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16 CFR Part 316

Definitions, Implementation, and Reporting Requirements Under the CAN–SPAM Act; Proposed Rule

FEDERAL TRADE COMMISSION

16 CFR Part 316

[Project No. R411008]

RIN 3084–AA96

Definitions, Implementation, and Reporting Requirements Under the CAN–SPAM Act

AGENCY: Federal Trade Commission (FTC).

ACTION: Advance notice of proposed rulemaking; request for public comment.

SUMMARY: The FTC is requesting comment on various topics related to §§ 3(2)(c), 3(17)(B), 5(c)(1), 5(c)(2), and 13 of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (''CAN–SPAM Act'' or ''the Act''). In addition, the FTC is requesting comment on topics relevant to certain reports to Congress required by additional provisions of the CAN–SPAM Act.

DATES: Comments addressing the ''National Do Not E-mail'' Registry must be submitted on or before March 31, 2004. Comments addressing any other aspect of the CAN–SPAM Act must be submitted on or before April 12, 2004.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to ''CAN–SPAM Act Rulemaking, Project No. R411008'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed to the following address: Federal Trade Commission, CAN–sySPAM Act, Post Office Box 1030, Merrifield, VA 22116–1030. Please note that courier and overnight deliveries cannot be accepted at this address. Courier and overnight deliveries should be delivered to the following address: Federal Trade Commission/Office of the Secretary, Room 159–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments containing confidential material must be filed in paper form.

An electronic comment can be filed by (1) clicking on *http://www.regulations.gov;* (2) selecting ''Federal Trade Commission'' at ''Search for Open Regulations;'' (3) locating the summary of this Notice; (4) clicking on ''Submit a Comment on this Regulation;'' and (5) completing the form. For a given electronic comment, any information placed in the following fields—''Title,'' ''First Name,'' ''Last Name,'' ''Organization Name,'' ''State,'' ''Comment,'' and ''Attachment''—will be publicly available on the FTC Web site. The fields marked with an asterisk on the form are required in order for the FTC to fully consider a particular comment. Commenters may choose not to fill in one or more of those fields, but if they do so, their comments may not be considered.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments with all required fields completed, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at *http://www.ftc.gov.* As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ ftc/ privacy.htm.*

FOR FURTHER INFORMATION CONTACT: Michael Goodman, Staff Attorney, (202) 326–3071; or Catherine Harrington-McBride, Staff Attorney, (202) 326–2452; Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

The CAN–SPAM Act, which took effect on January 1, 2004, imposes a series of new requirements on the use of commercial electronic mail messages (''email''). In addition, the Act gives federal civil and criminal enforcement authorities new tools to combat unsolicited commercial email (''UCE'' or ''spam''). The Act also allows state attorneys general to enforce its civil provisions, and creates a private right of action for providers of Internet access services.

The CAN–SPAM Act directs the Commission to issue regulations, not later than 12 months following the enactment of the Act, ''defining the relevant criteria to facilitate the determination of the *primary purpose* of an electronic mail message.''[1] The term ''the primary purpose'' is incorporated in the Act's definition of the key term ''commercial electronic mail message.'' Specifically, ''commercial electronic mail message'' encompasses ''any electronic mail message the *primary purpose* of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose.)''[2]

The CAN–SPAM Act also provides discretionary authority for the Commission to issue regulations concerning certain of the Act's other definitions and provisions.[3] Specifically, the Commission is authorized to:

- Modify the definition of the term ''transactional or relationship message'' under the Act ''to the extent that such modification is necessary to accommodate changes in electronic mail technology or practices and accomplish the purposes of [the] Act;''[4]
- Modify the 10-business-day period prescribed in the Act for honoring a recipient's opt-out request;[5]
- Specify activities or practices as aggravated violations (in addition to those set forth as such in § 5(b) of the CAN–SPAM Act) ''if the Commission determines that those activities or practices are contributing substantially to the proliferation of commercial electronic mail messages that are unlawful under subsection [5(a) of the Act];''[6] and
- Issue regulations to implement the provisions of this Act.''[7]

In issuing this Advance Notice of Proposed Rulemaking (''ANPR''), the Commission initiates the mandatory ''primary purpose'' rulemaking proceeding by soliciting comment on issues relating to that term and its use in the Act. In addition, this notice solicits comments on the several areas of discretionary regulation listed above. Finally, the Commission also seeks

[1] CAN–SPAM Act, § 3(2)(C).

[2] CAN–SPAM Act, § 3(2)(A) (emphasis supplied).

[3] The Act authorizes the Commission to use notice and comment rulemaking pursuant to the Administrative Procedures Act, 5 U.S.C. 553. CAN–SPAM Act, § 13.

[4] CAN–SPAM Act, § 3(17)(B).

[5] CAN–SPAM Act, § 5(c)(1)(A)–(C).

[6] CAN–SPAM Act, § 5(c)(2).

[7] CAN–SPAM Act, § 13(a). This provision excludes from the scope of its general grant of rulemaking authority § 4 of the Act (relating to criminal offenses) and § 12 of the Act (expanding the scope of the Communications Act of 1934). In addition, § 13(b) limits the general grant of rulemaking authority in § 13(a) by specifying that the Commission may not use that authority to establish ''a requirement pursuant to § 5(a)(5)(A) to include any specific words, characters, marks, or labels in a commercial electronic mail message, or to include the identification required by § 5(a)(5)(A) in any particular part of such a mail message (such as the subject line or body).'' Section 5(a)(5)(A) provides that ''it is unlawful for any person to initiate the transmission of any commercial electronic mail message to a protected computer unless the message provides clear and conspicuous identification that the message is an advertisement or solicitation * * *''

comment in this ANPR on a variety of topics relevant to certain reports that, pursuant to the mandate of the CAN–SPAM Act, the Commission must issue within the coming two years.

II. Mandatory ''Primary Purpose'' Rulemaking

The CAN–SPAM Act mandates that the FTC issue regulations ''defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message.'' This mandate is integral to the Act's definition of ''commercial electronic mail message.'' [8] Generally, the Act applies only to messages that fall within this definition.[9] Thus, the ''primary purpose'' regulation will elucidate how to determine whether a particular message constitutes a ''commercial electronic mail message,'' and is therefore subject to the CAN–SPAM Act's requirements and prohibitions. Accordingly, the FTC seeks comment on how to determine an electronic mail message's primary purpose, including comment on criteria that would facilitate this determination.

III. Subjects for Discretionary Rulemaking Under the CAN–SPAM Act

In addition to seeking comment on the mandatory ''primary purpose'' rulemaking, the Commission also seeks comment on the four areas of discretionary rulemaking that were established in the Act. These four areas, described in detail below, are: (1) The Act's definition of ''transactional or relationship messages;'' (2) the 10-business-day period for processing opt-out requests; (3) the Act's enumeration of ''aggravated violations;'' and (4) the implementation of the provisions of the CAN–SPAM Act generally.

A. Transactional or Relationship Messages

The CAN–SPAM Act designates five broad categories of messages as ''transactional or relationship messages.''[10] The Act excludes these messages from its definition of ''commercial electronic mail message,'' [11] and thus excludes them from most of the Act's substantive requirements and prohibitions.[12] ''Transactional or relationship messages'' are those, the primary purpose of which is either:

- To facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;
- 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;
- To provide specified types of information 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; [13]
- To provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or
- 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.

Section 3(17)(B) gives the Commission the authority to modify the definition in § 3(17)(A) to ''expand or contract the categories of messages that are treated as ''transactional or relationship messages'' for the purposes of this Act to the extent that such modification is necessary to accommodate changes in electronic mail technology or practices and accomplish the purposes of the Act.'' [14] Accordingly, the FTC seeks comment on the categories of ''transactional or relationship messages'' identified in the Act, and on how changes in technology or practices might warrant modifications with respect to these categories to accomplish the purposes of the Act. The Commission seeks comment on additional categories of messages that changes in technology or practices might warrant excluding from the definition of ''commercial electronic messages'' by designating them as ''transactional or relationship messages.'' The Commission also seeks comment on additional categories of messages that might warrant designation as ''transactional or relationship messages'' to accomplish the purposes of the Act. The Commission also seeks comment on categories listed in § 3(17) that, due to changing technology or practices, might become inappropriate to exclude from coverage of CAN–SPAM's provisions as ''transactional or relationship messages.''

B. 10-Business-Day Period for Processing Opt-Out Requests

Section 5(a)(4) of the CAN–SPAM Act addresses the time within which a request to ''opt-out'' of receiving additional electronic mail messages must be honored. Section 5(a)(4)(A) prohibits senders and persons acting on their behalf from initiating the transmission of a commercial email message to any recipient who has opted out of receiving their commercial email messages. This section also provides that senders have ten (10) business days after receiving a recipient's opt-out request to process it and put it into effect.

Section 5(c)(1) gives the Commission the authority to issue regulations modifying the 10-business-day period for processing recipients' opt-out requests if the Commission determines that a different time period would be more reasonable ''after taking into account (A) the purposes of [subsection 5(a)]; (B) the interests of recipients of commercial electronic mail; and (C) the burdens imposed on senders of lawful commercial electronic mail.'' [15] Accordingly, the FTC seeks comment on the reasonableness of the 10-business-day time period for processing opt-out requests, and on whether a different time period would be more reasonable, in view of the three considerations enumerated in the statute and the relative costs and benefits.

C. Additional Aggravated Violations

Section 5(c)(2) of the Act grants the Commission rulemaking authority with respect to the list of ''aggravated violations'' set forth in § 5(b) of the Act. The practices listed in § 5(b) include email address harvesting and dictionary attacks. The Act's provisions relating to enforcement by the States and by providers of Internet access service create the possibility of increased statutory damages if the court finds a defendant has engaged in one of the practices specified in § 5(b) while also violating § 5(a). Specifically, §§ 7(f)(3)(C) and (g)(3)(C) permit the court to increase a statutory damages award up to three times the amount that would have been granted without the commission of an aggravated

[8] CAN–SPAM, § 3(2)(C).

[9] One provision, § 5(a)(1), which prohibits false or misleading transmission information, applies equally to ''commercial electronic mail messages'' and ''transactional or relationship messages'; otherwise, CAN–SPAM's prohibitions and requirements cover only ''commercial electronic mail messages.''

[10] CAN–SPAM Act, § 3(17).

[11] CAN–SPAM Act, § 3(2)(B).

[12] *See* note 9 above.

[13] The specified types of information are: notification concerning a change in the terms or features; notification of a change in the recipient's standing or status; or regular periodic account statement or balance information. CAN–SPAM Act, § 3(17)(A)(iii).

[14] CAN–SPAM Act, § 3(17)(B).

[15] CAN–SPAM Act, § 5(c)(1).

violation.[16] The Commission seeks comment on what activities and practices, if any, should be added to the list of aggravated violations under § 5(b) of the Act.

D. Implementation of Provisions of the CAN–SPAM Act Generally

Section 13 of the Act details the fourth and final area of discretionary rulemaking by the Commission under the CAN–SPAM Act. Specifically, § 13(a) provides that the Commission may issue regulations to implement the provisions of the Act.[17] Accordingly, the Commission seeks comment on any additional regulations that may help implement the provisions of the Act.

Since the effective date of CAN–SPAM, several issues have repeatedly arisen that potentially may warrant rulemaking under § 13. The first of these involves a scenario where a sender of a commercial email message seeks to induce recipients to forward the message to friends and acquaintances, who, in turn, are urged to forward the message. The Commission seeks comment on whether it would further the purposes of CAN–SPAM or assist the efforts of companies and individuals seeking to comply with the Act if the Commission were to adopt rule provisions clarifying the legal obligations of initiators and recipients who forward messages in such ''forward-to-a-friend'' scenarios.

The second issue involves whether several entities or persons simultaneously could be considered the ''sender'' of a particular electronic mail message under the terms of the Act. For example, an email message that promotes an upcoming conference and also includes ads from the companies sponsoring the conference may have more than one sender. A common concern regarding this type of message is whether it may be sent to a recipient who has previously opted out of receiving messages from one of the sponsoring companies whose ad is in the message. The Commission seeks comment on whether it would further the purposes of CAN–SPAM or assist the efforts of companies and individuals seeking to comply with the Act if the Commission were to adopt rule provisions clarifying the obligations of multiple senders under the Act.

The third issue involves the requirement of § 5(a)(5)(A)(iii) of the Act for initiators of commercial electronic mail to include in their messages, *inter alia,* ''a valid physical postal address of the sender.'' Some companies and individuals seeking to comply with the Act have sought guidance on what is necessary for an address to meet the requirements of the Act. Some have asked whether a valid physical postal address would include a Post Office box or commercial mail drop. The Commission seeks comment on whether it would further the purposes of CAN–SPAM or assist the efforts of companies and individuals seeking to comply with the Act if the Commission were to adopt rule provisions clarifying what constitutes a valid physical postal address of the sender.

There may be other issues of interpretation or compliance that have not yet come to the attention of the Commission but that might warrant consideration for rulemaking under § 13 of the Act. The Commission seeks comment on any such issues, and solicits specific recommendations for proposed provisions that might further the purposes of CAN–SPAM or assist the efforts of companies and individuals seeking to comply with the Act.

IV. Reports Required by CAN–SPAM

CAN–SPAM requires the Commission to prepare and submit to Congress four separate reports within the next two years: A report on establishing a nationwide marketing Do Not E-mail registry to be submitted by June 16, 2004; a report on establishing a system for rewarding those who supply information about CAN–SPAM violations by September 16, 2004; a report setting forth a plan for requiring commercial email to be identifiable from its subject line by June 16, 2005; and a report on the effectiveness of CAN–SPAM by December 16, 2005.

A. National Do Not E-Mail Registry

Section 9(a) of the CAN–SPAM Act mandates a Commission report setting forth ''a plan and timetable for establishing a nationwide marketing Do-Not-E-Mail registry.'' The report is to include ''an explanation of any practical, technical, security, privacy, enforceability, or other concerns that the Commission has regarding such a registry; and * * * an explanation of how the registry would be applied with respect to children with email accounts.''[18] Moreover, § 9(b) provides that ''the Commission may establish and implement the plan, but not earlier than 9 months after the date of enactment of this Act.'' Thus, Congress has authorized establishment of a National Do Not E-Mail Registry, but is interested in learning of potential concerns about practicality, technical feasibility, privacy, and enforceability that such a registry raises. The Commission issued a Request for Information (''RFI'') to potential vendors seeking information on how an effective registry might be structured,[19] and is also seeking comment in response to this Notice that would assist it in preparing this report.

B. A System for Rewarding Those Who Supply Information About CAN–SPAM Violations

Section 11(1) of the Act requires the Commission, on or before September 16, 2004, to submit a report to the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Energy and Commerce setting forth a system for rewarding those who supply information about violations of the Act. The statute further specifies that the report include ''procedures for the Commission to grant a reward of not less than 20 percent of the total civil penalty collected for a violation of the Act to the first person that identifies the person in violation of the Act, and supplies information that leads to the successful collection of a civil penalty by the Commission.'' (The Act, however, does not authorize the Commission to establish or implement such a reward system.) In addition, the statute requires that the report also include ''procedures to minimize the burden of submitting a complaint to the Commission concerning violations of [the CAN–SPAM] Act, including procedures to allow the electronic submission of complaints to the Commission.'' Accordingly, the Commission seeks comment that would assist it in preparing this report.

C. Labeling Commercial Electronic Mail

Section 11(2) of the Act requires the Commission to submit a report that sets forth a plan for requiring commercial email to be identifiable from its subject line, or an explanation of any concerns the Commission has that cause the Commission to recommend against the

[16] This heightened statutory damages calculation also applies when a court finds that the defendant's violations of § 5(a) were committed ''willfully and knowingly.'' CAN–SPAM Act, §§ 7(f)(3)(C) and (g)(3)(C).

[17] As noted above, the Act expressly excludes from this grant of rulemaking authority the criminal provisions in § 4 and its amendment of the Communications Act of 1934 in § 12. Section 13(b) further limits the scope of this rulemaking authority by prohibiting the Commission from requiring any specific words, characters, marks, or labels in a commercial email pursuant to § 5(a)(5)(A), or from requiring the identification required by § 5(a)(5)(A) in any particular part of a commercial email, such as the subject line or body. *See* note 7, above.

[18] CAN–SPAM Act, § 9(a).

[19] This RFI is available at: *http://www.ftc.gov/ftc/oed/fmo/procure/040224donotemailrfi.pdf.* Responses to this RFI were due on or before March 10, 2004.

plan.[20] This report is due on or before June 16, 2005. Accordingly, the Commission seeks comment on how best to require that commercial email be identifiable from its subject line, and on concerns about implementing this type of labeling requirement. In particular, information is sought concerning the feasibility, costs, and benefits of labeling commercial email.

D. Effectiveness and Enforcement of the CAN–SPAM Act

Section 10 of the CAN–SPAM Act requires the Commission to submit a report to Congress providing a detailed analysis of the effectiveness and enforcement of the Act and the need (if any) for Congress to modify such provisions. This report is due on or before December 16, 2005, and must include:

- An analysis of the extent to which technological and marketplace developments, including changes in the nature of the devices through which consumers access their electronic mail messages, may affect the practicality and effectiveness of the Act;
- Analysis and recommendations concerning how to address commercial email that originates in or is transmitted through or to facilities or computers in other nations; and
- Analysis and recommendations concerning options for protecting consumers, including children, from receiving and viewing commercial email that is obscene or pornographic.

Accordingly, the Commission seeks comment on how the effectiveness and enforcement of the Act should be assessed, and on the specific areas of inquiry set forth in § 10 of the Act.

V. Communications by Outside Parties to Commissioners or Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding from any outside party to any Commissioner or Commissioner's advisor will be placed on the public record. See 16 CFR 1.26(b)(5).

VI. Invitation to Comment

All persons are hereby given notice of the opportunity to submit written data, views, facts, and arguments addressing the issues raised by this Notice. Written comments on the National Do Not E-Mail Registry must be submitted on or before March 31, 2004. Written comments on all other aspects of the CAN–SPAM Act must be submitted on or before April 12, 2004. Comments should refer to ''CAN–SPAM Act Rulemaking, Project No. R411008'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed to the following address: Federal Trade Commission, CAN–SPAM Act, Post Office Box 1030, Merrifield, VA 22116–1030. Please note that courier and overnight deliveries cannot be accepted at this address. Courier and overnight deliveries should be delivered to the following address: Federal Trade Commission/Office of the Secretary, Room 159–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580. If the comment contains any material for which confidential treatment is requested, it must be filed in paper (rather than electronic) form, and the first page of the document must be clearly labeled ''Confidential.''[21]

An electronic comment can be filed by (1) clicking on *http://www.regulations.gov;* (2) selecting ''Federal Trade Commission'' at ''Search for Open Regulations;'' (3) locating the summary of this Notice; (4) clicking on ''Submit a Comment on this Regulation;'' and (5) completing the form. For a given electronic comment, any information placed in the following fields—''Title,'' ''First Name,'' ''Last Name,'' ''Organization Name,'' ''State,'' ''Comment,'' and ''Attachment''—will be publicly available on the FTC Web site. The fields marked with an asterisk on the form are required in order for the FTC to fully consider a particular comment. Commenters may choose not to fill in one or more of those fields, but if they do so, their comments may not be considered.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments with all required fields completed, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at *http://www.ftc.gov.* As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

Without limiting the scope of issues on which it seeks comment, the Commission is particularly interested in receiving comments on the following questions. In responding to these questions, include detailed, factual support whenever possible.

A. Criteria for Determining Whether ''The Primary Purpose'' of an Electronic Mail Message is Commercial

1. The term ''the primary purpose'' could be interpreted to mean that an email's commercial advertisement or promotion is more important than all of the email's other purposes combined. Does this interpretation provide relevant criteria to help determine the primary purpose of an email? Why or why not? When an email has more than one purpose, what determines whether one purpose is more important than all other purposes combined?

2. The term ''the primary purpose'' could be interpreted to mean that the email's commercial advertisement or promotion is more important than any other single purpose of the email, but not necessarily more important than all other purposes combined. Does this interpretation provide relevant criteria to help determine the primary purpose of an email? Why or why not? When an email has more than one purpose, what determines whether one purpose is more important than any other purpose?

3. In other contexts, the FTC has stated that marketing material is to be judged by the net impression that the material as a whole makes on the reasonable observer. The ''net impression'' standard has been used to assess the meaning of an advertisement and the adequacy of disclosures. This standard takes into account placement of disclosures within the marketing material, the proximity of disclosures to the relevant claims, the prominence of the disclosures, and whether other parts of the marketing material distract attention from the disclosure. Should this ''net impression'' analysis be applied to determining whether the primary purpose of an email is a commercial advertisement or promotion? Why or why not? Are there considerations unique to electronic mail that would influence the application of such analysis, and if so, how?

[20] Section 11(2) expressly contemplates that the means for making commercial electronic mail identifiable from its subject line should be ''by means of compliance with Internet Engineering Task Force Standards, the use of the characters ''ADV'' in the subject line, or other comparable identifier.''

[21] Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

4. The term ''the primary purpose'' could be interpreted to mean that a commercial advertisement or promotion in an email is more than incidental to the email. Does this interpretation provide relevant criteria to help determine ''the'' primary purpose of an email? Why or why not?

5. In determining whether a commercial advertisement or promotion in an email is the primary purpose of the email, one approach could be to base the analysis on whether the commercial aspect of the email financially supports the other aspects of the email. For example, an electronic newsletter may be funded by advertising within the newsletter. Such advertising arguably would not constitute the primary purpose of the newsletter. Does the issue of whether the commercial aspect provides the financial support for non-commercial content provide relevant criteria to help determine the primary purpose of an email? Why or why not? Does it matter what the overall purpose of the newsletter is? Why or why not? Is this an appropriate way to approach the question of whether an email's primary purpose is commercial? Why or why not?

6. Should the identity of an email's sender affect whether or not the primary purpose of the sender's email is a commercial advertisement or promotion? Why or why not? For example, if a professional sports league sends email promoting its involvement with a charitable organization, should that email be considered to have a commercial ''primary purpose'' under the Act based on the league's ''for-profit'' status?

7. Are there other ways to determine whether a commercial advertisement or promotion in an email is the primary purpose of the email? Do these approaches provide relevant criteria to help determine the primary purpose of an email? Why or why not?

B. Modifying What Is a ''Transactional or Relationship Message''

1. Have any changes in electronic mail technology or practices occurred since the CAN–SPAM Act became effective on January 1, 2004, that would necessitate modification of the CAN–SPAM Act's definition of ''transactional or relationship message'' to accomplish the purposes of the Act?

2. Email messages that facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender are considered transactional or relationship messages under the Act. Are the terms ''facilitate, complete, or confirm'' clear, or is further clarification needed to prevent evasion of the Act's requirements and prohibitions?

3. Email messages that 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 are considered transactional or relationship messages under the Act. Should the Commission modify or elaborate on this definition? Why or why not?

4. Email messages that provide notice concerning a change in the terms or features of 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 are considered transactional or relationship messages under the Act. Should the Commission modify or elaborate on this definition? Why or why not?

5. Email messages that provide notification of a change in the recipient's standing or status 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 are considered transactional or relationship messages under the Act. Are the terms used in this subsection of the Act (§ 3(17)(A)(iii)) clear, or is further clarification needed to prevent evasion of the Act's requirements and prohibitions?

6. Email messages that provide, at regular periodic intervals, account balance information or other types of account statements 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 are considered transactional or relationship messages under the Act. Should the Commission modify or elaborate on this definition? Why or why not?

7. Email messages that provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled are considered transactional or relationship messages under the Act. Should the Commission modify or elaborate on this definition? Why or why not?

8. Email messages that 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 are considered transactional or relationship messages under the Act. Should the Commission modify or elaborate on this definition? Why or why not?

9. Some transactional or relationship messages may also advertise or promote a commercial product or service. In such a case, is ''the primary purpose'' of the message relevant? If so, what criteria should determine what is ''the primary purpose''? Should such messages be deemed to be commercial email messages? Should they be deemed transactional or relationship messages? Why?

C. Modifying the 10–Business-Day Time Period for Processing Opt-Out Requests

1. Is ten (10) business days an appropriate deadline for acting on an opt-out request by deleting the requester's email address from the sender's email directory or list? Why or why not? If not, what time limit would be appropriate? Why?

2. What procedures are required to delete a person's email address from the sender's email directory or list? What reasons, if any, prevent such deletion in a time period shorter than ten (10) business days? What burdens, including costs, would be borne by senders if the time period were shortened? What benefits to consumers would result from a time deadline shorter than ten (10) business days for effectuating an opt-out request?

3. What costs are associated with deleting a person's email address from a sender's email directory or list? What costs does the recipient bear from unwanted electronic mail during the period from submission of the request to the effectuation of that request?

4. What currently is the average time to create and implement procedures to delete a person's email address from a sender's email directory or list following that person's opt-out request? What factors affect the length of time necessary to create and implement these procedures?

5. What currently is the average time in which a request to be removed from an email list is processed once these procedures have been created and implemented? What factors affect the length of time necessary to process such a request?

6. What is the industry standard, if any, regarding the time frame to create and implement procedures for processing opt-out requests? What is the industry standard, if any, regarding the time frame to process opt-out requests once procedures have been created and implemented?

7. How are lists of email addresses used for electronic mail marketing maintained, distributed, and used? What impact, if any, do the maintenance, distribution, and use of these lists have on the time it takes to effectuate an opt-out request?

8. How do the size and structure of the sender's business, the use of third-party e-mailers, and the manner in which opt-out requests are received affect the time it takes to effectuate an opt-out request?

D. Identifying Additional ''Aggravated Violations''

1. Section 5(c)(2) of the Act gives the Commission authority to ''specify additional activities or practices to which [§ 5(b)] applies if the Commission determines that those activities or practices are contributing substantially to the proliferation of commercial electronic mail messages that are unlawful under [§ 5(a)].'' Section 5(b) identifies four ''aggravated violations.'' What additional activities or practices, if any, should be treated as ''aggravated violations'' under the Act? Why should these activities or practices be considered ''aggravated violations''? How do these activities or practices contribute substantially to the proliferation of commercial e-mail that violates § 5(a)? Do these activities or practices have any use other than initiating e-mail that violates the Act?

2. Are there new technologies that have been developed or are in development that would contribute substantially to the proliferation of commercial e-mail that is unlawful under § 5(a)? If so, what are they? Should they be added to the list of ''aggravated violations'' under § 5(b)? Why or why not? What are the costs and benefits to industry in implementing procedures to overcome these technologies? What are the costs and benefits to consumers? Do these new technologies have any use other than initiating e-mail that violates the Act?

E. Issuing Regulations Implementing the Act

1. Section 3(16) of the Act defines when a person is a ''sender'' of commercial e-mail. The definition appears to contemplate that more than one person can be a ''sender'' of commercial e-mail; for example, an e-mail containing ads for four different companies. In such a case, who is the ''sender'' of the e-mail? What costs or burdens may be imposed on such entities if all are determined to be ''senders''? What costs or burdens may be imposed on consumers if only the entity originating the e-mail is determined to be the ''sender''? If a consumer previously has exercised his or her rights under § 5(a)(3) by ''opting out'' from receiving commercial e-mail from one of the companies advertised in the e-mail example above, has § 5(a)(4) of the Act been violated? If so, by whom?

2. Should the Commission use its authority in § 13 to issue regulations clarifying who meets the definition of ''sender'' under the Act? If so, how? If not, why not?

3. The Act defines ''initiate'' to mean originate or transmit, or procure the origination or transmission of, a message. In turn, the term ''procure'' means to pay, provide consideration, or ''induce'' a person to initiate a message on one's behalf.

a. Do ''forward-to-a-friend'' and similar marketing campaigns that rely on customers to refer or forward commercial e-mails to someone else fall within the parameters of ''inducing'' a person to initiate a message on behalf of someone else?

b. Are there different types of such ''forwarding'' marketing campaigns? What forms do these campaigns take?

c. Should these marketing campaigns have to comply with the Act? Why or why not? If so, who should be considered a person who ''initiates'' the message when one recipient forwards the message to another person? Who should be required to provide an ''opt-out'' mechanism for the message? Should each person who forwards the message be required to comply with the Act? Should the original sender of the message remain liable for compliance with the Act after the original recipient forwards the message to someone else? Why or why not?

d. Do the Act's requirements and prohibitions reach e-mail messages containing advertisements sent by using a Web site that urges or enables individuals to e-mail articles or other materials to friends or acquaintances? How, if at all, does the Act apply to this situation when recipients have previously ''opted-out'' of receiving e-mails from the advertised entities?

e. Should unsolicited commercial e-mail campaigns that rely on having customers refer or forward the e-mail to other parties be treated differently from other unsolicited commercial e-mail? Why or why not? If there are different types of these campaigns, should the different types be treated differently? Why or why not?

f. If referrals or forwarding of e-mails should be distinguished from other types of e-mail, how should they be distinguished? What, if any, restrictions should be placed on them? Why? What disclosures, if any, should be required? Why? Should the Commission distinguish between different types of ''forwarding'' campaigns? Why or why not?

g. What are the costs and benefits of forwarded commercial e-mail campaigns to consumers? To businesses? Are the costs and benefits to consumers and industry different for forwarded commercial e-mail campaigns than for other types of unsolicited commercial e-mail? Why or why not?

4. Section 5(a)(5)(A)(iii) requires the disclosure of ''a valid physical postal address of the sender'' in each commercial electronic mail message. How should this required disclosure be interpreted? Should a PO Box be considered a ''valid physical postal address''? Why or why not? Should a commercial mail drop be considered a ''valid physical postal address''? Why or why not?

5. Section 5(a)(1), regarding false or misleading transmission information, addresses information displayed in a message's ''from'' line. Is the Act sufficiently clear on what information may or may not be disclosed in the ''from'' line? What ''from'' line information should be considered acceptable under the Act? Why? If a sender's e-mail address does not, on its face, identify the sender by name, does that e-mail address comply with § 5(a)(1)?

F. National Do Not E-Mail Registry Report

1. The Commission is required to write a report setting forth a plan and timetable for establishing a nationwide marketing Do Not E-mail Registry, including an explanation of any practical, technical, security, privacy, enforceability, or other concerns regarding such a registry, and an explanation of how the registry would be applied with respect to children with email accounts. The Commission issued a Request for Information (''RFI'') to potential vendors seeking information on how an effective registry might be structured, and is also seeking information from the public in this Notice. What practical, technical, security, privacy, enforceability, and other concerns exist with respect to establishment of such a registry? Can these concerns be overcome so that a registry would be workable and effective? If so, what might be an appropriate plan and timetable for establishing a registry? Is such a registry a practical, efficient, and workable method of solving the spam problem? What are the relative costs and benefits?

2. How could such a registry be structured and applied to best protect children with email accounts? Could such a registry be effective as a means to protect children from inappropriate spam?

G. System for Rewarding Those Who Supply Information About CAN–SPAM Violations

1. What kinds of information would be most useful in facilitating enforcement of the Act? What kinds of information can the FTC reasonably expect to receive? Would such information likely be received in a form and manner that would make it useful in an enforcement action to prove violations of the Act? How would this information advance the Commission's ability to identify and locate people who violate the Act? How could a system for rewarding those who supply information about violations of the Act be structured? What are the relative costs and benefits?

2. What procedures would be necessary to determine who is ''the first person that identifies the person in violation of the Act, and supplies information that leads to the successful collection of a civil penalty by the Commission,'' as specified by the Act? What other procedures would be necessary to implement a reward system, *e.g.*, to resolve disputes among competitors seeking to be ''the first person that identifies the person in violation of the Act''?

3. Is the phrase ''identifies the person in violation of the Act'' sufficiently clear to provide a bright line with respect to who will be entitled to a reward? If not, how can deciding this issue be made more certain?

4. How would the prospect of receiving a portion of civil penalties collected by the FTC affect existing incentives for persons who have information about the identity of spammers to come forward with such information?

5. How would a reward system affect the behavior of ISPs and other industry participants with regard to initiating and conducting investigations of spammers, and other approaches to addressing unsolicited commercial email? Under what circumstances, if any, would ISPs and other industry participants likely submit information under a proposed reward system? What factors would be relevant to an ISP's choice whether to proceed under a reward system as opposed to proceeding under the private right of action for ISPs created by § 7(g) of the Act? Specifically, what kind of information would ISPs and other industry participants likely supply, and in what format? Would such information likely be received in a form and manner that would make it useful in an enforcement action to prove violations of the Act?

6. How successful have been the efforts of private entities or others to establish and operate reward programs similar to the one contemplated in the Act? Have such reward programs been successful in eliciting information otherwise unavailable to support enforcement or other legal action? Have such reward programs been successful in achieving the goal of reducing or deterring certain conduct?

7. How might the Commission implement ''procedures to minimize the burden of submitting a complaint to the Commission concerning violations of [the CAN–SPAM Act], including procedures to allow the electronic submission of complaints to the Commission,'' as provided by the Act?

H. Study of Effects of the CAN–SPAM Act

1. The Commission is required to write a report providing a detailed analysis of the effectiveness and enforcement of the provisions of the Act and the need (if any) for the Congress to modify such provisions. What measures of the effectiveness of the Act should the Commission consider?

2. Are there any developments likely to reach the market in the next two years that are likely to affect the effectiveness of the Act? How should the Commission monitor these developments?

3. This report must include an analysis and recommendations concerning how to address commercial email that originates in or is transmitted through or to facilities or computers in other nations, including initiatives or policy provisions that the Federal government could pursue through international negotiations, fora, organizations, or institutions. Given the ease of falsifying header information, how can the Commission determine the extent to which email originates in or is transmitted through or to facilities or computers in other nations? How should the Commission conduct this analysis?

4. This report must include an analysis and recommendations concerning options for protecting consumers, including children, from the receipt and viewing of commercial email that is obscene or pornographic. How should the Commission conduct this analysis?

I. Study of Subject Line Labeling

1. Prior to the enactment of the CAN–SPAM Act, many states required that unsolicited non-adult commercial email have an ''ADV'' label. How was this provision enforced by the States? What obstacles to enforcement did the States encounter? What, if any, limitations were found in these laws that the Commission should consider addressing in the required report regarding subject line labeling?

2. How effective is labeling?

3. Should the Commission recommend that all unsolicited non-adult commercial email be labeled ''ADV ''? Why or why not?

4. Would labeling, as part of a regime that includes other technological or law enforcement approaches, be an appropriate and effective tool to help control spam? Why or why not?

5. What are the costs and benefits to industry of labeling?

6. What are the costs and benefits to consumers of labeling?

7. If the Commission recommends that non-adult commercial email have an ''ADV'' label, should it also recommend that senders be allowed to provide additional explanatory information in the subject line; *e.g.*, ''ADV: Automobiles''? Why or why not?

J. Regulatory Flexibility Act

1. What burden to small business does the Act impose in the Act's requirements that certain disclosures be made in commercial electronic mail messages? How, if at all, may the burdens associated with required disclosures be minimized?

2. Does the Act impose any disparate impact on small businesses? If so, how may this disparate impact be minimized?

3. Describe and, where feasible, estimate the number of small entities to which the Act applies.

VII. Conclusion

The Commission will proceed from this ANPR with proposed rulemaking and drafting of required reports. Evaluation of comments submitted in response to this ANPR will comprise part of the Commission's rulemaking and report-drafting processes.

By direction of the Commission.

Donald S. Clark,

Secretary.

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