INTERNET COMMITTEE
OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Consisting of the Chief Legal Officers
of California, Kansas, Maryland, Nevada, Texas, Vermont, Virginia, and Washington

November 4, 2003

The Honorable J. Dennis Hastert
Speaker of the House
235 Cannon House Office Building
Washington, DC 20515

The Honorable Nancy Pelosi
House Minority Leader
2371 Rayburn House Office Building
Washington, DC 20515

The Honorable W.J. "Billy" Tauzin
Chairman, House Energy
and Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable John D. Dingell
Ranking Member, House Energy
and Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable F. James Sensenbrenner
Chairman, House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member, House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

Re: S.877, The CAN-SPAM Act of 2003

Dear Representatives:

The CAN-SPAM Act of 2003, which recently passed out of the Senate and is now in the House of Representatives for consideration, is a laudable effort at dealing with the enormous problem of spam. We are encouraged that Congress has recognized the importance of the issue and the need for legislation. A majority of the states have passed statutes regulating spam, and we believe that these laws should complement a strong federal law.

Because it passed so quickly through the Senate, we have only just now had the opportunity to review S. 877, as amended by the Senate. Unfortunately, in its current form, the Bill creates so many loopholes, exceptions, and high standards of proof, that it provides minimal consumer protections and creates too many burdens for effective enforcement. Its substantive protections are weak, as are its damage provisions. It preempts stronger state laws. The defenses it provides for would-be violators virtually assure that it will engender litigation, rather than deter unlawful conduct. We respectfully request that you not move forward with S. 877 and ask that you consider a bill that provides more protections for consumers and businesses.

The following is a breakdown of our concerns about the Bill. This list is not exhaustive, but presents what we see as the major issues:

1. Section 105(a)(2) prohibits deceptive subject headings but creates standards of knowledge and materiality that are unprecedented in consumer protection law. The provision requires that a person "knows" the subject heading "would be likely to mislead a recipient, acting reasonably under the circumstances about a material fact regarding the contents or subject matter of the message." Consumer protection law only requires a capacity or tendency to deceive the recipient in order to show a violation. Requiring a showing of knowledge and materiality creates a barrier to enforcement where none currently exists.

This heightened knowledge standard is also found at Section 103(13) of the legislation which concerns liability for a person who "procures" the services of a spam sender to initiate an unlawful message. The term "procure" requires that an individual know or consciously avoid knowing he is hiring someone to send an unlawful spam message. Again, this knowledge standard exceeds what is found in other consumer protection statutes.

2. Section 103(2)(A) defines a "commercial electronic mail message" as having the "primary purpose" of promoting a commercial product or service. This language creates a loophole for spammers who may argue the primary purpose of their email is something other than advertising. It creates an unnecessary defense and narrows the category of commercial email that consumers should be allowed to opt out of.

3. Section 105(a)(3)(B) permits the sender to create a menu approach to opting out. By permitting the sender to create this menu approach, the ease, utility, and understandability of the opt out is compromised. Consumers will not be able to easily elect to stop receiving emails – they will have to decide, based on the sender's potentially confusing menu of choices, what they wish to opt out of, and if they want to receive some but not all unsolicited email. The option of a total opt-out, while required in the bill, can easily be buried in text by the sender.

4. Section 105(a)(3)(C) provides that if a sender's electronic mail address or other mechanism is "unexpectedly and temporarily unable to receive" an opt-out message, the sender will not be out of compliance with the law. This creates a big loophole, since spammers are always unable to

receive messages right after their spam is sent out – their mailboxes are always full at that point. And that is precisely when most opt-out requests are made.

5. Section 105(a)(4)(A) prohibits a sender's initiation of email to a recipient who has opted out "more than 10 business days after the receipt of such request." While a short period of time for compliance may be reasonable, 10 business days is simply too long. The following section, Section 105(a)(4)(C) creates an even bigger loophole. It provides that persons who act on behalf of the original sender are only liable if they "know or consciously avoid knowing" of the recipient's opt-out to the original sender. As a practical matter, the middlemen, or "spam houses" in the industry, will say they simply didn't know a recipient had opted out, and thereby escape liability by insulating themselves from knowledge.

6. Section 105(b)(B)(1)(A) prohibits "harvesting" of email addresses (when a spammer captures email addresses off of third-party websites and chatrooms) and "dictionary attacks" (when a spammer generates email addresses through an automated means). These are only deemed aggravating violations of other violations of the statute, and cannot be independent bases for liability. Given that these practices significantly affect Internet Service Providers and other online businesses, there should be independent causes of action for both.

7. Section 105(c) provides that spammers may avoid liability if they can show they implemented "reasonable practices" to avoid violations and that they made "good faith" efforts to comply. This creates a defense that is unprecedented in consumer protection law and also creates an additional barrier to enforcement.

8. Section 106(a) creates liability for those whose products are sold by a spammer when that person "knows or should have known" unlawful spam was sent on his behalf, he received economic benefit from the spam, and took no reasonable action to prevent it or detect it and report it to the FTC. Liability for this section is only limited to those who own 50% or more of the merchant business or those who have actual knowledge of the violation. It is seemingly at odds with other provisions for liability in the bill, including those which define the "initiator" of an email as a person who procures a sender's services to send an email (i.e., a merchant). According to these provisions, at Section 105, liability falls on those who procure such services in the same manner it falls on other violators. In contrast, Section 106(a) essentially forecloses any liability for merchants, except in extremely limited circumstances.

Section 106(a) also limits enforcement ability exclusively to the FTC, which is different from other parts of the statute that allow for state and ISP enforcement.

9. Section 107(e)(2) limits the recovery of states for violations of the bill to $100 for violations involving misleading header information and $25 for all other violations. Additionally there is a cap on overall damages of $1,000,000 for any violations other than misleading headers. Neither of

these amounts will act as a significant deterrent to spammers who will simply see it as a "cost of doing business." States may have a difficult time proving with particularity how many spams were sent to their citizens and statutory damages will likely be minimal in those circumstances. Internet Service Providers are hampered by similar limits at Section 107(f).

10. Section 108(b) preempts many state laws which regulate the use of electronic mail. Though states' statutes prohibiting falsity or deception in commercial email are not preempted, numerous states have taken a broader approach to regulation. Some states require labeling, others provide for specific disclosures within the body of the email. At least one state statute provides that before a spammer can send email, the recipient must opt in to receiving it. The preemption in S.877 effectively negates these statutory schemes and leaves a much weaker set of provisions in their place. Given the concerns we have described above, we strongly oppose the bill's preemption provisions.

In conclusion, while we support the efforts of Congress to address the issue of spam in order to protect consumers and businesses, we believe that S.877 lacks the necessary elements to reach that goal. We would welcome the opportunity to work with the House in assuring that what is ultimately passed will be effective. We look forward to working with you and encourage you to contact us directly.

Sincerely,

Attorney General Christine O. Gregoire
Attorney General of Washington
Chair, NAAG Internet Committee

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Attorney General of California
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