

FEDERAL TRADE COMMISSION**16 CFR Part 316**

RIN 3084-AB38

CAN-SPAM Rule**AGENCY:** Federal Trade Commission (“Commission” or “FTC”).**ACTION:** Rule review; request for public comments.

SUMMARY: The Commission is requesting public comments on its rule implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act (the “CAN-SPAM Rule” or “Rule”). The Commission is soliciting comments about the efficiency, costs, benefits, and regulatory impact of the Rule as part of its systematic review of all current Commission regulations and guides. All interested persons are hereby given notice of the opportunity to submit written data, reviews, and arguments concerning the Rule.

DATES: Written comments concerning the CAN-SPAM Rule must be received no later than August 31, 2017.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write: “CAN-SPAM Rule, 16 CFR part 316, Project No. R711010,” on your comment, and file your comment online at <http://www.ftc.gov/oc/privacyandsecurity/act/16cfr316>.

by following the instructions on the web-based form. If you prefer to file your comment on paper, write “CAN-SPAM Rule, 16 CFR part 316, Project No. R711010,” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC-5610 (Annex B), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex B), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Christopher E. Brown, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW., Washington, DC 20580, (202) 326-2825.

SUPPLEMENTARY INFORMATION:**I. Background**

Enacted in 2003, and effective since January 1, 2004, the Controlling the

Assault of Non-Solicited Pornography and Marketing Act (“CAN-SPAM Act” or “Act”),¹ regulates the transmission of all commercial electronic mail (“email”) messages. The Act specifically prohibits certain commercial email acts and practices² and establishes specific requirements for the content of these messages³ to ensure that recipients have the right to opt out of receiving them.⁴ The Act explicitly directed the Commission to issue regulations “defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message.”⁵ The Act also mandated that the “Commission in consultation with the Attorney General shall 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.”⁶ In addition to these mandatory rulemakings, the Act also provides discretionary authority for the Commission to issue regulations concerning certain of the Act’s other definitions and provisions.⁷

Pursuant to the Act’s directive, the Commission promulgated a rule styled the Label for Email Messages Containing Sexually Oriented Material (“Adult Labeling Rule”) in 2004.⁸ The Adult Labeling Rule provides 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 phrase “SEXUALLY-EXPLICIT: ”; and (2) provide that the content of the email message that is initially viewable when the message is opened include only certain specified information, and not include any sexually oriented materials.⁹ The Adult Labeling Rule also exempts situations where a recipient has given his or her prior consent to receipt of a sexually oriented message.¹⁰

In 2005, the Commission issued CAN-SPAM Rule provisions that define the relevant criteria to determine the “primary purpose” of an email message.¹¹ To facilitate this determination, the Rule describes four categories of messages—(1) messages that contain only commercial content, (2) messages that contain both commercial content and “transactional or relationship content,” (3) messages that contain both commercial content and content that is neither commercial nor “transactional or relationship,” (4) messages that contain only “transactional or relationship content”—and provides criteria for determining the primary purpose of such email messages.¹² Under the Rule, if an email message contains only commercial content, the “primary purpose” of the message shall be deemed to be commercial.¹³ Similarly, if an email message contains only transactional or relationship content, the “primary purpose” of the message shall be deemed to be “transactional or relationship.”¹⁴ If an email message contains both commercial content and transactional or relationship content, then the primary purpose of the message shall be deemed to be commercial if: (1) A recipient reasonably interpreting the subject line of the email message would likely conclude that the message contains the commercial advertisement or promotion of a commercial product or service; or (2) the email message’s transactional or relationship content does not appear, in whole or in substantial part, at the beginning of the

¹ 15 U.S.C. 7701-7713.

² Section 7704(a)(1) of the Act prohibits transmission of any email that contains false or misleading header or “from” line information. Section 7704(a)(2) prohibits the transmission of commercial email messages with false or misleading subject headings.

³ Section 7704(a)(5) prohibits the initiation of a commercial email message unless it contains three disclosures: (1) Clear and conspicuous identification that the message is an advertisement or solicitation; (2) clear and conspicuous notice of the opportunity to decline to receive further commercial email messages from the sender; and (3) a valid physical postal address of the sender.

⁴ Section 7704(a)(3) requires that a commercial email message contain a functioning return email address or similar Internet-based mechanism for recipients to use to “opt out” of receiving future commercial email messages. Section 7704(a)(4) prohibits the sender, or others acting on the sender’s behalf, from initiating a commercial email to a recipient more than ten business days after the recipient has opted out.

⁵ 15 U.S.C. 7702(2)(C). 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.

⁶ 15 U.S.C. 7704(d)(3).

⁷ 15 U.S.C. 7702(17)(B); 7704(c)(1)(A)–(C); 7704(c)(2); 7711(a).

⁸ 16 CFR 316.4 (Apr. 19, 2005).

⁹ 16 CFR 316.4 (Apr. 19, 2005).

⁹ 16 CFR 316.4 (a). The Adult Labeling Rule was originally numbered section 316.1 when it was promulgated on April 19, 2004. In the August 13, 2004, Notice of Proposed Rulemaking, the only change proposed to the Adult Labeling Rule was to renumber it as section 316.4. The Commission requested comment on this proposed change and did not receive any responsive comments.

¹⁰ 16 CFR 316.4(b).

¹¹ 16 CFR 316.4 (Apr. 19, 2005).

¹² 16 CFR 316.3.

¹³ 16 CFR 316.3(a)(1).

¹⁴ 16 CFR 316.3(b).

body of the message.¹⁵ In addition to the subject line criterion applicable to all dual-purpose messages, the Rule also describes another criterion to determine the primary purpose of a message that contains commercial content and content that is neither commercial nor “transactional or relationship” in nature.¹⁶ In such a case, the primary purpose of the message still would be deemed “commercial” if a recipient reasonably interpreting the body of the message would likely conclude that the primary purpose of the message is to advertise or promote a product or service. The Rule lists several factors relative to this inquiry, including the placement of content that advertises or promotes a product or service at or near the beginning of the body of the message; the proportion of the message dedicated to such content; and how color, graphics, type size, and style are used to highlight commercial content.¹⁷

The Rule also clarifies that the definitions of certain terms taken from the Act and appearing in the Rule are prescribed by particular referenced portions of the Act. These terms include: “affirmative consent,” “commercial electronic mail message,” “electronic mail address,” “initiate,” “Internet,” “procure,” “protected computer,” “recipient,” “routine conveyance,” “sender,” “sexually oriented material,” and “transactional or relationship message.”¹⁸ The Rule also includes a severability provision that provides that if any portion of the Rule is found to be invalid, the remaining portions will survive, the Rule also

¹⁵ 16 CFR 316.3(a)(2).

¹⁶ 16 CFR 316.3(a)(3).

¹⁷ 16 CFR 316.3(a)(3)(ii).

¹⁸ 16 CFR 316.2(a), (c)–(n).

¹⁹ 16 CFR 316.6. The severability provision was previously numbered section 316.5 when it was promulgated in January 19, 2005, and applies to the entire Final Rule.

²⁰ 73 FR 29654 (May 21, 2008).
²¹ 15 U.S.C. 7702(17)(B) and 7704(c)(1)–(2).

(d) How would this modification affect the benefits to consumers?
2. As discussed above, the Rule tracks the CAN-SPAM Act in prohibiting the sending of commercial email to a recipient more than ten business days after the recipient opts out. Should the Commission modify the Rule to reduce the time-period for processing opt-out requests to less than ten business days?

(a) Why or why not?
(b) What evidence supports such a modification?
(c) How would this modification affect the costs the Rule imposes on businesses, including small businesses?

(d) How would this modification affect the benefits to consumers?
3. Should the Commission modify the Rule to specify additional activities or practices that constitute aggravated violations?

(a) Why or why not?
(b) What evidence supports such a modification?
(c) How would this modification affect the costs the Rule imposes on businesses, including small businesses?
(d) How would this modification affect the benefits to consumers?

IV. Request for Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before August 31, 2017. Write "CAN-SPAM Rule, 16 CFR part 316, Project No. R711010," on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at <http://www.ftc.gov>.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at: <http://www.ftc.gov>, by following the instructions on the web-based form. If this Notice appears at <http://www.ftc.gov> / #!, you also may file a comment through that Web site.

If you prefer to file your comment on paper, write "CAN-SPAM Rule, 16 CFR part 316, Project No. R711010" on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC-5610 (Annex B), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the

Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex B), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible FTC Web site at <http://www.ftc.gov>, you are solely responsible for making sure that your comment does not include any sensitive personal information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number; passport number, financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "trade secret or any commercial or financial information which . . . is privileged or confidential"—as provided in section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. www.ftc.gov FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the public FTC Web site—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from the FTC Web site, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC Web site to read this document and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The

Commission will consider all timely and responsive public comments that it receives on or before August 31, 2017. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see <http://www.ftc.gov/privacy>.

By direction of the Commission.
Donald S. Clark,
[FR Doc. 2017-13471 Filed 6-27-17; 8:45 am]
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FEDERAL TRADE COMMISSION

16 CFR Part 410

RIN 3084-AB44

Trade Regulation Rule Concerning Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets

AGENCY: Federal Trade Commission.
ACTION: Advance notice of proposed rulemaking (ANPR); request for public comment.

SUMMARY: As part of its systematic review of all current FTC rules and guides, the Commission requests public comment on the overall costs, benefits, necessity, and regulatory and economic impact of the FTC's Trade Regulation Rule concerning Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets ("Rule" or "Picture Tube Rule").

DATES: Comments must be received on or before August 31, 2017.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write: "16 CFR part 410—Picture Tube Rule Review, File No. P174200" on your comment, and file your comment online at <http://www.ftc.gov>.

by following the instructions on the web-based form. If you prefer to file your comment on paper, write "16 CFR part 410—Picture Tube Rule Review, Matter No. P174200" on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC-5610 (Annex B), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW.,