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<sup>1</sup> 15 U.S.C. 7701-7713.

<sup>12</sup> 15 U.S.C. 7702(3)(A) (Emphasis supplied). The term primary purpose is also used in the Act's definition of "transactional or relationship message." 15 U.S.C. 7702(17).

<sup>13</sup> The Act authorizes the Commission to use notice and comment rulemaking pursuant to the Administrative Procedures Act, 5 U.S.C. 553. 15 U.S.C. 7711.

<sup>14</sup> 15 U.S.C. 7702(17)(B).

<sup>15</sup> 15 U.S.C. 7704(c)(1)(A)-(C).

<sup>16</sup> 15 U.S.C. 7704(c)(2).

<sup>17</sup> 15 U.S.C. 7711(a). This provision excludes from the scope of its general grant of rulemaking authority § 7703 of the Act (relating to criminal offenses) and § 7712 of the Act (expanding the scope of the Communications Act of 1934). In addition, § 7711(b) limits the general grant of rulemaking authority in § 7711(a) by specifying that the Commission may not use that authority to establish "a requirement pursuant to Section 7704(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 Section 7704(a)(5)(A) \* \* \* in any particular part of such a mail message (such as the subject line or body)." Section 7704(a)(5)(A) provides that, among other things, "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. \* \* \*" Thus, § 7711(b) explicitly precludes the Commission from promulgating rule provisions requiring inclusion of any specific words, characters, marks, or labels in a commercial email message, or inclusion of the identification required by § 7704(a)(5)(A)(i) in any particular part of a commercial email message.

<sup>18</sup> 69 FR 11776 (Mar. 11, 2004). The ANPR also solicited comment on questions related to four reports that the Commission must submit to Congress within the next two years: a report on establishing a "Do Not Email" Registry that was submitted on June 15, 2004; a report on establishing a system for rewarding those who supply information about CAN-SPAM violations to be submitted by September 16, 2004; a report setting forth a plan for requiring commercial email to be identifiable from its subject line to be submitted by June 15, 2005; and a report on the effectiveness of CAN-SPAM to be submitted by December 16, 2005.

carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in Section 406(b) of said Act." 15 U.S.C. 45(a)(2) (footnotes omitted). In addition, the FTC does not have jurisdiction over any entity that is not "

<sup>30</sup> Although some senders may use a "teaser" subject line from which advertising or promoting a good or service may not be apparent until the recipient views the body of the message, as explained below, § 7704(2) of CAN-SPAM places a limit on this practice. Unlike teasers in conventional advertising, where contextual features such as program breaks or layout likely alert consumers that the teaser has a commercial purpose, consumers viewing subject lines in an email browser have no other cues that they are about to view an advertisement.

<sup>31</sup> See, e.g., *FTC v. Brian Westby, et al.*, Case No. 03 C 2540 (N.D. Ill. Amended Complaint filed Sept. 16, 2003) (FTC alleged in part that Defendants used deceptive subject lines to expose unsuspecting consumers to sexually explicit material).

<sup>32</sup> 15 U.S.C. 45(a). The express language of § 7704(2)(a) of CAN-SPAM tracks the deception standard developed in the Commission's cases and enforcement statements, thereby prohibiting subject line content that is likely to mislead a consumer acting reasonably under the circumstances about a material fact regarding the content or subject matter of the message. *Cliffdale Associates, Inc.*, 103 F.T.C. 164-5. The framework for analyzing alleged deception is explicated in an Appendix to this

decision, reprinting a letter dated Oct. 14, 1983, from the Commission to The Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (1984) ("Deception Statement"). Note, however, that § 7704(a)(6) of the Act establishes a definition of "materially" that is distinct from, but consistent with, the definition articulated in the Deception Statement. The § 7704(a)(6) definition applies only to § 7704(a)(1), which prohibits header information that is "materially false or materially misleading."

<sup>33</sup> *Id.* at 176. *Thiret v. FTC*, 183 Fed. Cl. 1101 (2001).

<sup>38</sup> Subparagraph (b) of proposed § 316.3 restates the five categories of “transactional or relationship messages” identified in § 7702(17)(A) of CAN-SPAM. *See* note 27.

<sup>39</sup> *See* Comerica; Venable; Wells Fargo.

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<sup>47</sup>The “reasonable consumer” standard focuses on the ordinary or average consumer, not any particular consumer. Deception Statement at 178. If a particular act or practice is directed to a particular audience, then the Commission assesses the overall sophistication and understanding of that particular group in determining the reaction of the “reasonable consumer.” *Id.* at 178, 180. For a more detailed explanation of the “reasonable consumer” standard, *see* Deception Statement at 176–87.

<sup>48</sup>*Cliffdale* at 176.

<sup>49</sup>*Id.*

<sup>50</sup>*Id.*

more than 33 $\frac{1}{3}$ %” of the message’s overall content, which MPAA claims is consistent with consumer expectations). *See also* Marzuola.

<sup>58</sup> Go Daddy; Nextel; MBNA.

<sup>59</sup> *See, e.g.*, MPAA, whose “percentage” proposal would measure the amount of email “space” or “volume” dedicated to commercial content.

<sup>60</sup> AeA instead favored a “net impression” test using the sender’s intent as the perspective.

<sup>61</sup> IAC instead favored a standard that considered the sender’s intent, a reasonable consumer’s perception, and the subject line.

<sup>62</sup> Danko.

<sup>68</sup> PMA. *See also* Coalition; ERA; AT&T; ICC.

<sup>69</sup> It is well-settled that the Commission need not show intent to prove a violation of § 5 of the FTC Act. *See, e.g., FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168 (9th Cir. 1997); *In re National Credit Management Group, LLC*, 21 F. Supp. 2d 424 (D.N.J. 1998); *FTC v.*

<sup>63</sup> *See* statement from Sen. Wyden cited above.

<sup>64</sup> *See, e.g.*, DMA; PMA; Visa.

<sup>65</sup> CBA; SIA; Wells Fargo.

<sup>66</sup> ERA; MBNA; USCC.

<sup>67</sup> NAR.

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<sup>73</sup> See Teevan; Smith; Lane; ClickZ; Lenox.

<sup>74</sup> Under CAN-SPAM, commercial messages sent based on the recipient's "affirmative consent" need not provide the "clear and conspicuous identification that the message is an advertisement or solicitation" required by § 7704(a)(5)(A)(i); and a recipient's affirmative consent provided subsequent to an opt-out request overrides that previous request. 15 U.S.C. 7704(a)(5)(A)(i), 7704(a)(4)(B).

<sup>75</sup> See, e.g., Dobo-Hoffman ("If ANYONE is going to potentially generate income in any way, the email is commercial."); DeHotman ("Any language which could be interpreted [sic] as an inducement to buy, sell, or support an action or position should be considered commercial.").

<sup>76</sup> See 15 U.S.C. 7702(2)(A).

<sup>77</sup> See EFF; Cox; Davis; Anderson; Lykins. See also M&F; SIA; Wells Fargo; CBA; Cox; MCI; MPAA; Hekimian-Williams (arguing that electronic

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newsletters should not be regu557 0 7(argu3idtSntteBT/F3 1 Tf11 0 0(to11a 0S776commercial messages MCI; )as 1 Tf0.55





<sup>101</sup> Several commenters argued that the “net impression” analysis is vague and arbitrary. *See, e.g.,* ACB; EFF; SIA; MBNA; MBA. The Commission disagrees. It is not vague because it directs marketers to clear-cut and fundamental signifiers of an email message’s primary purpose: the subject line and the message’s content. It is not arbitrary because it derives from the Commission’s long-standing approach to the scrutiny of advertising under its deception authority. One commenter claimed that a “net impression” standard could be “potentially draconian.” This commenter was concerned that a message could inadvertently have a commercial primary purpose when that was not the sender’s intent. *See Visa.* Nevertheless, the Commission believes it unlikely that the proposed standard would apply in ways that would take an email marketer by surprise. The record thus far does not provide support for the argument that an email message could inadvertently be considered “commercial” in light of the fact that marketers retain connadvere9Nmat the proposey surprise. Thest t2

Comments containing confidential material must be filed in paper form, and the first page of the document must be clearly labeled "Confidential."<sup>111</sup>

To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the <https://secure.commentworks.com/ftc-canspam/weblink>. You may also visit <http://www.regulations.gov> to read this proposed Rule, and may file an electronic comment through that Web site. The Commission will consider all comments that [regulations.gov](http://www.regulations.gov) forwards to it.

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, 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>.

#### **IV. Communications by Outside Parties to Commissioners or Their Advisors**

Written communications and  
summary for  
Thermanu0696oraomments that rand

<sup>111</sup> 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).

<sup>112</sup> Specifically, the authority for the mandatory rulemaking "defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message" is 15 U.S.C. 7702(2)(c).

<sup>113</sup> One provision, § 7704(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."

<sup>114</sup> 15 U.S.C. 7702(16)(A); Proposed Rule § 316.2(n).

<sup>115</sup> 15 U.S.C. 7702(9).

<sup>116</sup> 15 U.S.C. 7702(9) and (15).

<sup>117</sup> These numbers represent the size standards for most retail and service industries (\$6 million total receipts) and manufacturing industries (500 employees). A list of the SBA's size standards for all industries can be found at <http://www.sba.gov/size/summary-what.html>.

<sup>118</sup> See <http://www.ecommercetimes.com/story/35004.htm>.





adding a new part 316 to read as follows:

**PART 316 - CAN SPAM RULE**

Sec.

316.1 Scope.

316.2 Definitions.

316.3 Primary purpose.

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

316.5 Severability.

**Authority:** 15 U.S.C. 7701-7713.

**316.1 Sc .**

This part implements the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act"), 15 U.S.C. 7701-7713.

**316.2 D . . .**

(a) 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).

(b) "Character" means an element of the American Standard Code for Information Interchange ("ASCII") character set.

(c) 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).

(d) 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).

(e) 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).

(f) 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).

(g) 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).

(h) 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).

(i) 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).

(j) 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).

(k) The definition of the term "routine

<sup>1</sup> 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.

(i) The phrase “SEXUALLY-EXPLICIT:” in a clear and conspicuous manner;<sup>2</sup>

(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 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.FF13  
stam8stam8(: XPLICIT:)Tj/Fd 606 consent.stam8

<sup>2</sup> This phrase consists of nineteen (19) characters and is identical to the phrase required in § 316.4(a)(1).