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May 2, 2008

Donald S. Clark  
Secretary  
Federal Trade Commission  
Room H-135 (Annex N)  
600 Pennsylvania Avenue NW  
Washington, DC 20580

RE: Comments – Beyond Voice  
Project No. P074403

Dear Mr. Clark:

The Consumer Federation of America (CFA), an association of more than 300 nonprofit consumer organizations, has since 1968 sought to advance the consumer interest through research, education, and advocacy. Consumer Action (CA), founded in 1971, is a nonprofit organization that advocates for consumers and provides consumer education through its extensive network of community organizations. Consumers Union (CU) is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about goods, services, health, and personal finance. CU's income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on CU's own product testing, *Consumer Reports* with approximately 5.8 million paid circulation, regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions that affect consumer welfare. CU's publications carry no advertising and receive no commercial support.

CFA, CA and CU are pleased to offer the following comments to the Federal Trade Commission (FTC) in advance of its May 6-7 Town Hall entitled "Beyond Voice – Mapping the Mobile Marketplace.

We welcome this examination of the burgeoning mobile marketplace. Because mobile devices are portable, relatively inexpensive, and easy to use, they have become an indispensable part of Americans' daily lives. By December 2007, there were more than 255 million wireless subscribers in the US, with 84 percent of the population having wireless service.<sup>1</sup>

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<sup>1</sup> According to "Wireless Quick Facts" from CTIA, <http://www.ctia.org/advocacy/research/index.cfm/AID/10323>

Businesses and organizations of all types are actively pursuing opportunities to engage with consumers via their mobile devices. Mobile commerce, which can be defined broadly as a business model in which consumers can make a wide variety of transactions via mobile devices without the use of voice, is expected to grow significantly in the next few years. According to Juniper Research, by 2011 more than 52 million consumers worldwide will be using mobile devices to pay for everyday goods and services,<sup>2</sup> and Gartner predicts that the number of mobile payment users overall will exceed 103 million by the same year.<sup>3</sup>

Of course, mobile marketing is broader than mobile commerce, encompassing advertisements that can be sent to mobile devices and mobile searches that may lead to transactions at brick and mortar stores or on consumers' PCs. But from an m-marketer's perspective, the optimum scenario is one in which every step in the transaction, from the initial solicitation to the consumer's agreement and payment, is conducted seamlessly through a mobile device.

Mobile commerce and mobile marketing more generally offer many potential benefits to consumers, enabling them to make purchases, transfer funds, play games, and get timely information any time of day or night, no matter where they are. However, as mobile devices become more than simply a convenient means to communicate with friends and family, their unique characteristics – their small size, their ease of use, the fact that they are so ubiquitous that even children have them, and their ability to track information such as the location of users and the results of mobile searches – present significant challenges to consumer protection.

A 2005 resolution<sup>4</sup> on mobile commerce from the Trans Atlantic Consumer Dialogue (TACD), a coalition to which CFA, CA, CU and more than 60 other consumer organizations in the U.S. and EU member countries belong, lists many concerns, including:

- Inadequate disclosures about the goods or services offered, the costs, terms and conditions;
- Deceptive solicitations;
- Unauthorized charges;
- Spam;
- Marketing to children;
- Privacy and discrimination issues;
- Security of financial information;
- Illegal activities, such as gambling or child pornography;
- Lack of clear legal protections;
- Disparate and inadequate dispute rights and means of redress.

These concerns were borne out in a 2006 consumer survey<sup>5</sup> conducted by the TACD. Nearly 2,000 individuals from 44 countries (of which 11% were from the U.S.) responded to the online survey. Among the key findings were:

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<sup>2</sup> Press release October 30 2007, <http://www.juniperresearch.com/shop/viewpressrelease.php?id=88&pr=62>

<sup>3</sup> Press release April 21 2008, <http://www.gartner.com/it/page.jsp?id=652308>

<sup>4</sup> <http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=283>

<sup>5</sup> <http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=305>

- Nearly 4 in 10 respondents (38%) reported that they had problems related to mobile commerce within the previous 12 months. The problem most frequently cited was that the cost of goods or services was inaccurate or misleading (35%).
- Other common problems included: failure to clearly disclose the terms of services, such as subscription with recurring charges (26%); inaccurate or misleading description of the goods or services (26%); cancellation policy was not clearly disclosed (22%); and the personal information given to the vendor in making the transaction was abused (20%). Seventeen percent said they were billed for a transaction they'd never made; the same number complained that they had paid for a service but it did not work. Four percent said they paid for goods or services they never received, 2% said that they had been billed for transactions their children made.
- Half (51%) of respondents said they had received an unwanted commercial advertisement on their mobile phone or PDA within the previous 12 months.
- More than half (59%) of those who had problems said they never complained to anyone. Those who did complain most frequently contacted the vendor (67%).
- Half (50%) of those who tried to resolve their problem were unsuccessful.
- Only small numbers of respondents agreed that advertisements for mobile commerce generally provide clear and complete information about the offers (10%), that it is easy to cancel mobile commerce contracts (8%), that there are adequate protections against unauthorized charges (9%), that personal data provided in making mobile commerce purchases is generally secure from abuse (9%), that it is easy to resolve mobile commerce disputes (6%), and that there are adequate protections from unwanted commercial solicitations on mobile phones and PDAs (9%).

Since this survey, new developments in the mobile marketplace raise more concerns. The use of the wireless service billing platform for mobile gambling essentially skirts the prohibition under U.S. law against using the credit card system, electronic fund transfers, or other financial instruments to pay for that type of activity.<sup>6</sup>

SMS “instant loans,” already a serious problem in Denmark, Finland, and other European countries, also pose a threat to U.S. consumers, especially to young people and those in financial difficulty. Like payday loans in the physical world, these short-term loans are unconscionably expensive and granted without any real assessment of the borrowers’ ability to repay. But even more troubling is the fact that mobile devices make it easy to engage in transactions such as gambling and loans on impulse, with no mandatory cooling-off periods or other legal safeguards. Furthermore, there are problems with people using other people’s mobile devices to make transactions such as short-term loans without the device owners’ knowledge or consent.

Another growing area of concern is privacy. Behavioral tracking and targeting, already a hot topic in the online context, is also being aggressively promoted for use the mobile marketplace. It is unclear whether current Federal Communication Commission (FCC) rules

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<sup>6</sup> Unlawful Internet Gambling Enforcement Act, Public Law 109-347, Section 801, codified at 31 USC 53 §§ 5361 *et seq.*

concerning telephone customer proprietary network information<sup>7</sup> extend to any aspects of mobile marketing and if so, which and under what circumstances. Profiling for marketing purposes raises a number of issues, including transparency, consumer consent, potential use of such data for price discrimination and other forms of “redlining,” and access to data by law enforcement agencies and others for secondary purposes.

The privacy of information about children is a special concern. Cellnumbers.com claims that half of the children in the US have cell phones.<sup>8</sup> Yet there is no equivalent to the Children’s Online Privacy Protection Act<sup>9</sup> to protect children’s privacy in mobile marketing.

It is also unclear whether the rules concerning pay-per-call services<sup>10</sup> apply to mobile commerce and under what circumstances. There are many similarities between certain types of mobile commerce transactions for which premium charges appear on consumers’ wireless bills and pay-per-call services. However, pay-per-call services are narrowly defined as being accessed through a 900 number or other prefix or area code designated by the FCC.

Spam is also a problem. FCC rules<sup>11</sup> prohibit sending unsolicited commercial emails to mobile devices without a recipient’s prior express consent, but they do not apply to SMS messages.

As more financial transactions are made via mobile devices, another crucial issue is the security of financial information that may be stored on or transmitted by them. It is unclear what protection consumers have for unauthorized use of pre-paid funds stored on their mobile devices or whether and in what circumstances they have any dispute rights if their financial account data is stolen.

In its resolution on mobile commerce, the TACD called on both the U.S. and EU governments to assess whether existing laws and regulations apply to mobile commerce and identify gaps. This analysis has not been done on either side of the Atlantic.

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<sup>7</sup> 47 CFR 64 §§ 2001 *et seq.* Account information, for instance, is defined in § 2003 (a) as “information that is specifically connected to the customer’s service relationship with the carrier, including such things as an account number or any component thereof, the telephone number associated with the account, or the bill’s amount.” In § 2003 (d) call detail is defined as “any information that pertains to the transmission of specific telephone calls, including, for outbound calls, the number called, and the time, location, or duration of any call and, for inbound calls, the number from which the call was placed, and the time, location, or duration of any call.” It is unclear whether information pertaining to mobile searches, locations of consumers carrying mobile devices, or payments and money transfers using mobile devices would be covered by these definitions.

<sup>8</sup> <http://www.cellnumbers.com/cell-phone-usage.aspx>

<sup>9</sup> 15 USC 6501-6505. Among other things, COPPA requires operators of commercial Web sites that collect personal information about children under age 13 to provide certain notices, to give parents the choice of whether or not to allow the information to be collected, and to keep the information confidential and secure.

<sup>10</sup> The FTC’s 900 Number Rule, at 16 CFR 308, requires consumers to be provided with clear information about the services being offered and the costs and terms before incurring any charges. It also prohibits pay-per-call services and ads for them from being directed at children under the age of 12 except for bona fide educational services, and requires ads to disclose that parental permission is required for children between 12 and 18 to call pay-per-call numbers. In addition, the FTC Rule places liabilities on the billing entities and service bureaus as well as on vendors, and provides strong dispute rights for consumers. The FCC regulations on pay-per-call services, at 47 CFR 64 §§ 1501 *et seq.*, protect consumers from having their local or long-distance service terminated for failure to pay disputed charges.

<sup>11</sup> 47 CFA 64 § 3100

The FTC Town Hall may provide some insight about applicable laws, but the agenda seems to be structured mainly to examine industry practices. That is important; the TACD resolution urges government to encourage vendors, billing and payment intermediaries, and other businesses involved in mobile commerce to develop best practices and self-regulatory programs that protect consumers and provide effective means for resolving disputes. However, self-regulation should be implemented in addition to, not in lieu of, strong legal rights and protections for consumers.

As the distinction between telephones, computers, and payment devices disappears, it is crucial for the FTC to assess what baseline legal protections are necessary to ensure that consumers who wish to take advantage of the convenience of the mobile marketplace can do so with confidence. The issues must be addressed holistically.

The FTC, in conjunction with other relevant agencies, should conduct a thorough review of current law, issue guidance that clarifies which laws apply, and convene a working group representing stakeholders to develop recommendations for how to fill gaps in consumer protection. The FTC should also initiate a major effort, in conjunction with stakeholders, to educate consumers and businesses about how to navigate the mobile marketplace.

Sincerely,



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