

FEDERAL TRADE COMMISSION**16 CFR Part 316**

RIN 3084-AA96

Label for Email Messages Containing Sexually Oriented Material**AGENCY:** Federal Trade Commission.**ACTION:** Final rule.

SUMMARY: In this document, the Federal Trade Commission ("FTC" or "Commission") issues its Final Rule pursuant to the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act" or "the Act").¹ Section 7704(d) of the Act requires the Commission, within 120 days of the date of the enactment of the CAN-SPAM Act, to prescribe a mark to be included in commercial electronic mail ("email") that contains sexually oriented materials.

EFFECTIVE DATE: The Rule will become effective on May 19, 2004.

ADDRESSES: Requests for copies of the Rule and the Statement of Basis and Purpose should be sent to Public Reference Branch, Room 130, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580. Copies of these documents are also available at the Commission's Web site, <http://www.ftc.gov>.

FOR FURTHER INFORMATION CONTACT: Jonathan Kraden, (202) 326-3257, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: The Rule implements the requirements of the CAN-SPAM Act by requiring that any person who initiates, to a protected computer, the transmission of a commercial email that includes sexually oriented material must: (1) Exclude sexually oriented materials from the subject heading and include in the subject heading of that email the mark "SEXUALLY-EXPLICIT: "; and (2) provide that the matter in the email message that is initially viewable when the message is opened include only certain specified information, not including any sexually oriented materials. The Rule also exempts situations where a recipient has given his or her prior consent to receipt of a sexually oriented message; clarifies that certain terms taken from the Act and appearing in the Rule have the definitions prescribed by particular referenced sections of the Act; and

includes a severability provision that provides that if any portion of the Rule is found invalid, the remaining portions will survive.

Statement of Basis and Purpose**I. Introduction**

As expressly set forth in Section 7701(a)(5) of the CAN-SPAM Act, Congress found that "some commercial email contains material that many recipients may consider vulgar or pornographic in nature,"² and this finding, in part, prompted passage of this legislation. Congress' finding reflects the serious concern of large segments of the population regarding the sexually explicit material that is often included in email messages. A recent survey of computer users found that "when asked to identify the type of content that bothers [email] users most * * * pornography exceeds all others, by nearly four times more than any runner-up."³

To combat this problem, Congress included Section 7704(d) in the CAN-SPAM Act. This section of the Act directs the FTC to prescribe "clearly identifiable marks or notices to be included in or associated with commercial electronic mail that contains sexually oriented material, in order to inform the recipient of that fact and to facilitate filtering of such electronic mail."⁴ The Act also requires that any person who initiates a commercial email that contains sexually oriented material: (1) Include the mark prescribed by the Commission in the "subject heading for the electronic mail message;"⁵ and (2) include only the following information in the initially viewable matter of the message: (i) The Commission's prescribed mark;⁶ (ii) identifier, opt-out and physical address information;⁷ and (iii) instructions on how to access the sexually oriented material.⁸

Pursuant to its mandate under section 7704(d) of the Act and its authority under section 7711(a) of the Act,⁹ and

² 15 U.S.C. 7701(a)(5).

³ Deborah Fallows, *Spam: How It Is Hurting Email And Degrading Life On The Internet*, Pew Internet & American Life Project, October 22, 2003 available at www.pewinternet.org/reports/toc.asp?Report=102. ("Among the types of spam that are out there, users were most bothered by pornography (53%), followed by pitches for products and services (14%), and investment deals and financial offers (11%).") (emphasis in original).

⁴ 15 U.S.C. 7704(d)(3).

⁵ 15 U.S.C. 7704(d)(1)(A).

⁶ 15 U.S.C. 7704(d)(1)(B)(i).

⁷ 15 U.S.C. 7704(d)(1)(B)(ii) referencing section 7704(a)(5) of the Act.

⁸ 15 U.S.C. 7704(d)(1)(B)(iii).

⁹ Section 7711(a) of the Act grants the Commission broad rulemaking authority. The

after extensive consultation with the Department of Justice, the Commission published a Notice of Proposed Rulemaking ("NPR") in the **Federal Register** on January 29, 2004.¹⁰ The NPR sought comment on a number of issues, including: The effectiveness of the Rule in aiding recipients to recognize, and computers to filter, e-mails that contain sexually oriented materials; any technical considerations that would affect the implementation of the Rule; other marks that would be more effective in achieving the objectives of the Act; and the effect of the Rule on business entities, including small business entities.

In response to the NPR, the Commission received eighty-nine (89) comments from a wide array of interested parties. The commenters included private individuals, technologists, public interest organizations, and representatives of state and federal agencies. Based upon the entire record in this proceeding, the Final Rule adopted by the Commission is similar to the Proposed Rule. However, the Final Rule contains some important changes from the Proposed Rule. These modifications are based upon the recommendations of commenters and careful consideration of relevant First Amendment case law.

The comments received in response to the NPR addressed three broad topics. First, many commenters emphasized their distress at the problem the Proposed Rule is designed to remedy, and generally expressed support for the Commission's proposal. The comments from individuals overwhelmingly supported the requirement that sexually oriented e-mail messages be labeled.¹¹ A typical commenter stated "[p]lease, please, please do something to protect us and our children from the junk" and wrote that she receives more than one hundred (100) pornographic spam a day that "disguise what the content of the e-mail is about" so that "when you open it, [you are] bombarded with nude photos of people having intercourse."¹²

Individual commenters favored the proposed requirements for a number of reasons. Several believed that labeling will help protect children from exposure to objectionable materials.¹³

pertinent portion of Section 7711(a) states that "the Commission may issue regulations to implement the provisions of this Act." 15 U.S.C. 7711(a).

¹⁰ 69 FR 4263 (Jan. 29, 2004).

¹¹ A list of the comments and the names used to identify each commenter is attached hereto as Appendix A. References to comments are cited by the commenter's name followed by the appropriate page designation.

¹² Halliwell.

¹³ See, e.g., Gregg ("Not only do these sexually oriented e-mail not identify their content, and seek

¹ Pub. L. 108-187 (codified at 15 U.S.C. 7701 et seq.).

Others welcomed the opportunity to have some control over their e-mail.¹⁴ Several commenters expressed frustration that, despite their repeated efforts, they are unable to block and filter these messages.¹⁵ In addition, commenters agreed that the Commission's proposed mark ("SEXUALLY-EXPLICIT-CONTENT:") in the subject line of an e-mail message would effectively alert them that an e-mail contains sexually oriented materials. Ultimately, the consensus of the great majority of commenters can be summed up by one comment: "Anything you can do to limit porn spam would be so gratefully appreciated by my entire household. I've had to close e-mail accounts because they completely choke out normal mail."¹⁶

The second broad topic addressed by commenters is the First Amendment implications of the Proposed Rule. The Commission's assessment of the various First Amendment arguments advanced has direct bearing on the ultimate form of the Final Rule. Discussion of First Amendment concerns precedes the section-by-section analysis of the Rule. The third broad topic touched on by a number of commenters related to technical aspects of the Commission's proposal, such as the character set to be used for the mark, placement of the mark, and implementation of an "initially viewable" area that is free of sexually oriented materials. These comments will be discussed in the section-by-section analysis, which follows the discussion of First Amendment concerns, immediately below.

to fool the recipient with false information about forwards and returns, but they contain words which my children find appealing. My children are just reaching the age where they are starting to e-mail their friends, and I would like to be able to protect them as best I can from inappropriate and offensive material.") See also Lieberg.

¹⁴ See, e.g., Bordeaux (The Rule "will give the general public some control over what they read * * * Nowhere else in society am I basically forced to look at content I don't desire to see. Pornography magazines at least have covers, satellite broadcasts have subscriptions and controls, but the inbox has had very little ability to actually give control over such content."). See also Cooper; Wandasoup; and Manion.

¹⁵ See, e.g., Kautz ("I have built special rules into my e-mail messaging, activated spam blockers and done whatever I could to block these unwelcome messages, only to have them sneak through anyway. I even changed my high speed Internet access provider hoping to avoid such disgusting material. Nothing helps."). See also Potts ("On a daily basis I go through 5 different e-mail accounts deleting [adult content] e-mails. Two of those mail accounts are for my 12 and 13 year old daughters. Even with spam filters it does not catch a vast majority of these e-mails. It is very frustrating * * *").

¹⁶ Sunlemming.

II. First Amendment Concerns

The Commission received a comment from the Center for Democracy and Technology ("CDT") questioning the constitutionality of the Rule under the First Amendment.¹⁷ CDT cites no cases and provides no systematic analysis to support its assertion that the Rule is fatally flawed "because of the burdens the proposed label will place on senders of constitutionally protected e-mail."¹⁸

CDT first argues that the Rule does not directly advance a substantial governmental interest,¹⁹ because it will "address only spam originating in the United States," and because the Rule "will likely not be enforceable against off shore spammers."²⁰ However, CDT's assertion is incorrect. Spammers operating from abroad but targeting United States residents are, in fact, subject to the requirements of the Rule and are subject to law enforcement actions in the United States for any violations of the Rule. Under the CAN-SPAM Act, a violation of the Rule is enforceable as if it were an unfair or deceptive act or practice under the FTC Act.²¹ The FTC Act has often been used to obtain relief from foreign defendants.²² Thus, where foreign spammers aim their campaigns at residents of the United States (and constitutional "minimum contact" requirements for jurisdictional purposes are met), such spammers are subject to legal action under the Rule in the United States.

CDT also argues that the Rule is unconstitutional because domestic spammers will not comply with it.²³ The constitutionality of the Rule can not

rest on the belief that the Rule will not be obeyed. The Commission does not believe that, simply because the government may not be able to stop sexually explicit spam, it must sit idly by as its citizens are exposed to objectionable materials that are being forced into their homes. The First Amendment does not require that the government "make progress on every front before it can make progress on any front."²⁴ As the Supreme Court noted in *Edge Broadcasting Co.*, "[w]ithin the bounds of the general protection provided by the Constitution to commercial speech, [the Court] allow[s] room for legislative judgments."²⁵

CDT also argues that the Rule offends the First Amendment because it will "prevent senders of lawful material from reaching willing recipients" because "it is designed to promote filtering by the ISPs and takes control away from the end user. Ideally, mechanisms to reduce spam should be modeled on a user empowerment approach, wherein the user, taking advantage of filtering software on her computer, is the ultimate arbiter of what content she receives."²⁶

The Commission believes this argument cannot bear close scrutiny. The fact that the prescribed mark may facilitate filtering does not necessarily cede to Internet Service Providers ("ISPs") the choice of whether to receive e-mail messages containing sexually explicit material. Rather, such filtering promotes opportunity for greater consumer choice. The marketplace is remarkably flexible, and one would expect that, if consumers desire choice, some ISPs would offer their subscribers individual choice in the matter of filtering, or that some ISPs would provide filtering to all subscribers while others would cater to individuals who want to receive sexually explicit e-mail messages without filtering. Simply because the mark facilitates filtering does not mean that filtering will be ubiquitous, or that consumers will not be able to exercise individual choice in the matter of receiving sexually explicit commercial e-mail messages.

Finally, CDT argues that the Rule is unconstitutional because it would serve as a "prohibition against including lawful sexually oriented material directly in a commercial e-mail." The Final Rule, however, does not prohibit or suppress any speech. The Rule does not prevent senders of sexually explicit e-mail from sending their messages or

¹⁷ CDT at 1 (stating, in answer to the Commission's question about potential conflict with other laws, "there is indeed a very important federal rule that conflicts with the proposed labeling requirement, namely the First Amendment to the Constitution.").

¹⁸ *Id.*

¹⁹ *Id.* This is one of the elements of *Central Hudson Gas & Elec. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

²⁰ *Id.*

²¹ 15 U.S.C. 7706(a), (d).

²² See, e.g., *FTC v. Domain Registry of America, Inc.*, No. 03-CV-10075 (S.D.N.Y. 2003); *FTC v. 1268957 Ontario Inc. et al.*, No. 01-CV-0423 (N.D. Ga. 2001); *FTC v. Growth Plus Int'l Marketing, Inc.*, No. 00C-7886 (N.D. Ill. 2000); *FTC v. Verity Int'l, Ltd.*, 124 F. Supp. 2d 193 (S.D.N.Y. 2000); *FTC v. Carlos Pereira et al.*, No. 99-1367-A (E.D. Va. 1999); *FTC v. The Tracker Corp. of America*, No. 97-CV-2654-JEC (N.D. Ga. 1998); *FTC v. 9013-0980 Quebec Inc.*, No. 1:96CV-1567 (N.D. Ohio 1996); and *FTC v. Ideal Credit Referral Servs. Ltd.*, C96-0874R (W.D. Wash. 1996). See also, *FTC v. BTV Industries et al.*, No. CV-S-02-0437-LRH (D. Nev. 2002); *FTC v. Benoit (a.k.a. One or More Unknown Parties)*, No. 3:99 CV 181 (W.D.N.C. 1999).

²³ CDT at 1 (noting that "domestic spammers are notoriously elusive and not distinguished by their compliance with the law.").

²⁴ *United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993).

²⁵ *Id.*

²⁶ CDT at 2.

selling their products. Nor does it prevent or encumber a willing recipient from receiving these messages. The Rule merely directs where and how materials may be presented in a manner that is easily accessible to all who wish to view these materials, yet unobtrusive to those who prefer not to receive them. The Rule does not place the e-mail recipient who wishes to view such materials at any disadvantage as compared to the e-mail recipient who does not wish to view them. Each person is only a mouse click away from his or her desired result. To that extent, the Rule facilitates commercial speech, by helping to ensure that people are willing recipients of the e-mail messages that are being sent. The Commission respectfully disagrees with the CDT and believes that the Final Rule is a constitutionally permissible regulation of commercial speech.

The CAN-SPAM Act applies only to commercial email messages.²⁷ In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Supreme Court established the applicable analytical framework for determining the constitutionality of a regulation of commercial speech that is not misleading and does not otherwise involve illegal activity.²⁸ Under that framework, the regulation: (1) Must serve a substantial governmental interest; (2) must directly advance this interest; and (3) is not more extensive

²⁷ The Final Rule applies only to the initiation of a "commercial email message," which is defined in the Act as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service." See 15 U.S.C. 7702(2)(a) (emphasis supplied). The Act mandates that the Commission conduct notice and comment rulemaking for the purpose of "defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message." See 15 U.S.C. 7702(2)(c). Accordingly, the Commission has recently published an Advanced Notice of Proposed Rulemaking on this issue. Pending completion of this proceeding, the interpretation of "commercial email message" looks to the core notion of commercial speech as developed in applicable case law: commercial speech is "speech that proposes a commercial transaction." *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (emphasis in original). See also *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983).

²⁸ 447 U.S. 557 (1980). For purposes of this analysis only, the Commission assumes that the content of the emails in question are at worst indecent and therefore constitutionally protected under the First Amendment. This assumption is based on the fact that the definition of sexually oriented materials under the Act covers speech that may be merely indecent (which is protected speech under the First Amendment) and not necessarily obscene (which is not protected speech under the First Amendment). See *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989).

than necessary to serve the government's interests²⁹—that is, there must be "a 'fit' between the legislative ends and the means chosen to accomplish those ends * * * a fit that is not necessarily perfect, but reasonable * * * that employs not necessarily the least restrictive means but * * * a means narrowly tailored to achieve the desired objective."³⁰

The Final Rule serves to advance two substantial government interests: (1) protecting the privacy right of individuals to be free from unwanted and unwelcome commercial intrusions into their homes, and (2) supporting parental supervision of the materials to which their children are exposed.

The government has a substantial interest in protecting the privacy of individuals in their homes. In *Rowan v. Post Office Dept.*, the Supreme Court upheld a federal statute empowering a homeowner to bar mailings from specific senders by notifying the Postmaster General that he/she wished to receive no further mailings from that sender.³¹ The Court stated:

We therefore categorically reject the argument that a vendor has a right under the constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even "good" ideas on an unwilling recipient. That we are often "captives" outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain * * *. To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home. Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.³²

The special protection extended to an individual's home was again stressed by the Supreme Court in *Frisby v. Schultz*, noting that "the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized

²⁹ *Central Hudson* at 566.

³⁰ *Board of Trustees* at 480.

³¹ 397 U.S. 728 (1970).

³² *Id.*, at 737-38 (internal citations omitted).

society."³³ "Individuals are not required to welcome unwanted speech into their own homes and the government may protect this freedom."³⁴

The Rule also advances the government's interest in supporting parental supervision over the materials to which children are exposed.³⁵ In upholding a state statute that prohibited sales to minors of material not defined as obscene for adults, the Supreme Court stated in *Ginsberg v. New York* that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression.³⁶

The comments the Commission received in response to the NPR demonstrate that sexually explicit email messages encroach upon individuals' right to privacy in their own homes.³⁷ Furthermore, it is axiomatic, and confirmed by the record, that a substantial number of people find unwanted sexually oriented email to be offensive and, given the opportunity, would shield minors from exposure to such materials.³⁸ By requiring the

³³ 487 U.S. 474, 484 (1988) (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)). See also *Mainstream Mktg. Servs. v. FTC*, 2004 U.S. App. LEXIS 2564, citing *Frisby*.

³⁴ *Frisby* at 485.

³⁵ See S. Rep. No. 102, 108th Cong., 1st Sess. at 6 (2003) (demonstrating Congress' concern that: "[u]nsuspecting children who simply open emails with seemingly benign subject lines may be either affronted with pornographic images in the email message itself, or automatically and instantly taken * * * to an adult web page exhibiting sexually explicit images."). See also *id.* at 7 (noting that spam with pornographic content or links to websites with pornographic content, are also common and place "additional burdens on parents to constantly monitor their children's email (even when they are already using an ISP's "parental controls"). In addition, when called to speak about CAN-SPAM, several Senators specifically referred to the government's interest in supporting parental supervision over the materials to which children are exposed. See 149 Cong. Rec. S13,025 (daily ed. Oct. 22, 2003) (statement by Senator Schumer: "[I]f parents can control what their kids watch on TV, they should be able to control what their children are exposed to on the Internet."). See also *id.* at 13036 (statement by Senator Enzi that the Act "takes an important step in protecting Internet and email users, especially minors, from receiving sexually explicit, offensive and unwanted content in their emails.").

³⁶ 390 U.S. 629 (1968).

³⁷ See, e.g., Bordeaux; Manion; Roth; Gannon.

³⁸ See, e.g., Potts; Giddens; Andre; Gregg. See also, National Consumers League (citing an online survey about spam conducted in late 2003 by the Trans Atlantic Consumer Dialogue ("TACD"), a coalition of 65 consumer organizations from the United States and European Union countries, that "92 percent of the U.S. respondents said that unsolicited commercial emails characterized as "adult/porn" were the most objectionable or upsetting to receive * * *." *Report of TACD's Online Survey on Spam*, Oct.-Dec. 2003, available at <http://www.tacd.org/docs/?id=225>).

prescribed mark in the subject line and in the immediately viewable area of the email message, the Rule will aid email recipients to filter or delete this material without viewing it, thus advancing these legitimate government interests. In addition, the Rule's requirement for including the opt-out and other disclosures in the initially viewable area will enable unwilling recipients to avoid future exposure to such email messages. Finally, the requirement to exclude sexually oriented materials from the subject line of an email message, and to include only certain information in the "initially viewable" portion of an email message helps shield individuals and children from exposure to depictions of graphic sexual materials.

A reasonable fit exists between the requirements of the Final Rule and the government's interests if the Rule directly advances those interests and is narrowly tailored.³⁹ In this context, the "narrowly tailored" standard does not require that the government employ the least restrictive means to protect the substantial interests mentioned above. All that is required is a proportional response.⁴⁰

The Commission believes that the requirements of the Final Rule are narrowly tailored to fit the interests at stake. The Rule does not forbid or suppress any speech. In fact, the Rule expressly allows senders to include instructions in the email's "initially viewable" area on how to access the sexually explicit material. Further narrow tailoring of the Rule's impact has been achieved through the "prior consent" exclusion in § 316.1(b). This provision places outside the Rule's scope of coverage any email message sent with the recipient's prior affirmative consent to receive the sender's sexually oriented messages. Thus, the Rule covers no more email messages than necessary to achieve its purpose, and merely restricts the place and manner where sexually explicit content included in commercial emails may be presented. In this way, the Rule permits sexually explicit email messages while protecting potentially unwilling recipients from unwelcome speech invading their own homes.

In addition, the Commission has further narrowed the length of the prescribed mark to encroach as little as possible on space available for senders' messages, consistent with achieving the Rule's purposes. As originally proposed, the Rule required that commercial email messages that contain sexually oriented

materials include the phrase "SEXUALLY-EXPLICIT-CONTENT:" in the subject heading of the email message.⁴¹ Commenters noted that no technical limitations on the length of an email's subject line constrain the extent of the prescribed mark.⁴² Yet, several commenters noted that when placed in the subject line of an email message, a mark may push some or all of the sender's subject line message beyond the area that is readable by an email recipient.⁴³

The Commission is concerned that the prescribed mark be narrowly tailored so that no more speech is affected than is necessary to advance the privacy and parental supervision interests that prompted Congress to pass Section 5(d) and, accordingly, the Commission to adopt this Rule. The Commission has determined that a shorter mark likely can achieve the desired purpose as well, or nearly as well, as the longer mark proposed initially. Thus, the Commission has shortened the mark in the Final Rule to the phrase "SEXUALLY-EXPLICIT:".⁴⁴ This shorter phrase will provide senders with more room for their own messages while still effectively advancing the government's interests and accurately describing the materials in question.⁴⁵

Similarly, the prohibition on sexually oriented materials in the subject heading and in the "initially viewable" area, the "electronic brown paper wrapper,"⁴⁶ is narrowly tailored to

directly advance the government's interests without completely banning the inclusion of such materials. The Rule does not prohibit the inclusion of sexually explicit materials in an email message, it merely restricts the manner in which they can be displayed. Placement of the prescribed mark in the subject line of a sexually oriented email should aid recipients in the filtering of unwanted sexually oriented emails. Nevertheless, not all email recipients have equal access to filtering programs. Moreover, filtering programs are not foolproof. The record confirms that, despite efforts to filter, sexually oriented emails often find their way into an email recipient's inbox.⁴⁷ Thus, without a prohibition against sexually oriented materials in the subject heading of an email message, the Rule would be much less effective in that email recipients could be routinely confronted with materials that are not filtered out and that they find offensive or objectionable. Similarly, without a prohibition against sexually oriented materials in the "initially viewable" area of an email message, the Rule would be much less effective at insuring that email recipients are not unwittingly and unwillingly subjected to offensive or objectionable materials in email messages that appear in the preview pane of their email program or are mistakenly opened, notwithstanding inclusion of the mark in the subject line.

In addition, prohibiting sexually oriented materials from the subject line promotes a range of consumer choice, rather than forcing consumers into a rigid "all or none" regime. As one commenter noted "[i]t may not be appropriate to assume that a recipient's willingness to view one sexually oriented message is tantamount to a willingness to view all sexually oriented messages—even within sexually oriented material there are degrees and differences in taste."⁴⁸ By the same token, a consumer may not wish, through filtering or the use of an ISP that offers filtering, to forego receipt of *all* email messages with sexually explicit content as the price he or she must pay to avoid a smaller subcategory of such messages that he or she finds objectionable. Prohibiting sexually oriented materials from the subject heading of an email message preserves the recipient's ability to make his or her viewing choice, on a message-by-message basis, based on the content of the subject line, without exposing that person to sexually explicit content that he or she may find offensive. The email

⁴¹ The original mark proposed by the Commission comprises twenty-seven (27) characters, including the dashes between the three words and the colon (:) and the space following the phrase.

⁴² See, e.g., ICC at 2 (stating "[t]here is no technical reason that [they] can identify why the Proposed Mark cannot be included in the subject line of emails that contain sexually explicit material."). See also Moore at 6.

⁴³ See, e.g., Moore at 1-3, 6 (Although "there are no technical reasons why the Proposed Mark cannot be transmitted in the Subject line of email messages," the length of the proposed mark may be "undesirable" because computer programs and devices which display email messages impose practical limits on the portion of the subject line that is displayed to an email recipient.) See also Hinckley ("[W]ith a prefix that long, having anything readable in the subject line of a list of emails is going to be difficult.")

⁴⁴ The phrase "SEXUALLY-EXPLICIT" comprises seventeen (17) characters, including the dash between the two words. The colon (:) and the space following the phrase are the 18th and 19th characters.

⁴⁵ By dropping the word "content" from the proposed mark, and reducing the size of the mark from twenty-seven to nineteen characters, the Commission has more narrowly tailored the mark, providing a sender with an additional eight characters in which to include his or her message.

⁴⁶ The phrase is a reference to the wrapper placed over the cover of sexually explicit magazines sent through the U.S. Postal system. For purposes of the Rule, the phrase electronic "brown paper wrapper" refers to the initially viewable area of an email message that is free of sexually oriented materials.

⁴⁷ See, e.g., Kautz; Potts.

⁴⁸ Moore at 7.

³⁹ *Central Hudson* at 564-65.

⁴⁰ *Board of Trustees* at 480.

recipient who wishes to view only certain types of sexually explicit email messages could modify his or her filtering programs to allow the delivery of sexually explicit messages and then choose among these messages without being subjected to potentially offensive materials.

In addition to requiring the prescribed mark in the subject heading and the “initially viewable” portion of an email message that contains sexually oriented materials, the Final Rule also requires the “initially viewable” area of the message to include certain specified information. In requiring the disclosures in the “initially viewable” area, the Rule directly advances the government’s previously identified interests and provides email recipients with important factual information about the email message. In *Zauderer v. Office of Disciplinary Counsel*, the Supreme Court considered a challenge to compelled commercial speech in an advertisement by an attorney and found that an advertiser’s “constitutionally protected interest in not providing any particular factual information in his advertising is minimal.”⁴⁹ In upholding a disclosure requirement in advertisements, the Court noted that the statute at issue did not prevent attorneys from conveying information to the public, it merely required them “to provide somewhat more information than they might otherwise be inclined to present.”⁵⁰

Similarly, the Final Rule does not prevent sending sexually oriented materials to the public; rather, the Rule merely requires the inclusion of important factual information that sexually explicit email messages generally do not provide.⁵¹ The prescribed mark in the subject heading of the email message alerts a recipient to the fact that an email contains materials that a recipient may find objectionable. Considering that sexually explicit email messages are often mislabeled in an apparent attempt to confuse and deceive recipients,⁵² the Commission believes it is appropriate to require the mark in the subject heading of a sexually explicit email message.⁵³ In addition, placement of the prescribed mark, identifier, opt-out and physical address information in the “initially viewable” area provides a recipient with important factual information about the

content of the message and the sender of the message, without forcing the recipient to view materials that he or she may find objectionable.

In conclusion, the Commission believes that the Final Rule, as mandated by Section 7704(d) of the Act, is analogous to the statute upheld in *Rowan* and focuses on unwanted advertisements of a sexual nature sent to individuals’ homes. The First Amendment raises no impediment to Rule provisions that will enable a person to filter out a class of objectionable commercial communications, or in the alternative, to receive accurate labeling information about the content of the email message before being confronted with such content.

III. The Rule

A. Section 316.1(a)(1)—The Prescribed Mark

Section 316.1(a)(1) of the Proposed Rule would have required that “[a]ny person who initiates * * * the transmission of a commercial electronic mail message that includes sexually oriented material must: (1) Include in the subject heading for the electronic mail message the phrase “SEXUALLY-EXPLICIT-CONTENT:” in capital letters as the first twenty seven (27) characters at the beginning of the subject line.”⁵⁴

Commenters agreed that the Commission’s proposed mark would effectively alert recipients that an email message contains sexually oriented materials.⁵⁵ Although the mark is not constrained by any technical limitations in the length of an email’s subject line,⁵⁶ several commenters noted that when placed in the subject line of an email message, a mark may push some or all of the sender’s subject line message beyond the readable area of the subject line.⁵⁷ As noted above, to address these concerns, the Commission has shortened the prescribed mark to the phrase “SEXUALLY-EXPLICIT:” The Commission believes that this shortened mark leaves as much space in the subject line as possible, consistent with effectively aiding recipients to recognize

and filter emails that contain sexually oriented materials.

The Final Rule also specifies in Section 316.1(a)(1) that the initiator of an email message containing sexually oriented material must “exclude sexually oriented materials from the subject heading * * *” This provision complements the requirement in Section 316.1(a)(2) that the initially viewable area, or “brown paper wrapper,” of an email message, may contain only certain specified information—not sexually oriented material.

This modification of the Rule ensures that neither the subject line nor the initially viewable portion of the message body—that portion of an email that a recipient may be able to see without taking any affirmative action other than opening his or her email program—will confront recipients with unwelcome verbal or visual depictions of sexually explicit conduct.⁵⁸ Without this modification, the Commission believes that the Rule would not adequately advance the legitimate privacy interest of email message recipients in not being unwittingly subject to materials depicting such conduct—and not allowing their children to be subjected to them. Absent this modification, the Rule provisions designed to eliminate such materials from the “initially viewable” portion of the email could easily be defeated by inclusion of such material in the subject line (albeit, preceded by the prescribed mark). The Commission, therefore, adjusted the Rule to prevent this counterproductive outcome.

In formulating the shorter mark or notice, the Commission once again considered using variations of the word “adult” in the mark.⁵⁹ The Commission concludes that use of the word “adult” in the mark does not provide a recipient with the most effective notice of the materials contained in a sexually explicit email. There are many products or services that could be considered “adult” in nature, making the phrase inappropriate and inaccurate in this context.⁶⁰

⁵⁸ See USDOJ (opining that “the CAN–SPAM Acts provision [§ 7704(d)] applies to email containing textual descriptions of sexually explicit conduct without images.”).

⁵⁹ See, e.g., 69 FR at 4264.

⁶⁰ For example, one of the first states to implement an “adult” labeling requirement was California in 1998. California’s “ADV:ADLT” label applied to email messages containing a range of “adult” materials, including any “unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit, that may only be viewed, purchased, rented, leased, or held in possession by an individual 18 years of age and

⁴⁹ 471 U.S. 626, 651 (1985).

⁵⁰ *Id.* at 650.

⁵¹ See, e.g., *Libera*; *Perry*; *Andre*; *Gregg*.

⁵² See, e.g., *Haliwell*; *Gregg*; *Lieber*.

⁵³ See *Zauderer* at 651 (“[D]isclosure requirements trench [sic] much more narrowly on an advertiser’s interests than do flat prohibitions on speech.”).

⁵⁴ 69 FR at 4266.

⁵⁵ See, e.g., ICC at 3 (“[t]he proposed rule does satisfy the statutory requirement to inform recipients that an email may contain objectionable sexually explicit content.”). See also *VanMeter* at 1; *Chapman*; *USDOJ*; *Orlando* at 1. Compare Attorney General of New Mexico (the mark “is not clear enough and needs to go further to adequately warn recipients of the disturbing and objectionable material that may be included with the email.”).

⁵⁶ See, e.g., ICC at 2; *Moore* at 6.

⁵⁷ See, e.g., *Moore* at 1–3; *Hinckley*.

In addition, one commenter suggested that “a mark such as ‘ADLT:SEX’ would be sufficient to convey * * * that the message was intended for adults and that it was sexually oriented, without occupying as much display space.”⁶¹ This phrase may alleviate some concerns about using the word “adult” in the mark, but the materials covered by the Final Rule are not simply sexual or adult materials, but rather explicit images or explicit descriptions of sexual conduct, including graphic depictions of various sex acts. While maximizing brevity, the label should be as precise as possible, and should accurately reflect the nature of the material whose presence it signals. Since an email recipient decides on whether to view an email message based on information contained in the email’s subject line, for the mark to be effective it must accurately signal the sexually explicit materials contained in that email.⁶² For these reasons, the Commission does not believe that the phrase “ADLT:SEX” provides an email recipient with the most effective notice that an email contains sexually oriented materials.

Several commenters also addressed whether the inclusion of a mark in the subject line of an email message would aid in blocking or filtering sexually oriented messages. One commenter stated that the mark would “admirably serve this purpose,”⁶³ noting that the mark would work because “[p]opular email programs, including NetScape Communicator and Microsoft Outlook and Outlook Express have filtering capabilities that likewise perform text matches within headers,” and that he himself had “created a spam-filtering software program that operates by doing text matches within the headers of incoming email messages.”⁶⁴

Other commenters agreed that the inclusion of the mark in the subject heading of an email would assist a computer filtering program, but noted that several technical issues, including the character set used for the mark, the placement of the mark in the subject

older.” See Ca. Bus. & Prof. Code § 17538.4 (repealed 2003). See also New Mexico’s Unsolicited Facsimiles or E-mail Prohibition, which requires the subject line of an email to include the phrase “ADV:ADLT” if “the unsolicited advertisement advertises realty, goods, services, intangibles or the extension of credit that may only be viewed, purchased, licensed, rented, leased or held in the possession by an individual eighteen years of age or older.” N.M. Stat. Ann. section 57–12–23(B)(4).

⁶¹ See Moore at 6.

⁶² The American Heritage Dictionary defines the word “explicit” as: “describing or portraying nudity or sexual activity in graphic detail.” American Heritage Dictionary of the English Language (4th ed. 2000).

⁶³ Oney at 1.

⁶⁴ *Id.*

heading of an email message, the use of punctuation in the mark, and the use of non-English words in the mark should be considered to maximize the effectiveness of any subject heading label.⁶⁵ These technical considerations are discussed below.

(i) The Use of a Single Character Set

As noted above, the Proposed Rule specified that the mark must be displayed “as the first * * * characters at the beginning of the subject line.”⁶⁶ Numerous commenters suggested that the Final Rule go further, to specify that a single character set is required for the mark.⁶⁷ One commenter specifically mentioned problems that other countries have encountered when spammers used different character sets to avoid filters, while still complying with the letter of the law.⁶⁸

The Commission is persuaded that to discourage evasion of the labeling requirements, the Final Rule should specify the character set in which the prescribed mark must appear. Therefore, the Final Rule requires that the prescribed mark be in the ASCII character set.⁶⁹ This requirement will maintain a single standard for the mark and therefore should promote the effectiveness of filtering systems. The Commission has added a definition to Section 316.1(c) of the Final Rule to clarify that the word “character” means “an element of the American Standard Code for Information Interchange (“ASCII”) character set.”

(ii) Placement of the Mark in the Subject Line

In the NPR, the Commission proposed requiring that the mark be displayed “as the first twenty seven (27) characters at the beginning of the subject line” of any commercial email message that includes sexually oriented materials.⁷⁰ Several

⁶⁵ See, e.g., Moore at 7 (agreeing that the inclusion of the Proposed Mark would aid a filtering program in blocking unwanted sexual emails, but noting that technical considerations may ultimately limit the effectiveness of the mark). See also Oney at 1; Hinckley.

⁶⁶ 69 FR at 4266.

⁶⁷ See, e.g., Mason (The Commission should “be very clear that those exact characters, in a given, named character set, must appear in the subject line.”); Koehn.

⁶⁸ Mason.

⁶⁹ ‘ASCII’ stands for American Standard Code for Information Interchange. ASCII is the basic coding system which computers use to communicate with one another. Computers can only understand numbers, so an ASCII code is the numerical representation of a character such as ‘a’ or ‘@’ or an action of some sort. The standard ASCII character set consists of 128 decimal numbers ranging from zero through 127 that are assigned to letters, numbers, punctuation marks, and the most common special characters.

⁷⁰ 69 FR at 4266.

commenters questioned the interaction between the mark and other tags that often occur in the subject line of email messages, such as the abbreviations “re:” and “fw:,” which are automatically added to an email message that an individual has respectively, sent in response, or forwarded.⁷¹ One commenter noted that these tags could place the mark several characters off of the beginning of the subject line of an email message, possibly causing messages to slip by filters that were set up to recognize the mark as the first characters of the subject line.⁷²

After reviewing the comments, the Commission has determined that no change in the Rule is necessary to address the situation when these tags are placed in the subject heading of an email message. A tag is automatically placed in the subject heading of an email message only after the original email recipient has taken some affirmative step either to respond to or forward that email.⁷³ Because these tags result from a recipient’s affirmative step, the recipient who forwards or responds to such sexually oriented messages should delete any such tags added on to the message.⁷⁴

(iii) The Effect of Punctuation on the Mark

The NPR also elicited comment on whether the inclusion of punctuation in the mark would affect the ability of computer programs to filter email containing the mark.⁷⁵ The Commission included punctuation in the mark (a dash between the two words and a colon and space after the phrase) to make the phrase more recognizable, unique, and prominent.

⁷¹ See, e.g., Hinckley (the Commission “may want to clarify that it’s the first non-meta information in the subject, or give more leeway for initial text (not to mention Fwd: or Re: type items).”). See also Moore at 3–4, Oney at 1.

⁷² Moore at 3–4.

⁷³ A recipient who forwards an email message that contains sexually oriented material may be an initiating or transmitting person within the meaning of Section 5(d) of the Act, and is therefore responsible for complying with the Rule and the Act. In a separate **Federal Register** notice, the Commission requested comment on who should be considered a person who “initiates” an email message when one recipient forwards the message to another. 69 FR 11776 (Mar. 11, 2004).

⁷⁴ One commenter also noted that email discussion lists often attach a prefix of the mailing list’s “listname” to inform recipients that the message was sent through a particular discussion list. See Moore at 3. The Commission believes that the voluntary nature of a discussion list provides a sender with the opportunity to obtain prior affirmative consent from the list’s recipients before sending out any commercial email messages that contain sexually oriented materials, thereby placing these messages outside the Rule’s scope of coverage.

⁷⁵ 69 FR at 4266.

Several commenters addressed this issue and confirmed that the inclusion of punctuation characters diminishes the likelihood of a filtering program inappropriately or incorrectly filtering or blocking an email message.⁷⁶ Because the Commission did not receive any comments that suggested that the punctuation in the mark would frustrate or negatively effect a filtering program, or any that suggested that other punctuation would be superior, the Final Rule retains the proposed punctuation in the prescribed mark.

In addition, the Final Rule retains the requirement that the mark be displayed in capital letters. The Commission believes that this requirement makes the mark more prominent and noticeable, thereby presenting recipients with an eye-catching phrase that should immediately alert them to the sexual content of an email message. The Commission received no negative comments regarding the requirement that the mark be displayed in capital letters.

(iv) Non-English Alternatives

In the NPR the Commission chose to prescribe a mark that consisted of words rather than images or icons.⁷⁷ The Commission received no comments that suggested that the prescribed mark should be anything other than words. However, one commenter noted that since the mark contains only English words, it may not provide effective notice to people who do not speak English.⁷⁸ The Commission is aware of the limitations inherent in using English words in the mark, yet practical considerations dictate such a choice.

As mentioned above, the viewable portion of the subject line of an email message depends on the email program that a recipient is using and the hardware configurations of the email recipient's computer. The limited viewable area of a subject line dictates

⁷⁶ See, e.g., VanMeter at 1 ("The Proposed Mark's inclusion of hyphens between the words will address any concerns that a filter set to block a simple English phrase like 'sexually explicit content' would prevent delivery of an email from an anti-pornography group utilizing such a phrase in the content of their email. Further, the use of the hyphens creates a unique mark that will serve to make emails containing such information to be more effectively and easily detected by recipients who do not wish to receive such material."). See also Moore at 8 (noting that the use of odd spellings (such as "ADLT") would also have a similar effect).

⁷⁷ The Commission selected words over images or icons for the mark because of concerns about the efficacy of an image or icon in alerting email recipients about the sexual nature of an email message. Moreover, an icon or image that accurately depicted the sexual materials in question may run afoul of the requirements of the Final Rule, thereby frustrating the purpose of the statute.

⁷⁸ Moore at 4.

that the mark be short in length while still providing an accurate description of the sexual content of an email message. Because of these length limitations, it is not feasible to include in the mark additional words or phrases translating the mark into the wide range of languages that may be spoken by various persons living in this country. In addition, nothing in a recipient's email address identifies the language that he or she may speak. The impossibility of determining the language that a recipient speaks further diminishes the utility of incorporating different languages into the Commission's prescribed mark. Furthermore, the Commission believes that email recipients, regardless of their native language, will quickly learn to identify the prescribed mark and understand the relationship between the mark and sexually explicit email messages. After reviewing the comments and considering the practical limitations in placing a label in the subject heading of an email, the Commission has decided to require that the mark be displayed only in English.

B. Section 316.1(a)(2)—The Electronic "Brown Paper Wrapper"

Section 316.1(a)(2) of the Rule tracks the elements of Section 7704(d)(1)(B) of the CAN-SPAM Act, and requires that an email message that includes sexually oriented material include only certain information in the body of the email that is initially viewable by the recipient. Commenters focused on several aspects of this section of the Rule, including: (1) Clarification of the requirements of the electronic "brown paper wrapper"; (2) the meaning of the phrase "initially viewable area"; and (3) what information is allowed in the initially viewable area.

(j) Clarification of the Requirements of the Electronic "Brown Paper Wrapper"

Several commenters sought clarification as to how the electronic "brown paper wrapper" applies to initiators of sexually oriented emails.⁷⁹ To address these commenters' concerns, the Commission intends to make it clear that the Rule requires that initiators of commercial emails that contain sexually oriented materials include the prescribed mark in the subject heading of the email AND provide that the initially viewable area of the body of the email contain only certain specified information. The mark in the subject

⁷⁹ See, e.g., Hinckley ("I can't find any description of how the 'brown wrapper' is going to work."); Koehn ("Is there any technical definition of the 'brown paper wrapper.'"); Moore at 4.

heading informs a recipient that an email contains sexually oriented materials, while the electronic "brown paper wrapper" ensures that should a recipient open a sexually explicit email message, the recipient is not bombarded with graphic sexual materials.⁸⁰

With respect to the "brown paper wrapper," the CDT characterized the Rule as a "damned if you do, damned if you don't" labeling requirement which is "internally conflicting" and that "fails the constitutional requirement of clarity in speech."⁸¹ The Commission sees no such conflict or lack of clarity. The CDT's interpretation of the Rule is based on a reading of Section 7704(d)(1)(B) of the CAN-SPAM Act that would prohibit "sending commercial email that includes anything more than instructions on how to access sexually oriented material, even if the material is lawful."⁸² This reading of the Act is incorrect. Neither the Act, nor the Rule, excludes sexually oriented materials from the body of an email message. The Rule merely provides that these materials cannot be located in the subject line or the area of the email that is initially viewable to an email recipient.

(ii) The "Initially Viewable" Area

Section 316.1(a)(2) of the Proposed Rule required any person who initiates an email message that includes sexually oriented material to provide that "the matter in the message that is initially viewable by the recipient, when the message is opened by any recipient and absent any further actions by the recipient," only include certain information. The Final Rule retains this requirement with only one minor wording change. To make the provision more precise, the phrase "the content of" has been substituted for "the matter in."⁸³

A number of commenters questioned how initiators of sexually explicit materials should go about complying with the "initially viewable" requirements. One commenter noted that the different email protocol standards deal primarily with the manner in which information is conveyed between computers and not with how that information is ultimately

⁸⁰ Commercial emails that contain sexually oriented materials sometimes appear automatically in a recipient's preview pane. These situations make it more likely that the prescribed mark in the subject line of an email message, in and of itself, would not fully protect recipients from exposure to materials that they may find objectionable or offensive.

⁸¹ CDT at 3.

⁸² *Id.*

⁸³ See, e.g., USDOJ.

presented to the email recipient.⁸⁴ This in turn creates problems because the “initially viewable” area of an email may differ among different recipients of that email, depending on a number of factors, including the email program that a recipient is using and the hardware configurations of the email recipient’s computer.

Nevertheless, an initiator of sexually oriented emails is not without tools to ensure that the “initially viewable” portion of an email message does not force the recipient to be confronted with offensive and objectionable materials. Given the variables that determine how an email message confronts a recipient, the Commission believes that the most appropriate way to achieve the Act’s goals is to cast the Rule provisions in terms of a performance standard patterned after the language in the Act.

The Commission will consider sexually oriented materials to be in the “initially viewable” area of an email message if, upon opening the message, the recipient can see the materials without the recipient taking any further deliberate actions. The “initially viewable” area of an email message will be deemed to be free of sexually oriented materials if a recipient who wishes to view these materials must go looking for them. An initiator of sexually explicit emails must therefore structure the message to ensure that sexually explicit emails require an affirmative step by the email recipient to view the materials—for example, by scrolling down in order to view the sexually explicit content,⁸⁵ or clicking on a link to another section of an email message structured with multiple parts or to an external location such as a web server.

(iii) Disclosures To Be Included in the Electronic “Brown Paper Wrapper”

The Final Rule provides that the portion of an email message that is initially viewable, absent any actions by the recipient other than opening the message, may include only certain specified information. Like the Proposed Rule, the Final Rule closely tracks the requirements of Section 7704(d)(1)(B) of the Act with only slight

⁸⁴ Moore at 5 (noting that the Internet is composed of a wide range of computing systems and devices, each with varying display and input capabilities).

⁸⁵ The Commission recognizes that situations in which a recipient merely must scroll down through the initially viewable area to see sexually explicit content present challenges. The size of the area that must be above sexually oriented material in order for the content to be outside the initial viewable area will vary with the recipient’s software and hardware at any given time, and evolve with changes in technology and the price of technology.

modifications to improve the Rule’s clarity and consistency.

(a) *Section 316.1(a)(2)(i): The prescribed mark in the body of the email message.* Section 316.1(a)(2)(i) of the Proposed Rule would have required that the initially viewable area of the email message include the phrase “SEXUALLY–EXPLICIT–CONTENT:” in a “clear and conspicuous manner.”⁸⁶ The Commission received no comments on this requirement. Therefore, the Final Rule requires the same mark, “SEXUALLY–EXPLICIT:”, be displayed in the initially viewable area, as in the subject line of the email message.

(b) *Section 316.1(a)(2)(ii–vi): Inclusion of identifier, opt-out, and physical address in commercial email, and instructions on how to access the sexually oriented materials.* The Proposed Rule would have required that the initially viewable area of a sexually oriented commercial email message include only the following information: clear and conspicuous notice that the message is an advertisement or solicitation; a clear and conspicuous opt-out notice; a functioning return email address or other Internet-based mechanism for opt-outs; a valid physical postal address of the sender; and instructions on how to access the sexually oriented material. This required information tracks the language found in Section 7704(d)(1)(B)(ii) of the CAN-SPAM Act.⁸⁷ The Commission received no comments that directly pertain to Sections 316.1(a)(2)(ii–vi) of the Proposed Rule, and therefore retains these sections in the Final Rule with only one minor “house-keeping” change.

Except for the “instructions on how to access the sexually oriented material” in Section 316.1(a)(2)(vi),⁸⁸ all of the

⁸⁶ This requirement stems from Section 5(d)(1)(B)(i) of the CAN-SPAM Act, which states that the initially viewable area of an email message should include “to the extent required or authorized pursuant to paragraph (2), any such marks or notices.” The Commission believes that this internal reference to another section of the Act (paragraph (2)) is a typographical error because Section 7704(d)(3), not Section 7704(d)(2), directs the Commission to prescribe a mark or notice that will be included in commercial email that contains sexually oriented material. In addition, a review of the history of the Act revealed that, before its final passage, in prior versions of the Act, Section 7704(d)(2) directed the Commission to prescribe the mark or notice. Thus, the confusing reference to “paragraph (2)” is clearly the result of a reference that was mistakenly left over from an earlier version of the Act.

⁸⁷ Section 7704(d)(1)(B)(ii) of the Act references “information required to be included in the message pursuant to subsection (a)(5).” This subsection of the Act requires the “Inclusion of identifier, opt-out, and physical address in commercial electronic mail.” 15 U.S.C. 7704(a)(5).

⁸⁸ Because of the economic nature of the email message, the Commission is not concerned that a

required disclosures in Sections 316.1(a)(2) of the Final Rule are required to be “clearly and conspicuously” displayed. As originally proposed, 316.1(a)(2)(v) did not require that the “valid physical postal address of the sender” be clearly and conspicuously disclosed. The Commission intends to dispel any notion that the valid physical postal address could be lawfully displayed in micro print, in a color of type that does not contrast with the background, or otherwise made hard to read and understand. Therefore, to ensure that this information is presented in a manner likely to be noticed by recipients, the Commission has added the phrase “clearly and conspicuously displayed” to Section 316.1(a)(2)(v) of the Final Rule.

(c) *Section 316.1(b): Prior Affirmative Consent.* Section 316.1(b) of the Proposed Rule provided that the requirements of the Rule do not apply “to the transmission of an electronic mail message if the recipient has given prior affirmative consent to receipt of the message.” This exception tracks the language found in Section 7704(d)(2) of the CAN-SPAM Act.⁸⁹ The Commission received no comments on Section 316.1(b), and, therefore, retains this section in the Final Rule without changes.

(d) *Section 316.1(c): Definitions.* Section 316.1(c) of the Final Rule includes the definitions of a number of key terms of the Rule.⁹⁰ Most of these terms are defined by references to the corresponding sections of the Act. The Commission sought comment in the NPR as to whether the definitions as set forth in the Proposed Rule were acceptable and whether it would be preferable to include the legal definitions themselves in the Final Rule.

Only one commenter suggested that the Rule should go beyond merely referencing the Act’s definitions and, for clarity’s sake, should also include the legal definitions in the Final Rule.⁹¹ At the other end of the spectrum, another commenter worried that importing the full statutory definitions into the Final Rule creates a risk that the Rule may

sender of a commercial email message that contained sexually oriented materials would fail to clearly and conspicuously display his or her instructions on how a potential buyer could access the materials.

⁸⁹ 15 U.S.C. 7704(d)(2).

⁹⁰ Most of the terms listed in § 316.1(c) occur in the text of the Final Rule; several of them are not in the Rule text, but are defined in the Rule because CAN-SPAM incorporates and defines them within the definition of another term. For example, the term “procure” is listed in the Rule’s definitions [at § 316.1(c)(7)] because the Act defines and includes it in the term “initiate.”

⁹¹ Orlando at 3.

become stale if Congress amends the Act, or sections of the Act to which the Rule refers.⁹²

The Commission believes that by referencing the definitions found in the Act, and any future modifications to those definitions, the Final Rule will accurately and effectively track any future changes made to the definitions in the Act.⁹³ Except as discussed below, the Commission has decided to maintain the method of defining key terms of the Final Rule by reference to the Act.

(i) *The definition of “sexually oriented materials”.* The term “sexually oriented material” is defined in Section 7704(d)(4) of the CAN-SPAM Act as “any material that depicts sexually explicit conduct (as that term is defined in Section 2256 of title 18, United States Code), unless the depiction constitutes a small and insignificant part of the whole, the remainder of which is not primarily devoted to sexual matters.”⁹⁴ (Emphasis supplied). Several commenters expressed confusion regarding what materials would be considered “sexually oriented” under the CAN-SPAM definition.⁹⁵ The Department of Justice (“DOJ”) opined that the Act applies to email messages that contain textual descriptions of sexually explicit conduct without images.⁹⁶ The Commission has determined that the phrase “sexually oriented materials,” as defined in Section 7704(d)(4) of the Act, applies to both visual images and written descriptions of sexually explicit conduct.

Nothing in the text of the CAN-SPAM Act, nor in its legislative history, indicates an intent to limit the application of Section 7704(d) to only visual materials. Referencing the definition of “sexually explicit content” from 18 U.S.C. Section 2256, the Sexual Exploitation and Other Abuse of Children Act (“Abuse of Children Act”), in CAN-SPAM’s definition of “sexually oriented material” does not necessarily import that Act’s limitations in scope into Section 7704(d).⁹⁷ Moreover, the

phrase “sexually explicit conduct,” as defined in the Abuse of Children Act is not itself limited to only visual images.⁹⁸

The Commission’s interpretation that the definition of “sexually oriented materials” covers both visual images and written descriptions of sexually explicit conduct also takes into consideration the meaning of the word “depicts,” as it is used in Section 7704(d)(4) of CAN-SPAM.⁹⁹ The American Heritage Dictionary of the English Language defines the word “depict” to mean: “(1) to represent in a picture or sculpture; (2) to represent in words; describe.”¹⁰⁰ Thus, while the primary meaning pertains to visual images, the secondary meaning encompasses descriptions in words. It is clear that an unsolicited commercial email could describe sexually explicit conduct in words as easily as it could represent such materials in a picture, and both types of depictions fall within the coverage of Section 7704(d) of the CAN-SPAM Act.¹⁰¹

(ii) *The definition of “character”.* As mentioned above, to help maintain a single standard for the mark and therefore increase the effectiveness of filtering systems, the Final Rule requires that the prescribed mark be in the ASCII character set. Section 316.1(c), therefore, has been expanded to include a definition of the word “character” to mean “an element of the American Standard Code for Information Interchange (“ASCII”) character set.”

IV. Paperwork Reduction Act

The Final Rule does not include a collection of information subject to the

CAN-SPAM’s reference to the Abuse of Children Act (a child pornography statute) does not limit CAN-SPAM’s coverage to only emails involving children.

⁹² Section 2256(2)(A) of the Abuse of Children Act, defines “sexually explicit conduct” to mean “actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person.”

⁹³ Sexually oriented materials is defined under Section 7704(d)(4) of the CAN-SPAM Act as “any material that depicts sexually explicit conduct * * *” (emphasis supplied).

¹⁰⁰ American Heritage Dictionary of the English Language (4th ed. 2000).

¹⁰¹ Numerous commenters expressed concerns over the large number of unsolicited commercial emails they receive that are sexual in nature (i.e., advertisements for sexual enhancing drugs.) Although the ultimate decision as to whether an email message includes a depiction of sexually explicit conduct will be based on a review of the content of the individual email message, it is important to recognize that the CAN-SPAM Act covers only those commercial email messages that depict sexually explicit conduct, as defined in the Act, and not all materials of a sexual nature.

Paperwork Reduction Act (44 U.S.C. 3506; 5 CFR 1320). The mark that the Final Rule requires “is information originally supplied by the federal government.”¹⁰²

V. Regulatory Flexibility Act

The NPR included an initial regulatory flexibility analysis (“IRFA”) under the Regulatory Flexibility Act (“RFA”),¹⁰³ even though the Commission did not expect that the Proposed Rule would have a significant economic impact on a substantial number of small entities. In addition, the Commission invited public comment on the Proposed Rule’s effect on small entities to ensure that no significant impact would be overlooked.¹⁰⁴

This Final Regulatory Flexibility Analysis (“FRFA”) incorporates the Commission’s initial findings, as set forth in the NPR; addresses the comments submitted in response to the IRFA notice; and describes the steps the Commission has taken in the Final Rule to minimize the impact on small entities consistent with the objectives of the CAN-SPAM Act.

A. Succinct Statement of the Need for, and Objectives of, the Final Rule

The Final Rule was created pursuant to the Commission’s mandate under Section 7704(d) of the Act and its authority under Section 7711(a) of the CAN-SPAM Act. In order to inform the recipient that an email message contains sexually oriented materials and to facilitate filtering of such email messages, the Final Rule requires that any person who initiates a commercial email that contains sexually oriented material must: (1) Exclude sexually oriented materials from the subject heading of the email message and include the phrase “SEXUALLY-EXPLICIT:” in the subject heading; and (2) include only the following information in the initially viewable matter of the message: (i) the phrase “SEXUALLY-EXPLICIT:”; (ii) identifier, opt-out, and physical address information; and (iii) instructions on how to access the sexually oriented material.

B. Summary of Significant Issues Raised by the Public Comments in Response to the IRFA

In the IRFA, the Commission sought comment regarding the impact of the Proposed Rule and any alternatives the Commission should consider, with a

¹⁰² See 5 CFR 1320.3(c)(2).

¹⁰³ 5 U.S.C. 601–612.

¹⁰⁴ 69 FR at 4265–66.

⁹² Oney at 2.

⁹³ For example, the Act requires that the Commission go through the rulemaking process to define the meaning of “the primary purpose of an electronic mail message.” See 15 U.S.C. 7702(2)(c). It is possible that this rulemaking will alter the underlying definition of “commercial electronic mail message” as well as the definition of “transactional or relationship messages.”

⁹⁴ 15 U.S.C. 7704(d)(4).

⁹⁵ See, e.g., Oney, Koehn, Nunex, Simon-Kissel.

⁹⁶ USDOJ.

⁹⁷ The Abuse of Children Act, on its face, applies only to visual images of child pornography. But referencing that Act does not limit Section 7704(d) of CAN-SPAM to only visual images. Similarly,

specific focus on the effect of the Rule on small entities. The public comments on the Proposed Rule are discussed above throughout the Statement of Basis and Purpose, as are any changes that have been made in the Final Rule. After reviewing the comments, the Commission does not believe that the Final Rule will unduly burden the entities who sell sexually oriented materials through email messages, or those consumers who purchase such materials.¹⁰⁵

C. Explanation as to Why No Estimate Is Available as to the Number of Small Entities to Which the Final Rule Will Apply

In general, the Final Rule will apply to any person or entity who initiates, originates, or transmits a commercial email message that contains sexually oriented material. Determining a precise estimate of the number of small entities subject to the Proposed Rule, or describing those entities, is not readily feasible because the assessment of whether an email message contains sexually oriented material turns on a number of factors that will require factual analysis on a case-by-case basis. In connection with the NPR and the IRFA, the Commission has not received any comments providing an estimate of the number of small entities to which the Final Rule will apply.

D. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirements of the Final Rule and the Type of Professional Skills That Will Be Necessary To Implement the Final Rule

The Final Rule does not impose any reporting or any specific record-keeping requirements within the meaning of the Paperwork Reduction Act. While one commenter expressed concerns about the additional costs that may be associated with implementing the requirements of the Rule,¹⁰⁶ the Commission does not believe that the requirements of the Rule will create a significant burden on persons or entities who initiate commercial email messages that include sexually oriented material.

¹⁰⁵ See, e.g., Bordeaux ("I am also an [Information Technology] director * * * and I don't see anything in the present rule that would cause significant technical issues."); Potts ("This would be a simple change (I work in IT and know what it would take) that could be accomplished in less than a day."); Orlando at 2; Van Meter at 1. *But see*, Moore at 7 (outlining several ways in which the Rule may burden sellers and purchasers of sexually oriented materials); Oney at 2.

¹⁰⁶ Moore at 5.

The Commission has not received any comments that necessitate modifying its previous description of projected compliance requirements.

E. Discussion of Significant Alternatives Considered by the Commission That Would Accomplish the Stated Objectives of the CAN-SPAM Act and That Would Minimize Any Significant Economic Impact of the Final Rule on Small Entities

Through the NPR, the Commission sought to gather information regarding the economic impact of CAN-SPAM's requirements on all businesses, including small entities. The Commission requested public comment on whether the Proposed Rule would unduly burden either entities selling lawful sexually oriented material through email messages or those consumers who were interested in purchasing sexually oriented material offered to them through email messages; whether this burden is justified by offsetting benefits to consumers; what effect the Rule will have on small entities that initiate commercial email messages that include sexually oriented material; what costs will be incurred by small entities to "implement and comply" with the Rule; and whether there are ways the Rule could be modified to reduce the costs or burdens for small entities while still being consistent with the requirements of the Act.¹⁰⁷ This information was requested by the Commission in an attempt to minimize the Final Rule's burden on all businesses, including small entities.

The Commission does not believe that the Final Rule will create a significant economic impact on persons or entities who initiate a commercial email message that includes sexually oriented material. The Final Rule does not prevent such entities from selling or advertising their materials; it merely limits the confrontational manner in which they currently advertise them. In doing so, it provides the offsetting benefit of allowing email recipients to potentially avoid unwanted exposure to materials that they might find offensive. In addition, the Final Rule imposes only a minor restriction on those individuals who are interested in purchasing sexually oriented materials—their ability to view or purchase such materials is only a mouse click away.

The Commission has not received any comments that lead it to believe that the Final Rule will unduly burden either the entities who sell, or those consumers who purchase, sexually oriented material through email

messages. In any event, the Commission believes that the minimal burden imposed upon such entities is justified by offsetting benefits to consumers, namely, the ability of a consumer to avoid viewing materials that they may consider objectionable or offensive.

List of Subjects in 16 CFR Part 316

Advertising, Business and industry, Computer technology, Consumer protection, Labeling.

■ Accordingly, for the reasons set forth in the preamble, the Commission adds a new part 316 consisting of § 316.1 to title 16 of the Code of Federal Regulations to read as follows:

PART 316—RULES IMPLEMENTING THE CAN-SPAM ACT OF 2003

§ 316.1 Requirement to place warning labels on commercial electronic mail that contains sexually oriented material.

(a) Any person who initiates, to a protected computer, the transmission of a commercial electronic mail message that includes sexually oriented material must:

(1) Exclude sexually oriented materials from the subject heading for the electronic mail message and include in the subject heading the phrase "SEXUALLY-EXPLICIT:" in capital letters as the first nineteen (19) characters at the beginning of the subject line;¹

(2) Provide that the content of the message that is initially viewable by the recipient, when the message is opened by any recipient and absent any further actions by the recipient, include only the following information:

(i) The phrase "SEXUALLY-EXPLICIT:" in a clear and conspicuous manner;²

(ii) Clear and conspicuous identification that the message is an advertisement or solicitation;

(iii) Clear and conspicuous notice of the opportunity of a recipient to decline to receive further commercial electronic mail messages from the sender;

(iv) A functioning return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed, that—

(A) A recipient may use to submit, in a manner specified in the message, a reply electronic mail message or other form of Internet-based communication requesting not to receive future

¹ The phrase "SEXUALLY-EXPLICIT" comprises 17 characters, including the dash between the two words. The colon (:) and the space following the phrase are the 18th and 19th characters.

² This phrase consists of nineteen (19) characters and is identical to the phrase required in § 316.1(a)(1) of this Rule.

commercial electronic mail messages from that sender at the electronic mail address where the message was received; and

(B) Remains capable of receiving such messages or communications for no less than 30 days after the transmission of the original message;

(v) Clear and conspicuous display of a valid physical postal address of the sender; and

(vi) Any needed instructions on how to access, or activate a mechanism to access, the sexually oriented material, preceded by a clear and conspicuous statement that to avoid viewing the sexually oriented material, a recipient should delete the email message without following such instructions.

(b) *Prior affirmative consent.*

Paragraph (a) of this section does not apply to the transmission of an electronic mail message if the recipient has given prior affirmative consent to receipt of the message.

(c) *Definitions.* (1) The definition of the term “affirmative consent” is the same as the definition of that term in the CAN–SPAM Act, 15 U.S.C. 7702(1).

(2) “Character” means an element of the American Standard Code for Information Interchange (“ASCII”) character set.

(3) The definition of the term “commercial electronic mail message” is the same as the definition of that term in the CAN–SPAM Act, 15 U.S.C. 7702(2).

(4) The definition of the term “electronic mail address” is the same as the definition of that term in the CAN–SPAM Act, 15 U.S.C. 7702(5).

(5) The definition of the term “electronic mail message” is the same as the definition of that term in the CAN–SPAM Act, 15 U.S.C. 7702(6).

(6) The definition of the term “initiate” is the same as the definition of that term in the CAN–SPAM Act, 15 U.S.C. 7702(9).

(7) The definition of the term “Internet” is the same as the definition of that term in the CAN–SPAM Act, 15 U.S.C. 7702(10).

(8) The definition of the term “procure” is the same as the definition of that term in the CAN–SPAM Act, 15 U.S.C. 7702(12).

(9) The definition of the term “protected computer” is the same as the definition of that term in the CAN–SPAM Act, 15 U.S.C. 7702(13).

(10) The definition of the term “recipient” is the same as the definition of that term in the CAN–SPAM Act, 15 U.S.C. 7702(14).

(11) The definition of the term “routine conveyance” is the same as the definition of that term in the CAN–SPAM Act, 15 U.S.C. 7702(15).

(12) The definition of the term “sender” is the same as the definition of that term in the CAN–SPAM Act, 15 U.S.C. 7702(16).

(13) The definition of the term “transactional or relationship messages” is the same as the definition of that term in the CAN–SPAM Act, 15 U.S.C. 7702(17).

(14) The definition of the term “sexually oriented material” is the same as the definition of that term in the CAN–SPAM Act, 15 U.S.C. 7704(d)(4).

(d) *Severability.* The provisions of this Rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission’s intention that the remaining provisions shall continue in effect.

Authority: Pub. L. 108–187, 117 Stat. 2699, 15 U.S.C. 7701 *et seq.*

By direction of the Commission.

Donald S. Clark,

Secretary.

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