as Nextel to efficiently communicate information about their products and services to consumers most likely to be interested in them. This multi-dimensional approach is essential for long-term company growth.

Processing opt-out requests directed toward a company, its sales representatives, outside vendors, affiliates, distributors and agents requires a great deal of coordination. Requiring such processes to be completed in less than 10 days is very difficult. It simply is infeasible for larger companies that utilize both internal and external resources to implement their email marketing strategies to complete opt-out processing in a 3-day period. For a company like Nextel, such a period would render some of its current opt-out compliance processes useless and therefore increase demands on the remaining usable opt-out processes. In order to comply with a 3-day limit, a company would not only have to collect and process do-not-email requests from multiple sources for incorporation into the company's do-not-email list virtually instantaneously, as the *Notice* contemplates, it also must either (1) obtain from all assisting parties the recipient lists for all email campaigns on a daily basis, scrub these lists against its do-not-email list itself, and send the scrubbed lists back the same day; or (2) allow these parties direct access to its do-not-email list and rely on those parties to perform scrubbing on a daily basis.

There is a serious question as to whether these tasks even could be performed within such a tight timeframe. There is no question, however, that it would require the establishment of

costly new processes and that the costs ultimately would have to be passed on to consumers. Moreover, such rushed processes and increased access and responsibilities for outside vendors undoubtedly would raise the likelihood of errors and the threat to customer privacy.[17] Further, because many larger companies like Nextel have worked to create a centralized repository for all do-not-contact requests they receive (including do-not-call requests), reworking the timeframe necessary for processing one type of request will impact the entire compliance system. The Commission should refrain from making any alterations to current regulations that would negatively affect companies' overall compliance across the various do-not-contact regimes.

Most important, there is no evidence that the 10-day period established by Congress has failed to serve the purposes of the Act. The *Notice* cited some commenters' assertions that allowing time between a consumer's opt-out request and the deadline for honoring such a request might encourage advertisers to bombard that consumer with UCEs during that period.[18] However, the Commission concluded in the *Notice* that the record does not demonstrate that the fears of "mail-bombing" during an opt-out period are well-founded.[19] Moreover, the hypothetical scheme posited by these commenters makes no economic sense. A primary attraction of email marketing is its economic efficiency as it provides a mechanism for the advertiser to reach a large number of customers or potential customers simultaneously. Those benefits would be lost under the commenters' hypothetical, because the advertiser would have to expend extra resources (1) to identify and target each individual who has made a do-not-email

[17] Creating increased privacy risks is contrary to the goals of the CAN-SPAM Act and the Commission should refrain from implementing any changes to current CAN-SPAM regulations that would jeopardize consumer privacy.

[18] *Notice* at 67-68.

[19] *Id.* at 69.

request, (2) cull out email messages from all its marketing campaigns or create new messages to accumulate the volume contemplated by the commenters for "mail-bombing," and (3) accomplish the foregoing within the compliance period for each customer, keeping in mind that this requires the extra step of tracking the compliance period for each individual in order to remain compliant. Furthermore, after assuming the additional costs described above, as well as the other costs of all other email marketing efforts, the company still would expect to get far lower benefits from these communications, given that the recipients already have expressed their opposition to receiving such emails. Indeed, any company that "mail-bombs" an individual immediately after he or she has made a do-not-email request must expect backlash in response. Consequently, no rational advertiser would undertake the "mail-bombing" scheme posited in the cited comments.

In short, there is no evidence supporting shortening to three days the period for parties to process and honor the do-not-email requests that they receive. It is also instructive that the Commission found 31 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.[20] Given that telemarketing calls to consumers' residences are more intrusive than unwanted email, it is inappropriate to adopt a more stringent standard for companies to honor consumers' opt-out requests from the receipt of commercial emails.

The Commission should retain the 10-day period established by the CAN-SPAM Act for honoring email opt-out requests. As Nextel has demonstrated above, the current 10-day period already poses a significant challenge to many large companies, and imposing the impractical and

[20] 16 C.F.R. § 310.4(b)(3)(iv).

unattainable 3-day requirement would negatively impact compliance procedures that companies like Nextel have worked in good faith to develop since the Act's passage in December of 2003.

B. The Commission should establish an expiration period of five years for email opt-out requests.

As the Commission discussed in the *Notice*, email addresses can be particularly transient because consumers often have work-associated email addresses that terminate when they change employment, Internet-based email accounts that expire from non-use and/or personal accounts that they often change.[21] Moreover, those email addresses could be reassigned to other users who may benefit from receiving commercial email offers. Nextel urges the Commission to revisit the issue of establishing a five-year time period, after which an email opt-out request expires unless renewed by the consumer, to prevent companies from being required to maintain endless suppression lists of defunct email addresses. The Commission recognizes that, unlike the do-not-call context, there are no registries or databases against which email address lists can be scrubbed to remove those addresses that are no longer active.[22] A five-year lifespan for email opt-out requests is a reasonable amount of time to accomplish the goals of the Act, while providing businesses with a way to periodically update their email suppression lists and avoid amassing unmanageable lists of defunct email addresses in an infinitely-expanding number of databases. Nextel has experience in managing large databases of information. As do-not-contact databases become more prevalent, the cost associated with storing a wide range of tables within such databases has increased significantly. Additionally, as those databases grow in size, they are more susceptible to failure or error – especially when many different organizations within a large company access those databases several times per day. A five year period properly

[21] *Notice* at 69-70.

balances consumer expectations with a business' need to control costs, database integrity and efficiency within its marketing organizations. Furthermore, a five-year time period is consistent with the time period during which a do-not-call request must be honored by a telemarketer under the federal rules. In adopting the five-year period for the national do-not-call registry, the Commission observed that "a five-year registration period coupled with the periodic purging of disconnected telephone numbers from the registry adequately balances, on the one hand, the need to maintain a high level of accuracy in the national registry and, on the other hand, the onus on consumers to periodically re-register their telephone numbers."[23] The same reasoning applies to support a five-year period for honoring do-not-email requests, given the far less intrusive nature of email communications.

CONCLUSION

As a provider of mobile services, Nextel has a strong interest in ensuring the success of the CAN-SPAM Act and the end of widespread spamming. The Commission should establish clear regulations to ensure both successful compliance and effective operational consistency among marketing regulatory regimes. This only can be accomplished by a fair balancing of consumer interests and business realities. If compliance is made near impossible for the largest companies sending the greatest amounts of legitimate commercial email, existing CAN-SPAM compliance programs will become ineffective and consumers will not benefit from the Act.

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[22] *Notice* at 70.

[23] *See* Telemarketing Sales Rule, *Final Amended Rule*, 68 FR 4580, 4640 (2003); *see also* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, 18 FCC Rcd 14014, 14068, para. 92 (2003) (shortening the time period a company must honor a company-specific do-not-call request from ten years to five years).

Accordingly, Nextel respectfully requests that the Commission adopt the regulatory proposals described herein.

Respectfully submitted,

/s/ To-Quyen T. Truong
To-Quyen T. Truong
Peter Cassat
Courtney Manzel
DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, NW
Suite 800
Washington, DC 20036
(202) 776-2000

Its Attorneys

Celeste M. Moy
Vice President and
Assistant General Counsel
Frank Triveri
Special Counsel
Edward Palmieri
Assistant Counsel
NEXTEL COMMUNICATIONS, INC.
2001 Edmund Halley Drive
Reston, VA 20191
(703) 433-4000

June 27, 2005