Proprietary or Confidential Business Information

Do not file in the docket information that you consider to be proprietary or confidential business information. Send or deliver this information directly to the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this document. You must mark the information that you consider proprietary or confidential. If you send the information on a disk or CD ROM, mark the outside of the disk or CD ROM and also identify electronically within the disk or CD ROM the specific information that is proprietary or confidential.

Under 14 CFR 11.35(b), when we are aware of proprietary information filed with a comment, we do not place it in the docket. We hold it in a separate file to which the public does not have access, and place a note in the docket that we have received it. If we receive a request to examine or copy this information, we treat it as any other request under the Freedom of Information Act (5 U.S.C. 552). We process such a request under the DOT procedures found in 49 CFR part 7.

Background

On July 14, 2004, the Federal Aviation Administration (FAA) issued Notice No. 04–10, Use of Certain Portable Oxygen Concentrator Devices Onboard Aircraft (69 FR 42324, 7/14/2004). Comments to that document were to be received on or before August 13, 2004.

In a letter dated August 4, 2004, ATA requested that the FAA extend the comment period for Notice No. 04–10 for 60 days. ATA stated that the NPRM came as a surprise and that they had not completed testing the Airsep Lifestyle portable oxygen concentrator (POC). ATA also feels that the NPRM raises questions of important technical, operational, and legal issues, such as the potential impact of having to train employees on the operation of POC devices. On August 6, 2004, we received a letter from the Regional Airline Association (RAA) supporting ATA's request to extend the comment period for 60 days. RAA specifically cited the uncertainty that the Airsep device would not affect navigation or communication systems onboard regional aircraft.

In response, two separate letters were received on August 5, 2004, objecting to ATA's request to extend the comment period on the NPRM. Gary Ewart, Director of the American Thoracic Society, wrote to inform the FAA that he had personally met with ATA and other concerned parties for over 3 years and that the NPRM was not unexpected in the physician, patient, oxygen device, or airline communities. Phillip Porte, Executive Director of the National Association for Medical Direction of Respiratory Care, and Jon Tiger, President of the National Home Oxygen Patients Association, jointly submitted their opposition to extending the comment period for the NPRM. They believe the 30 day comment period was enough time to develop comments and that any extension would unnecessarily delay promulgation of the final regulation.

We have considered the request for extension presented by ATA and weighed that request against the work done by the Department of Transportation, the opposition referenced above, and the momentum of the rulemaking, and the specific proposal. We agree that it is important for ATA and its members to review and consider this rule, but we feel that a 60-day extension of the comment period would be excessive.

Notice No. 04–10 makes very clear that this is an enabling proposal. No operator will be required to permit passengers to carry a POC device onboard an aircraft. If an operator decides to allow a passenger to use the Airsep (or any future approved device), it would have to determine if the device would interfere with the navigation or communication systems on its own. We also recognize that an operator would have to take several steps to train crewmembers and make appropriate administrative changes, but examining those potential actions is not necessary before our proposal is completed.

We will extend the comment period for Notice No. 04–10 for an additional 15 days only. We believe the total of 45 days is adequate for all interested parties to comment on this proposal. Absent unusual circumstances, the FAA does not anticipate any further extension of the comment period for this rulemaking.

Extension of Comment Period

In accordance with § 11.29(c) of Title 14, Code of Federal Regulations, the FAA has reviewed the petitions made by the Air Transport Association for extension of the comment period to Notice No. 04–10. The petitioner has a substantive interest in the proposed rule and the FAA has determined that a short extension of the comment period is consistent with the public interest.

Accordingly, the comment period for Notice No. 04–10 is extended until August 30, 2004.

Issued in Washington, DC, on August 10, 2004.

James W. Whitlow,

Deputy Chief Counsel.

[FR Doc. 04–18645 Filed 8–11–04; 11:50 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Part 316

[Project No. R411008]

RIN 3084–AA96

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

AGENCY: Federal Trade Commission (FTC).

ACTION: Notice of proposed rulemaking; request for public comment.

SUMMARY: In this document, the Federal Trade Commission (the ''Commission'' or ''FTC'') proposes rules to implement the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (''CAN–SPAM Act'' or ''Act''). Sections 7702(2)(C) and 7711(a) of the Act direct the FTC to prescribe rules, within 12 months after December 16, 2003, defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message and making such other modifications as the Commission deems appropriate to implement the provisions of the Act.

This document invites written comments on issues raised by the proposed Rule and seeks answers to the specific questions set forth in Section VII of this NPRM.

DATES: Written comments will be accepted until Monday, September 13, 2004. Due to the time constraints of this rulemaking proceeding, the Commission does not contemplate any extensions of this comment period or any additional periods for written comment or rebuttal comment.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to ''CAN–SPAM Act Rulemaking, Project No. R411008'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed to the following address: Federal Trade Commission, CAN–SPAM Act, Post Office Box 1030, Merrifield, VA 22116–1030. Please note that courier and overnight deliveries cannot be accepted at this address. Courier and overnight deliveries should be delivered to the following address:

Federal Trade Commission/Office of the Secretary, Room H–159, 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments containing confidential material must be filed in paper form, as explained in the Supplementary Information section. Comments filed in electronic form should be submitted by clicking on the following weblink: *https://secure.commentworks.com/ftc-canspam/* and following the instructions on the web-based form.

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 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 *www.ftc.gov.* As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

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

SUPPLEMENTARY INFORMATION:

I. Background

A. CAN–SPAM Act of 2003

On December 16, 2003, the President signed into law the CAN–SPAM Act.[1] The Act, which took effect on January 1, 2004, imposes a series of new requirements on the use of commercial electronic mail (''email'') messages. In addition, the Act gives federal civil and criminal enforcement authorities new tools to combat unsolicited commercial email (''UCE'' or ''spam''). The Act also allows state attorneys general to enforce its civil provisions, and creates a private right of action for providers of Internet access services.

In enacting the CAN–SPAM Act, Congress made the following determinations of public policy, set forth in § 7701(b) of the Act:

(1) There is a substantial government interest in regulation of commercial electronic mail on a nationwide basis;

(2) Senders of commercial electronic mail should not mislead recipients as to the source or content of such mail; and

(3) Recipients of commercial electronic mail have a right to decline to receive additional commercial electronic mail from the same source.

Based on these policy determinations, Congress set forth in §§ 7704(a) and (b) of the CAN–SPAM Act certain acts and practices that are unlawful in connection with the transmission of commercial email messages, including those practices which are aggravated violations that compound the available statutory damages when alleged and proven in combination with other CAN–SPAM violations. Section 7704(a)(1) of the Act prohibits transmission of any email that contains false or misleading header or ''from'' line information, and clarifies that a header will be considered materially misleading if it fails to identify accurately the computer used to initiate the message because the person initiating the message knowingly uses another protected computer to relay or retransmit the message in order to disguise its origin.[2] The Act also prohibits false or misleading subject headings,[3] and requires a functioning return email address or similar Internet-based mechanism for recipients to use to ''opt-out'' of receiving future commercial email messages.[4] The Act prohibits the sender, or others acting on the sender's behalf, from initiating a commercial email to a recipient more than 10 business days after the recipient has requested not to receive additional emails from the sender,[5] and prohibits sending a commercial email message without providing 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.[6] Section 7704(b) of the Act specifies four aggravated violations: address harvesting, dictionary attacks, automated creation of multiple email accounts, and relaying or retransmitting through unauthorized access to a protected computer or network.[7]

The Act authorizes the Commission to enforce violations of the Act in the same manner as an FTC trade regulation rule.[8] Section 7706(f) authorizes the attorneys general of the states to enforce compliance with certain provisions of § 7704(a) of the Act by initiating enforcement actions in federal court, after serving prior written notice upon the Commission when feasible.[9] Finally, CAN–SPAM authorizes providers of Internet access services to bring a federal court action for violations of certain provisions of §§ 7704(a), (b), and (d).[10]

Congress directed the Commission to issue regulations, not later than 12 months after December 16, 2003, ''defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message.'' [11] The term ''primary purpose'' is incorporated in the Act's definition of the key term ''commercial electronic mail message.'' Specifically, ''commercial electronic mail message'' encompasses ''any electronic mail message the *primary purpose* of which is the commercial advertisement or

[1] 15 U.S.C. 7701–7713.

[2] 15 U.S.C. 7704(a)(1).

[3] 15 U.S.C. 7704(a)(2).

[4] 15 U.S.C. 7704(a)(3).

[5] 15 U.S.C. 7704(a)(4).

[6] 15 U.S.C. 7704(a)(5).

[7] 15 U.S.C. 7704(b). The Act's provisions relating to enforcement by the states and providers of Internet access service create the possibility of increased statutory damages if the court finds a defendant has engaged in one of the practices specified in § 7704(b) while also violating § 7704(a). Specifically, §§ 7706(f)(3)(C) and (g)(3)(C) permit the court to increase a statutory damages award up to three times the amount that would have been granted without the commission of an aggravated violation. Sections 7706(f)(3)(C) and (g)(3)(C) also provide for this heightened statutory damages calculation when a court finds that the defendant's violations of § 7704(a) were committed ''willfully and knowingly.''

[8] Sections 7706(a) and (c) of the CAN–SPAM Act provide that a violation of the Act shall be treated as a violation of a rule issued under § 18(a)(1)(B) of the FTC Act. 15 U.S.C. 57a(a)(1)(B).

[9] 15 U.S.C. 7706(f). Specifically, the state attorneys general may bring enforcement actions for violations of §§ 7704(a)(1), 7704(a)(2), or 7704(d). The states may also bring an action against any person who engages in a pattern or practice that violates §§ 7704(a)(3), (4), or (5).

[10] 15 U.S.C. 7706(g). Section 7704(d) of the Act requires warning labels on email containing sexually oriented material. 15 U.S.C. 7704(d). The Commission recently promulgated its final rule regarding such labels: ''Label for Email Messages Containing Sexually Oriented Material'' (''Sexually Explicit Labeling Rule''). 69 FR 21024 (Apr. 19, 2004). The Commission is integrating the provisions of that existing rule into the proposed Rule, renumbering certain provisions as follows: former §§ 316.1(a) and (b) appear at § 316.4(a) and (b) in the proposed Rule; former § 316.1(c) [definitions] appears at § 316.2 in the proposed Rule; and former § 316.1(d) [severability] appears at 316.5 and applies to the entire rule, not only the Sexually Explicit Labeling Rule provisions.

[11] 15 U.S.C. 7702(2)(C).

promotion of a commercial product or service (including content on an Internet web site operated for a commercial purpose).'' [12] In addition to the mandatory rulemaking regarding the definition of ''primary purpose,'' CAN–SPAM also provides discretionary authority for the Commission to issue regulations concerning certain of the Act's other definitions and provisions.[13] Specifically, the Commission is authorized to:

- Modify the definition of the term ''transactional or relationship message'' under the Act ''to the extent that such modification is necessary to accommodate changes in electronic mail technology or practices and accomplish the purposes of [the] Act''; [14]
- Modify the 10-business-day period prescribed in the Act for honoring a recipient's opt-out request; [15]
- Specify activities or practices as aggravated violations (in addition to those set forth as such in § 7704(b) of CAN–SPAM) ''if the Commission determines that those activities or practices are contributing substantially to the proliferation of commercial electronic mail messages that are unlawful under subsection [7704(a) of the Act]''; [16] and
- ''issue regulations to implement the provisions of this Act.'' [17]

[12] 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).

[13] 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.

[14] 15 U.S.C. 7702(17)(B).

[15] 15 U.S.C. 7704(c)(1)(A)–(C).

[16] 15 U.S.C. 7704(c)(2).

[17] 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.

B. Advance Notice of Proposed Rulemaking

On March 11, 2004, the Commission published an Advance Notice of Proposed Rulemaking (''ANPR'') which solicited comments on a number of issues raised by the CAN–SPAM Act, most importantly, the definition of ''primary purpose.'' In addition, the ANPR requested comment on the modification of the definition of ''transactional or relationship message,'' on the appropriateness of the 10-business-day opt-out period that had been set by the Act, on additional aggravated violations that might be appropriate, and on implementation of the Act's provisions generally.[18] The ANPR set a date of April 12, 2004, to submit comments. In response to petitions from several trade associations, the Commission announced on April 7 that it would extend the comment period to April 20, 2004.[19]

In response to the ANPR, the Commission received approximately 13,517 comments from representatives from a broad spectrum of the online commerce industry, trade associations, individual consumers, and consumer and privacy advocates.[20] Commenters generally applauded CAN–SPAM as an effort to stem the flood of unsolicited and deceptive commercial email that has threatened the convenience and efficiency of online commerce. Commenters also offered several suggestions for the Commission's consideration in drafting regulations to implement the Act. Suggestions with respect to the Commission's ''primary purpose'' rulemaking and CAN–SPAM's definition of ''commercial electronic mail message'' and the Commission's reasons for accepting or rejecting them are discussed in detail in Section II. Because the ''primary purpose'' proceeding must meet a tight statutory deadline, the Commission will address issues of discretionary rulemaking upon which comment was solicited in the ANPR in a future **Federal Register** notice that the Commission anticipates will be published shortly.

C. Notice of Proposed Rulemaking

Based on the comments received in response to the ANPR, as well as the Commission's law enforcement experience, the Commission proposes in this NPRM regulations establishing criteria for determining ''the primary purpose'' of an email message. The Commission invites written comment on the questions in Section VII to assist the Commission in determining whether the proposed Rule provisions strike the appropriate balance, maximizing protections for email recipients while avoiding the imposition of unnecessary compliance burdens on legitimate industry.

II. Analysis of Comments and Discussion of the Proposed Rule

A. Section 316.1—Scope of the Regulations

Section 316.1 of the proposed Rule states that this part implements the CAN–SPAM Act. The Commission received a number of comments in response to the ANPR asking that the Commission expressly exempt from CAN–SPAM those entities that are not subject to the FTC's jurisdiction under the FTC Act (''FTC Act''), 15 U.S.C. 41 *et seq.*[21]

Section 7706(d) of the CAN–SPAM Act makes clear that the Commission may not initiate an enforcement action under the Act against any person or entity over which the Commission lacks jurisdiction under the FTC Act.[22] The

[18] 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. The comments related to the ''Do Not Email'' registry are discussed in the Commission's June 15, 2004 report. The Commission will consider the relevant comments received in response to the ANPR in preparing the remaining reports.

[19] 69 FR 18851 (Apr. 9, 2004). The associations seeking additional time were the Direct Marketing Association, the American Association of Advertising Agencies, the Association of National Advertisers, the Consumer Bankers Association, and the Magazine Publishers of America. The associations indicated that an extension was necessary because of the religious holidays and the need to consult more fully with their memberships to prepare complete responses.

[20] This figure includes comments received on the ''Do Not Email'' Registry, which had a comment period that ended March 31, 2004. Appendix A is a list of commenters and the acronyms used to identify each commenter who submitted a comment in response to the ANPR, including comments on the ''Do Not Email'' Registry, the proposed reward program, the proposal for labeling commercial email, and the efficacy of the Act. A full list of commenters, as well as a complete record of this proceeding, may be found on the Commission's web site: *http://www.ftc.gov/os/comments/canspam/index.htm.*

[21] *See, e.g.*, ASAE; NSBA; Walters; ASTC; UNC; Independent.

[22] Under § 5(a)(2) of the FTC Act, the Commission does not have jurisdiction over ''banks, savings and loan institutions described in section 18(f)(3) [of the FTC Act], Federal credit unions described in section 18(f)(4) [of the FTC Act], common carriers subject to the Acts to regulate commerce, air

Continued

CAN–SPAM Act does not expand or contract the Commission's jurisdiction or the scope of the proposed Rule's coverage. Limits on the FTC's jurisdiction, however, do not affect the ability of other federal agencies, the states, or providers of Internet access service to bring actions under the Act against any entity within their jurisdiction as authorized.[23] Thus, many persons and entities not within the FTC's jurisdiction may still be subject to an enforcement action for violating the CAN–SPAM Act.

B. Section 316.2—Definitions

Section 316.2 of the proposed Rule includes the definitions of a number of key terms of the Rule.[24] Thirteen of these terms are defined by references to the corresponding sections of the Act; the definition of the fourteenth term—''character''—is repeated verbatim from the Sexually Explicit Labeling Rule. Section 316.2 tracks § 316.1(c) of the Sexually Explicit Labeling Rule.[25]

The Commission believes that by referencing the definitions found in the Act, and any future modifications to those definitions, the Rule will accurately and effectively track any future changes made to the definitions in the Act. Thus, with the sole exception of the addition of the definition of ''character,'' the Commission has defined key terms of the proposed Rule by reference to the Act without any substantive changes to any definition.

C. Section 316.3—Primary Purpose

Section 7702(2)(C) of the CAN–SPAM Act directs the Commission to ''issue regulations pursuant to section 13 [of the Act] defining the relevant criteria to facilitate the determination of *the primary purpose* of an electronic mail message.'' (Emphasis supplied.) The term ''primary purpose'' comes into play in the Act's definition of ''commercial electronic mail message,'' which is ''any electronic mail message *the primary purpose* of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet web site operated for a commercial purpose).'' [26] Section 7702(2)(B) expressly excludes from the Act's definition of ''commercial electronic mail message'' messages that meet the definition of ''transactional or relationship message,'' [27] which also incorporates the term ''primary purpose.'' Generally, CAN–SPAM applies only to messages that fall within the Act's definition of ''commercial electronic mail message.'' [28]

1. Proposed Primary Purpose Provision

Proposed § 316.3 sets forth criteria for determining the ''primary purpose'' of an email message.[29] Because the Commission does not believe that a single standard can adequately cover the various ways that senders present commercial content in email messages, this proposal includes three sets of criteria that apply in specified circumstances. All three sets of criteria are based on a single fundamental principle: determining ''the primary purpose'' of an email message must focus on what the message's recipient would reasonably interpret the primary purpose to be.

First, proposed § 316.3(a)(1) states that if an email message contains *only* content that advertises or promotes a product or service (''commercial content''), then the ''primary purpose'' of the message would be deemed to be commercial.

Second, proposed § 316.3(a)(2) covers email messages that contain both commercial content and content that falls within one of the categories listed in § 7702(17)(A) of the Act (''transactional or relationship content''). The ''primary purpose'' of such an email message would be deemed to be commercial if either: (1) a recipient reasonably interpreting the subject line of the message would likely conclude that the message advertises or promotes a product or service; *or* (2) the message's transactional or relationship content does *not* appear at or near the beginning of the message.

Third, proposed § 316.3(a)(3) covers email messages that contain both commercial content and content that is neither commercial nor ''transactional or relationship.'' In such a case, the primary purpose of the message would be deemed to be commercial if either: (1) a recipient reasonably interpreting the subject line of the message would likely conclude that the message advertises or promotes a product or service; *or* (2) 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. Proposed § 316.3(a)(3)(ii) sets out certain factors as illustrative of those relevant to this interpretation, including the placement of commercial content at or near the beginning of the body of the message; the proportion of the message dedicated to commercial content; and how color, graphics, type size, and style are used to highlight commercial content.

Proposed § 316.3(b) restates subparagraph (A) of the Act's definition

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 ''organized to carry on business for its own profit or that of its members.'' 15 U.S.C. 44. Finally, the FTC does not have jurisdiction over the business of insurance to the extent that such business is regulated by state law. *See* § 2 of the McCarran-Ferguson Act, 15 U.S.C. 1012(b).

[23] Sections 7706(b) and (c) of the CAN–SPAM Act authorize federal agencies other than the FTC to enforce the Act against various entities outside the FTC's jurisdiction.

[24] Most of the terms listed in § 316.2 occur in the text of the proposed Rule; several of them are not in the Rule text, but are defined in the proposed 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 § 316.2(h)] because the Act defines and includes it in the term ''initiate.''

[25] Section 316.2 contains definitions of fourteen (14) terms, renumbered from § 316.1(c) of the Sexually Explicit Labeling Rule. These fourteen (14) terms are: ''affirmative consent;'' ''character;'' ''commercial electronic mail message;'' ''electronic mail address;'' ''electronic mail message;'' ''initiate;'' ''Internet;'' ''procure;'' ''protected computer;'' ''recipient;'' ''routine conveyance;'' ''sender;'' ''sexually oriented material;'' and ''transactional or relationship message.''

[26] 15 U.S.C. 7702(2)(A) (Emphasis supplied).

[27] Section 7702(17)(A) of the Act defines a ''transactional or relationship message'' as ''an electronic mail message the primary purpose of which is—

(i) to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;

(ii) to provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient;

(iii) to provide—

(I) notification concerning a change in the terms and features of;

(II) notification of a change in the recipient's standing or status with respect to; or

(III) at regular periodic intervals, account balance information or other type of account statement with respect to, a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender;

(iv) to provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or

(v) to deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.''

[28] 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.''

[29] These criteria will amplify and inform CAN–SPAM's definition of ''commercial electronic mail message,'' as contemplated by §§ 7702(2)(C) and 7711(a). The proposed Rule provision specifically addresses how CAN–SPAM applies to email messages that contain both ''commercial'' and ''transactional or relationship'' content. The latter term is defined in § 7702(17)(A).

of ''transactional or relationship message'' for clarity in applying the criteria that would be established in proposed § 316.3(a).

a. The Function of the Subject Line in Determining the Primary Purpose of an Email Message

The Commission believes that the subject line is important because consumers reasonably use the information it contains to decide whether to read a message or delete it without reading it. For this reason, *bona fide* email senders likely use the subject line to announce or provide a preview of their messages.[30] These email senders, when they are advertising or promoting a product or service, will likely highlight that fact in their subject lines so that recipients may decide whether to read the messages.

i. Deception in Subject Lines

The Commission is well aware that, in contrast, spammers frequently misrepresent or fail to disclose the commercial purpose of their messages in the subject line in order to induce recipients to open messages they otherwise would delete without opening.[31] Section 7704(a)(2) of CAN–SPAM, however, prohibits the use of ''a subject heading * * * [that] would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact *regarding the contents or subject matter of the message* (consistent with the criteria used in enforcement of Section [5 of the FTC Act]).'' (Emphasis supplied.) Thus, CAN–SPAM specifically applies to the subject line of covered email messages the deception jurisprudence the Commission has developed under § 5(a) of the FTC Act.[32] Accordingly, actual deception need not be shown, only that a representation, omission, or practice is likely to mislead.[33] The ''acting reasonably under the circumstances'' aspect of the analysis considers the representation from the perspective of the ordinary consumer to whom it is directed.[34] A material fact ''is one which is likely to affect a consumer's choice of or conduct regarding a product. In other words, it is information that is important to consumers.'' [35]

CAN–SPAM's focus on subject lines that misrepresent the content or subject matter of the message is in accord with case law developed under § 5 of the FTC Act with respect to deceptive ''door-openers.'' The subject line of an email message serves as a door-opener—an initial contact between a sender and a recipient that typically makes an express or implied representation about the purpose of the contact. Before the recipient views the body of an email message, he typically may view the subject line that, as the designation ''subject line'' implies, announces what the email message concerns. Some senders may be tempted to use misrepresentations in the subject line to induce recipients to open their messages. These senders would be well advised that CAN–SPAM prohibits using the subject line as an initial contact with consumers to get their attention by misrepresenting the purpose of the contact.[36]

ii. Subject Lines in Email Messages that Contain Only Content Advertising or Promoting a Product or Service

In view of the legal obligation under both CAN–SPAM and § 5 of the FTC Act for senders to ensure that the subject lines of their email messages are not deceptive, the Commission believes that when the body of an email message contains only content that advertises or promotes a product or service, then the subject line of that message must be consistent with that content. A non-deceptive subject line of such a message is therefore not a separate signifier of the primary purpose of the email; it complements and is consistent with the body of the email message. Therefore, the proposed criterion covering such messages does not include a separate element addressing the subject line.

iii. Subject Lines in Email Messages That Contain Both Commercial and Noncommercial Content (''Dual-Purpose Messages'')

In the case of a dual-purpose message with a subject line that a recipient would reasonably interpret as signaling a commercial message, under the proposed criteria, the message would be deemed to be commercial, regardless of whether the body of the message contained—in addition to commercial content—either: content that is ''transactional or relationship;'' or content that is neither commercial nor ''transactional or relationship.'' [37] This criterion is supported by the Commission's belief, discussed above, that *bona fide* email senders, when they are advertising or promoting a product or service, likely highlight that fact in their subject lines so that recipients may decide whether to read the messages. Thus it is reasonable to deem an email message to have a commercial primary purpose if the sender highlights the message's commercial content in the subject line.

b. Analysis of the Body of a Dual-Purpose Message To Determine the Message's Primary Purpose

With respect to dual-purpose email messages, if a recipient reasonably interpreting the subject line of the message would *not* likely conclude that the message advertises or promotes a product or service, then the Commission proposes two additional criteria relevant to determining a message's ''primary purpose.''

[30] 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.

[31] *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).

[32] 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.''

[33] *Id.* at 176. *Thiret* v. *FTC,* 512 F.2d 176, 180 (10th Cir. 1975); *Ger-Ro-Mar, Inc.* v. *FTC,* 518 F.2d 33, 36 (2d Cir. 1975); *Resort Car Rental System, Inc.* v. *FTC,* 518 F.2d 962, 964 (9th Cir. 1975).

[34] *Cliffdale* at 177–8.

[35] *Id.* at 182 (citations omitted).

[36] ''[W]hen the first contact between a seller and a buyer occurs through a deceptive practice, the law may be violated even if the truth is subsequently made known to the purchaser.'' Deception Statement at 180. *See also Carter Products, Inc.* v. *FTC,* 186 F.2d 821, 824 (5th Cir. 1951); *Exposition Press, Inc.* v. *FTC,* 295 F.2d 869, 873 (2d Cir. 1961), *cert. denied* 370 U.S. 917 (1962); *National Housewares, Inc.,* 90 F.T.C. 512, 588 (1977); *Resort Car Rental* v. *FTC,* 518 F.2d 962, 964 (9th Cir. 1975); *Encyclopaedia Britannica, Inc.,* 87 F.T.C. 421, 497 (1976), *aff'd sub nom. Encyclopaedia Britannica, Inc.* v. *FTC,* 605 F.2d 964 (7th Cir. 1979), *cert. denied* 445 U.S. 934 (1980).

[37] This ''subject line'' discussion is not intended to require that every email message with any commercial content must use a subject line that refers to the message's commercial content. Depending on the facts of a given situation, a dual-purpose message may use a subject line that is not deceptive and does not refer to commercial content.

i. Dual-Purpose Messages Containing Commercial and ''Transactional or Relationship'' Content

The Commission proposes a criterion to apply to messages containing both commercial content and transactional or relationship content. That criterion states that the ''primary purpose'' of the message shall be deemed to be commercial if the message's content pertaining to one of the functions listed in subparagraph (b)(1)–(5) of the proposed Rule provision [38] (*i.e.*, the message's transactional or relationship content) does *not* appear at or near the beginning of the message.

Commenters argued that CAN–SPAM's ''primary purpose'' standard should distinguish between such dual-purpose messages—which arise from a business relationship between the sender and the recipient—and dual-purpose messages that are basically ''cold-call'' contacts where no relationship exists between the sender and recipient. These commenters claimed that senders of messages with transactional or relationship content will not abuse their ability to communicate with customers via email by sending unnecessary transactional or relationship messages larded with commercial content, or by continuing to send unwanted messages to customers who have expressed a desire not to receive the sender's commercial messages.[39]

One commenter noted that the Act's legislative history supports treating as ''transactional or relationship'' messages that contain both commercial and transactional or relationship content:

> Our goal here is not to discourage legitimate online communications between businesses and their customers. Senator Burns and I have no intention of interfering with a company's ability to use e-mail to inform customers of warranty information, provide account holders with monthly account statements, and so forth.[40]

The Act's use of the phrase ''primary purpose'' in the ''commercial'' and ''transactional or relationship'' definitions establishes that a message can contain both types of content and still be regulated as either commercial or transactional or relationship. The Act does not specify that a ''transactional or relationship message'' is one containing *only* transactional or relationship content.

Commenters' arguments regarding messages containing commercial and transactional or relationship content, as well as the legislative history quoted above, persuade the Commission that the proposed ''primary purpose'' criteria should distinguish between messages that contain transactional or relationship content and those that do not. The Commission's proposed criteria give clear guidance to senders of messages that contain both commercial and transactional or relationship content: if the subject line criterion is not determinative, such dual-purpose messages have a commercial primary purpose unless the transactional or relationship content appears at or near the beginning of the message.[41]

There is no evidence on the record establishing that senders of *bona fide* transactional or relationship content would suffer any detriment under a CAN–SPAM regime calling for transactional or relationship content to be placed before commercial content in an email message.[42] Moreover, the harm that CAN–SPAM is meant to address—primarily, the time and resources wasted in dealing with unwanted unsolicited commercial messages—probably does not result from messages that begin with transactional or relationship content, followed by commercial content, if any.[43] Congress's decision largely to exempt transactional or relationship messages from CAN–SPAM requirements supports this determination. CAN–SPAM's definition of ''transactional or relationship message'' includes specific categories of messages that Congress determined to be ones that consumers want to receive. These categories include vital information such as bank account statements, product recalls, transaction confirmations, and warranty information. For messages containing both commercial and transactional or relationship content to be considered ''transactional'' rather than commercial, the Commission's proposed ''primary purpose'' criteria would require only that senders of such messages place their transactional or relationship content ''at or near the beginning of the message.'' This would allow recipients quickly to identify messages providing transactional or relationship content without first having to wade through commercial content. The Commission seeks comment and information regarding this approach to messages containing both commercial and transactional or relationship content.

ii. Dual-Purpose Messages That Contain Both Commercial Content and Content That Is Neither Commercial Nor Transactional/Relationship

In addition to the subject line criterion that would apply to all dual-purpose messages under the Commission's proposed ''primary purpose'' criteria, a separate criterion would apply to messages containing both commercial content and other content that is neither commercial nor transactional/relationship. Even if a recipient reasonably interpreting the subject line of the message would *not* likely conclude that the message advertises or promotes a product or service, the primary purpose of the message still would be deemed to be 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. Factors relevant to this interpretation include, but are not necessarily limited to, the placement of commercial content at or near the beginning of the body of the message; the proportion of the message dedicated to commercial content; and how color, graphics, type size, and style are used to highlight commercial content.

The criterion for this type of dual-purpose message derives from the Commission's traditional analysis of advertising under § 5 of the FTC Act.[44] The Commission assesses claims made in advertising by, among other things, evaluating *the entire document.* ''[I]n advertising, the Commission will examine 'the entire mosaic, rather than each tile separately.' '' [45] ''[T]he Commission looks to the impression made by the advertisement as a whole.'' [46] The Commission draws on this approach in its proposed criteria to

[38] 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.

[39] *See* Comerica; Venable; Wells Fargo.

[40] Verizon (citing Statement of Sen. Wyden, 149 Cong. Rec. S5208 (Apr. 10, 2003)).

[41] The Commission rejects an argument made by several commenters that CAN–SPAM establishes that messages with *any* transactional or relationship content are necessarily ''transactional or relationship messages.'' *See, e.g.*, NFCU; Verizon; ACLI; SIIA. The view espoused by these commenters is not supported by CAN–SPAM's ''transactional or relationship'' definition, which indicates that a message is ''transactional or relationship'' only if *the primary purpose* of the message is ''transactional or relationship.'' 15 U.S.C. 7702(17)(A) (Emphasis supplied).

[42] Without this requirement, some senders might be tempted to use dual-purpose messages that begin with commercial content and close with transactional or relationship content as a means of taking advantage of their business relationship with a recipient to send commercial messages that do not comply with CAN–SPAM.

[43] *See* 15 U.S.C. 7701 (Congressional findings and policy of the CAN–SPAM Act).

[44] *See* Deception Statement.

[45] Deception Statement at 181, citing and quoting *FTC* v. *Sterling Drug,* 317 F.2d 669, 674 (2nd Cir. 1963).

[46] Deception Statement at 181, citing and quoting *FTC* v. *American Home Products,* 695 F.2d 681, 688 (3rd Cir. 1982).

determine whether a dual-purpose email message is commercial when it contains both commercial content and content that is neither commercial nor transactional/relationship. The Commission believes this approach would provide guidance to email marketers while preventing spammers from evading CAN–SPAM by adding noncommercial content to an email sales pitch.

This proposed criterion is rooted firmly in traditional Commission legal analysis. Marketers have long been under an obligation to evaluate their advertising material from the reasonable consumer's perspective and determine what impression their material makes on consumers.[47]

In enforcing CAN–SPAM and the primary purpose criteria, the Commission will approach the issue of whether the body of an email message, taken as a whole, is primarily commercial in the same way it approaches the issue of whether certain claims are made in a challenged advertisement. ''In cases of implied claims, the Commission will often be able to determine meaning through an examination of the representation itself, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transactions.'' [48] In other situations, extrinsic evidence—such as expert opinion, consumer testimony, copy tests, surveys, or any other reliable evidence of consumer interpretation—may be necessary to make this determination.[49] In all instances, the Commission will carefully consider any extrinsic evidence that is introduced.[50]

2. Overview of ''Primary Purpose'' Comments

In response to the ANPR, the Commission received approximately 220 comments addressing ''primary purpose'' issues. Many individual consumers opined that a message has a commercial primary purpose if it contains *any* commercial content. Other consumers expressed the view that CAN–SPAM should regulate only unsolicited messages and should not apply to messages sent with the recipient's consent or where there is an established business relationship between the sender and the recipient.

Many commenters noted that criteria based upon the ''importance'' of a message's commercial content relative to any noncommercial content would not, on their own, provide adequate guidance.[51] According to these commenters, such criteria would need additional substance and structure to provide industry with the guidance it needs to comply with the Act's requirements. Many of these commenters—particularly email marketers—advocated criteria based on the sender's intent.

Other commenters supported criteria based on the ''net impression'' of a message, which was a possible approach suggested in the questions included in the ANPR. Under this approach, the primary purpose of an email message would be determined by assessing the message from the recipient's point of view, not the sender's. Many of these comments endorsed the ''net impression'' elements suggested in the ANPR—chiefly, placement and prominence of commercial content within the message. A number of comments also proposed that if a message's subject line refers to a promotion or advertisement, then the message likely has a commercial primary purpose. Each of these proposals is discussed below.

3. Commenters' Suggestions Not Adopted as Part of the Commission's Proposed Standard for Determining the ''Primary Purpose'' of an Email Message

In addition to suggesting several possible approaches to determine the ''primary purpose'' of an email message, the ANPR sought to elicit alternatives. The commenters responded with approximately 25 proposals. Some commenters were concerned primarily with advocating an objective standard for determining an email message's primary purpose. A second group advocated the sender's intent as the characteristic that determines an email's primary purpose. A third group focused on certain attributes that, in their view, rendered messages possessing them commercial. A fourth group discussed characteristics that, in their view, placed messages exhibiting those characteristics outside the commercial category.[52] The following sections discuss each of these groups.

a. Comments Discussing Use of an ''Objective Standard'' as a ''Primary Purpose'' Criterion

Many comments from industry members criticized some or all of the ''primary purpose'' standards suggested in the ANPR questions.[53] A common thread throughout these critiques was that any ''subjective'' standard would provide inadequate guidance to industry members who need to determine (1) whether CAN–SPAM applies to their messages, and, if so, (2) whether their messages comply with the law.[54] These commenters recommended that the Commission adopt some form of ''objective'' test for determining the primary purpose of a message.[55]

Many advocates of an objective standard supported a ''proportion of content'' standard. Under such a proposal, a message would have a commercial primary purpose if its commercial content comprised, for example, at least 25%,[56] 33⅓%,[57] or

[47] 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.

[48] *Cliffdale* at 176.

[49] *Id.*

[50] *Id.*

[51] The ANPR suggested three possible approaches, based respectively on whether the commercial purpose was (1) ''more important than all of the email's other purposes combined;'' (2) ''more important than any other single purpose of the email, but not necessarily more important than all other purposes combined;'' or (3) ''more than incidental.'' The ANPR also identified three other approaches that might be used to determine ''the primary purpose'' of an email: (1) A ''net impression'' analysis; (2) a ''financial support'' analysis; and (3) a ''sender'' analysis. The ANPR also asked whether there were ''other ways to determine whether a commercial advertisement or promotion in an email is the primary purpose of the email.'' 69 FR at 11779–80.

[52] A few commenters proposed standards for determining when an email is ''spam,'' such as: sending a message in bulk; including a tracking device in a message; ''spoofing'' identifying information in a message; or committing an aggravated violation when sending a message. *See, e.g.*, Bighorse; Sewing; Gitzendanner; Emmers; Just. The Commission appreciates that some commenters respond negatively to messages with these characteristics, but the proposals they advanced are too narrow as criteria and probably unworkable to determine the primary purpose of an email message. Additionally, a few commenters argued that a message is commercial if it is not ''transactional'' or personal, or if the message begins with an opt-out mechanism. *See* RealTime; Practice; BestPrac; Hawkins. Other commenters suggested that a message should be considered ''commercial'' only if it refers to an offer for a specific product or service. *See* MCI. *Cf.* Reed. The Commission does not believe that these proposals adequately reflect Congressional intent or provide the most useful guidance in establishing criteria to determine a message's primary purpose. Finally, two consumers argued that the government should not regulate email marketing. *See* Quinn; Ewing. Nevertheless, in CAN–SPAM, Congress has determined that commercial email is subject to regulation.

[53] Several consumers also supported this view. *See* Lunde; Ord; Mead; Marzuola. These suggested standards and commenters' criticisms are discussed in more detail below.

[54] *See, e.g.*, MBNA; MasterCard; Nextel; SIA.

[55] *See, e.g.*, DMA.

[56] Mead; Goth.

[57] MPAA (proposing a safe harbor under which a message will not have a commercial primary purpose if its commercial content ''constitutes no

Continued

51% [58] of the message's total content. Supporters of these ''percentage'' proposals claimed that a quantitative standard had the advantage of providing a clear standard while preserving marketers' flexibility in message design.[59]

On the other hand, a number of commenters criticized such a ''proportion'' standard as unworkable. AeA wrote that ''[d]etermining whether a message is a commercial promotion or not based on pre-set proportions is not a viable alternative, because setting a formula * * * would be arbitrary and unreliable.'' AeA noted that, with respect to messages with both commercial and transactional content—*e.g.*, ''account balance information''—a ''proportion'' standard could yield different results depending on whether or not a recipient's account reflected a lot of activity.[60] Presumably, this is because the amount of space in a message occupied by transactional content would increase as account activity increased. If so, a message reflecting a lot of account activity could be considered transactional and a message reflecting little account activity could be considered commercial even if both messages contained the same amount of commercial content. IAC opposed a bright-line test which would ''likely be easy for those intent on violating the statute to exploit and circumvent.'' [61]

The Commission declines to adopt a rigidly mechanical ''proportion'' standard for determining the primary purpose of a message. A standard that, for example, counts the lines of commercial versus noncommercial content is not responsive to the countless ways to market products and services via email. Such an approach would likely miss entirely the nuances that characterize any communication, including email. Moreover, as one commenter noted, a percentage-based standard is inadequate when non-commercial content is presented as text and commercial content is in the form of a Web site URL.[62] As IAC noted, such a standard could be easily sidestepped by email marketers seeking to evade CAN–SPAM. The Commission is particularly persuaded by this critique.

As was explained above, the Commission's proposed criteria distinguish between messages that package commercial content with transactional or relationship content and those that package commercial content with some other type of content. The Commission believes that senders of the former category of dual-purpose message are far less likely to attempt to evade CAN–SPAM. Moreover, messages in the former category provide content that Congress has legislatively determined to be particularly important to recipients.[63] The Commission's proposed ''primary purpose'' criteria for these messages would require them to provide transactional or relationship content at or near the beginning of the message in order to qualify as ''transactional or relationship'' rather than commercial.

IAC's cautionary comment, however, supports the Commission's view that messages that contain both commercial content and content that is neither commercial nor transactional/relationship merit a different standard. Such messages may or may not deliver content that is important to recipients; Congress has made no legislative determination on this issue. Therefore, the proposed criterion does not rely entirely on placement of the noncommercial content, although placement is one element to consider in determining the net impression. The Commission's proposed criteria with respect to these messages looks to the net impression created by the message.

b. Comments Discussing a ''Primary Purpose'' Criterion Based on Sender's Intent, Such as a ''But For'' Standard

As a whole, industry members expressed greatest support for a ''primary purpose'' standard based on the sender's intent. Most of these commenters framed this proposal as a ''but for'' test, under which a message would not be considered ''commercial'' if it would have been sent in any event because of its noncommercial content. These comments framed the ''but for'' test in several ways, such as asking whether a message would have been sent but for its commercial purpose [64] or its non-commercial purpose.[65] Other comments refined the standard and stated that the relevant question is whether a message would have been sent but for *particular* commercial content [66] or *any* commercial content.[67] Several other commenters proposed that the sender's intent should be part of a ''net impression'' approach to determining a message's primary purpose.

Several commenters argued that Congress's use of the phrase ''primary purpose'' evidences its ''clear intent to establish a standard which evaluates the status of the email based on the sender's objective and motivation.'' [68] The Commission is not persuaded by this argument. CAN–SPAM refers to the primary purpose of the *message*, not of the sender. While one way to determine a message's purpose could be to assess the sender's intent, a more appropriate way is to look at the message from the recipient's perspective.[69] Several commenters made this point. One urged the Commission ''to refrain from adopting any 'primary purpose' test that seeks to prioritize the subjective motivations of email senders.'' [70]

Based largely on the analytical approach the Commission takes with respect to advertising—which looks at claims in marketing material from the consumer's perspective rather than the marketer's [71]—the Commission declines, at this time, to adopt an approach that instead considers the advertiser's intent. Nevertheless, as is discussed in more detail below, the Commission recognizes that some spammers could attempt to evade CAN–SPAM by deceptively portraying commercial content as noncommercial content.[72]

more than 33⅓%'' of the message's overall content, which MPAA claims is consistent with consumer expectations). *See also* Marzuola.

[58] Go Daddy; Nextel; MBNA.

[59] *See, e.g.*, MPAA, whose ''percentage'' proposal would measure the amount of email ''space'' or ''volume'' dedicated to commercial content.

[60] AeA instead favored a ''net impression'' test using the sender's intent as the perspective.

[61] IAC instead favored a standard that considered the sender's intent, a reasonable consumer's perception, and the subject line.

[62] Danko.

[63] *See* statement from Sen. Wyden cited above.

[64] *See, e.g.*, DMA; PMA; Visa.

[65] CBA; SIA; Wells Fargo.

[66] ERA; MBNA; USCC.

[67] NAR.

[68] PMA. *See also* Coalition; ERA; AT&T; ICC.

[69] 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. *Patriot Alcohol Testers, Inc.*, 795 F. Supp. 851 (D. Mass. 1992); *FTC* v. *Affordable Media, LLC*, 1999 U.S. App LEXIS 13130, 1999–1 Trade Cas. (CCH) ¶ 72,547 (11th Cir. Jun. 15, 1999). Consistent with that principle, the Commission does not believe that, generally, the sender's intent would serve as a workable indicator of an email message's primary purpose. Nevertheless, the Commission discusses below the possibility that spammers may be tempted to use a ''deceptive format'' to trick recipients into thinking that an email message does not have a commercial primary purpose. In that discussion, the Commission asks whether the sender's intent should be added to the proposed ''primary purpose'' criteria to establish clearly that spammers may not evade CAN–SPAM in this manner.

[70] Cox. *See also* Microsoft; NetCoalition.

[71] *See generally* Deception Statement.

[72] Spammers could claim that such messages do not have a commercial primary purpose under the Commission's proposed criteria if, due to a sender's use of a deceptive advertising format, a recipient reasonably interpreting the body of the message would not likely conclude that the primary purpose of the message is to advertise or promote a product or service. *See* the ''net impression'' discussion below, including note 99, for the Commission's conclusion that such messages may still be deemed to have a commercial primary purpose under the Commission's proposed criteria.

The Commission requests comment and information on whether it should consider the sender's intent to advertise or promote a product or service within the criteria for determining the primary purpose of email messages that contain both commercial content and content that is neither commercial nor transactional/relationship.

c. Commenters' Proposals for Determining When a Message Has a Commercial Primary Purpose

Several commenters supported a standard that treated any unsolicited message (not sent with the recipient's consent) as commercial.[73] The regulatory scheme incorporated into the CAN–SPAM Act, however, obviates such an approach. The Act defines ''affirmative consent'' and describes how ''consent'' affects CAN–SPAM compliance.[74] It is clear from the Act that Congress did not intend for the primary purpose of an e-mail message to be determined based on whether a message was unsolicited. The Commission's proposed Rule is consistent with the Act's treatment of ''consent.''

Another proposal widely supported by consumers was to treat the primary purpose of an e-mail message as commercial if the message contains *any* commercial content.[75] CAN–SPAM specifies, however, that a ''commercial electronic mail message'' is a message ''*the primary purpose* of which is the commercial advertisement or promotion of a product or service. * * *'' [76] (Emphasis supplied.) That language establishes that mere inclusion of any commercial content is not enough by itself to bring an e-mail message within the ambit of the Act's coverage. Therefore, the Commission declines to adopt this proposed standard.

At the opposite extreme, some commenters urged that a message can be deemed to have a commercial primary purpose only if it contains *nothing but* commercial content.[77] EFF argued that ''when the ad or promotional aspects of the message are inextricably intertwined with noncommercial aspects, then the message is noncommercial for purposes of First Amendment analysis,'' and therefore likely beyond the reach of CAN–SPAM's requirements and prohibitions.[78] EFF criticized the standards posited in the ANPR that were based on the ''importance'' of commercial content and on the ''net impression.'' Cox's extensive comment developed the analysis more fully. Cox discussed the potential First Amendment implications of the ''primary purpose'' rule on the company's web sites that offer consumers the opportunity to register online to receive a variety of free content and information services, such as electronic newsletters and weather alerts. Cox argued that:

> [t]o avoid encroaching on core constitutionally-protected expression, Cox urges the Commission to refrain from adopting any ''primary purpose'' test that seeks to prioritize the subjective motivations of e-mail senders. Instead, the FTC should clarify that the ''primary purpose'' of an e-mail message that contains *substantial* editorial content is to convey constitutionally-protected speech—regardless of whether the message is supported by advertising. As discussed below, such an objective test is consistent with the intent of Congress and would harmonize the CAN–SPAM Act with the requirements of the First Amendment. (Emphasis supplied.)

The Commission believes that the proposed ''primary purpose'' standard achieves the goal that Cox espouses, and avoids the constitutional problems that prompt Cox's cautionary comments. The Commission is mindful of First Amendment limitations, but believes that the law is clear that commercial content generally may be regulated without violating the First Amendment.[79]

Under the ''primary purpose'' standard, an electronic newsletter that combines editorial or informational content and advertising would be governed by the proposed criteria for dual-purpose messages. If the newsletter satisfies any element of the ''transactional or relationship message definition—for example, if the newsletter constitutes ''deliver[y of] goods or services * * * that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender'' [80]—then it would not be considered to have a commercial primary purpose unless (1) a recipient reasonably interpreting the subject line of the message would likely conclude that the message advertises or promotes a product or service, or (2) the transactional or relationship content does *not* appear at or near the beginning of the message.

If the newsletter does not satisfy any element of the ''transactional or relationship message'' definition—for example, a message combining unrequested informational and commercial content—then it would not be considered to have a commercial primary purpose unless (1) a recipient reasonably interpreting the subject line of the message would likely conclude that the message advertises or promotes a product or service, or (2) 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.[81] In the case of a *bona fide* electronic newsletter, application of this analysis is likely to result in the conclusion that the message does not have a primary purpose that is commercial.

Articulating a concern noted by other commenters,[82] Cox opined that the Commission should adopt a standard ''that retains enough flexibility to allow for 'common sense' judgments'' necessary to ensure that unscrupulous 'spammers' cannot sidestep CAN–SPAM through the ruse of *faux* newsletters. As Cox put it, spammers should not be able to:

> immunize commercial messages from the requirements of the CAN–SPAM Act merely by including an incidental reference to a public issue or an editorial comment in a commercial sales solicitation. Thus, for example, spammers using commercial email messages to advertise discounts on generic Viagra tablets could not avoid the Act's requirements simply by larding their solicitations with an appeal for expanded Medicare prescription drug benefits.

[73] *See* Teevan; Smith; Lane; ClickZ; Lenox.

[74] 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).

[75] *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 interpereted [sic] as an inducement to buy, sell, or support an action or position should be considered commercial.'').

[76] *See* 15 U.S.C. 7702(2)(A).

[77] *See* EFF; Cox; Davis; Anderson; Lykins. *See also* M&F; SIA; Wells Fargo; CBA; Cox; MCI; MPAA; Hekimian-Williams (arguing that electronic newsletters should not be regulated by CAN–SPAM as commercial messages).

[78] *See also* MPAA; OPA; Courthouse (arguing that the First Amendment prohibits the Commission from treating messages with editorial content as commercial speech, even if such content is supported by advertising).

[79] *See, e.g., Central Hudson Gas & Electric Corp* v. *Public Service Comm'n. of N.Y.*, 447 U.S. 557 (1980).

[80] 15 U.S.C. 7702(17)(A)(v).

[81] As is explained above, factors illustrative of those relevant to this interpretation include the placement of content advertising or promoting 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.

[82] *See, e.g.*, ABM; CASRO.

Again, the Commission's proposed ''primary purpose'' criteria should provide the requisite flexibility that Cox advocates. The Commission seeks comment on how email messages with both commercial and noncommercial content should be treated.

d. Commenters' Proposals for Determining When a Message Does NOT Have a Commercial Primary Purpose

A significant number of comments, especially from industry members, proposed a number of criteria that would establish when a message is *not* commercial. Many of these comments urged that certain categories of messages should be exempted from the Act's ''commercial electronic mail message'' definition.

Messages From Nonprofit Entities—One category of messages that commenters recommended should *not* be treated as ''commercial'' under the Act are those sent by nonprofit entities. The nature and subject of email messages from nonprofit entities encompass a wide range, and the treatment of such messages under the Act elicited a variety of opinions. Some consumers argued for a broad interpretation of ''commercial'' that would extend the term to nonprofit entities.[83] NAA espoused a similar position: ''[A] not-for-profit university advertising grandfather clocks to alumni probably is sending a commercial advertisement that should be covered by the regulations, regardless of the sender's not for profit status.'' [84]

Nonprofit commenters took the opposite position. Some argued for a broad exemption, asserting that messages from nonprofit entities either should not be regulated at all, or should be treated as ''transactional or relationship messages.'' [85] Other nonprofit entities argued for a narrower exemption, which would be limited to messages ''primarily related to one or more of the organization's duly authorized tax exempt nonprofit purposes.'' [86] A third set of nonprofit entities urged that messages between a nonprofit entity and its members should not be regulated as commercial,[87] arguing for a nonprofit-based exemption that would apply to messages sent to both current and former members.[88]

As a preliminary matter, the Commission notes that, under the FTC Act, the Commission does not have jurisdiction over entities that do not operate for their own profit or the profit of their members.[89] Nevertheless, this limit on the FTC's jurisdiction does not exclude these entities totally from the ambit of CAN–SPAM. States and providers of Internet access service have a right of action under the Act. Thus, if a nonprofit organization were to send messages that could be deemed to have a primary purpose that is commercial, conceivably the organization could face the necessity of defending against an action brought by a state or provider of Internet access service based on the failure to abide by the requirements and prohibitions of CAN–SPAM. While such a scenario may seem unlikely, it could possibly arise.

At least one nonprofit argued that § 7701 of the Act—setting out Congressional findings and policy—reveals an intent to leave nonprofit entities unregulated. These commenters, however, are unable to point to any statement in § 7701 of CAN–SPAM (or, indeed, in any other provision) expressly exempting nonprofit organizations from coverage.

Some nonprofit entities argued that the multiple references to the word ''commercial'' in the definition of ''commercial electronic mail message'' reflect an intent to distinguish between for-profit and nonprofit messages.[90] The Commission is not persuaded by this argument. CAN–SPAM does not set up a dichotomy between ''commercial'' and ''nonprofit'' messages. Rather, it focuses on messages whose primary purpose is to *sell* something, as distinguished from ''transactional or relationship messages,'' informational and editorial messages, and (relevant to nonprofit entities) messages seeking a charitable contribution.

Under the Commission's proposed ''primary purpose'' criteria, it seems likely that only nonprofit entities' messages whose strongest, most prominent content advertises or promotes a product or service—*i.e.*, seeks to induce a purchase of goods or services—would be deemed to have a commercial primary purpose and therefore be covered by the Act. On the issue of messages between a nonprofit entity and its members, it is possible—or even likely—that such messages are ''transactional or relationship messages'' under § 7702(17)(A)(v), depending on the facts of a particular membership. Even if such messages also include commercial content, they will not have a commercial primary purpose unless (1) a recipient reasonably interpreting the subject line of the message would likely conclude that the message advertises or promotes a product or service, or (2) the transactional or relationship content does not appear at or near the beginning of the message. Consistent with CAN–SPAM, the proposed ''primary purpose'' criteria apply to all email messages with commercial content, regardless of whether sent by a nonprofit entity or a for-profit entity.

Arguments Advanced to Treat Other Types of Messages As Not Having a Primary Purpose That Is Commercial—Some businesses sought an exemption from CAN–SPAM for specialized messages sent in a narrow set of circumstances. For example, BMI argued that the primary purpose of its ''commercial email message[s] to enforce bona fide copyright rights of its affiliates'' is not commercial even if the messages also promote a music licensing service.[91] The Commission believes that specific criteria addressing narrow categories of messages like BMI's would create an unwieldy standard.[92] Moreover, such an approach is unnecessary in light of the criteria proposed by the Commission, which apply the same test to all email messages. A message containing commercial content as well as content that is neither commercial nor transactional/relationship has a commercial primary purpose if a recipient reasonably interpreting the subject line of the message would likely conclude that the message advertises or promotes a product or service, or 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.[93] One main advantage of the Commission's proposed ''primary purpose'' criteria is that they work well with respect to all

[83] *See* K. Krueger; Sawyer.

[84] NAA.

[85] *See* NADA; KSU.

[86] ASAE. *See also* IAAMC; AWWA; ABA; PMA; ASTC; Bankers.

[87] *See* NSBA; AVHA; NTA; PAR.

[88] *See, e.g.*, NTA.

[89] 15 U.S.C. 44. For purposes of this discussion, the term ''nonprofit entities'' refers to entities that do not operate for their own profit or that of their members.

[90] *See* NSBA.

[91] BMI.

[92] Similarly, the Commission rejects the proposal that the Act exempt business-to-business messages. *See* MMS; DSA. The comments did not present a persuasive reason to treat messages to businesses differently from messages to consumers. The Congressional findings in § 7701(a) of the Act clearly evidence Congress's concern with the economic injury to businesses caused by unsolicited emails. *See, e.g.*, 15 U.S.C. 7701(a)(4) and (6).

[93] As is explained above, factors illustrative of those relevant to this interpretation include the placement of content advertising or promoting 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.

messages that may be subject to CAN–SPAM, regardless of the subject matter or the sender of the message.

Standards Mentioned in the ANPR Questions but Not Included as Part of the Commission's Proposed Criteria—Standards Based on ''Importance''—Questions included in the ANPR to aid in eliciting comment made reference to three separate standards for determining an email's primary purpose based on the importance of the commercial content of an email message: whether the commercial content was, respectively, ''more important than all of the email's other purposes combined,'' ''more important than any other single purpose of the email, but not necessarily more important than all other purposes combined,'' or ''more than incidental to the email.''

Several commenters—mostly industry representatives—supported the first of these approaches.[94] The two other standards based on the importance of the commercial content received little support from commenters. The Commission received many more comments, especially from businesses, opposing as unhelpfully subjective all standards mentioned in the ANPR that were based on importance of the commercial content of an email message. These comments typically asserted that an objective standard would provide more useful and certain guidance for email marketers.[95]

The Commission is persuaded that an importance-based standard, without more, probably would not adequately ''facilitate the determination of the primary purpose of an electronic mail message.'' Any such standard would likely fail to provide email marketers with specific criteria they could apply to their messages to determine with confidence whether a particular message is covered by CAN–SPAM's requirements and prohibitions. The Commission's proposed ''primary purpose'' standard, which consists of specific criteria, will provide the reliability marketers and other email senders need to operate under the Act.

''Net Impression'' as Determining the ''Primary Purpose'' of an Email Message—Commenters from across the entire spectrum of interested parties supported the ANPR's suggestion that the primary purpose of an email message should be determined based on the ''net impression'' created by the message. Consumers, advertisers, email service providers, and industry associations all supported the placement, proportion, style, and subject line elements of this approach, as well as the proposed criteria's focus on the reasonable recipient.[96] The Commission's proposed criteria include a ''net impression'' criterion to determine whether the primary purpose of a message is commercial when the message contains both commercial content and content that is neither commercial nor transactional/relationship.[97]

As was discussed above, the Commission considers the ''net impression'' of an advertisement to determine if it is deceptive under § 5 of the FTC Act. Under this approach, '' 'the Commission looks to the impression made by the advertisements as a whole. Without this mode of examination, the Commission would have limited recourse against crafty advertisers whose deceptive messages were conveyed by means other than, or in addition to, spoken words.' '' [98] The Commission asked about the utility of the ''net impression'' approach as applied to CAN–SPAM because the primary purpose of an email message may not be stated expressly.

One of the Commission's concerns in the ''primary purpose'' rulemaking process is that spammers not be able to structure their messages to evade CAN–SPAM by placing them outside the technical definition of ''commercial electronic mail message.'' A typical example is a hypothetical message, unrequested by the recipient, that begins with a Shakespearean sonnet (or paragraphs of random words) and concludes with a one-line link to a commercial website. The Commission believes that a recipient of such a message could reasonably conclude that the message's primary purpose is commercial.

Spammers may also try to evade CAN–SPAM by presenting the commercial content of their email messages in the guise of informational content, deliberately structuring their messages to create the mistaken impression in the minds of reasonable recipients that the messages do not have a commercial primary purpose. A spammer might try to argue that, applying the Commission's proposed criteria, CAN–SPAM does not cover such a message, because a recipient reasonably interpreting the message would not likely conclude that the primary purpose of the message is commercial. The Commission believes this strategy may tempt some spammers, although it is unclear whether email messages are as conducive to deceptive format ploys as are other media.[99] In any event, if a sender deliberately structures his message to create a false impression that the message does not have a commercial primary purpose, the message should be considered to have a commercial primary purpose under the proposed criteria. In the Commission's view, if a message's entire design is to disguise commercial content as noncommercial content, the message is commercial.[100] In this regard, the Commission seeks comment and information on whether the proposed ''primary purpose'' criteria should include an element expressly providing that a message may be deemed to have a commercial primary purpose if the message creates a false ''net impression'' that the message is noncommercial because it is deliberately structured to do so.

The Commission believes that the proposed ''net impression'' approach for messages that contain commercial

[94] *See* ACB; AT&T; Visa; ABM; MPAA; NEPA; NetCoalition; NADA. In addition, some consumers proposed their own standards for ''primary purpose'' that were akin to the FTC's importance-based standards, using phrases such as ''chief emphasis'' and ''main focus'' to describe when the commercial content of a message is its primary purpose. *See* McMichael; Narcum; Noll.

[95] *See* BMO; Grogan; Ford; MasterCard; NetCoalition; Nextel.

[96] *See, e.g.*, NCL; Cook; Swallow; Tietjens; NFCU; Microsoft; DoubleClick; Discover; Time Warner; IAC; ABM; DSA.

[97] As was explained above, the Commission's proposed criteria for messages that contain both commercial and transactional/relationship content does not employ a ''net impression'' approach.

[98] Deception Statement at 181, citing and quoting *American Home Products*, 695 F.2d 681, 688 (3rd Cir. 1982).

[99] In other contexts, such as direct mail marketing, the Commission has sued marketers for violating the FTC Act because they disguised their sales pitches as informational content. The Commission recently filed a complaint against A. Glenn Braswell and four of his corporations alleging, among other things, that the defendants used deceptive advertising formats (including advertising material portrayed as an independent health magazine) to market their products. *See FTC* v. *A. Glenn Braswell, et al.*, No. CV 03–3700 DT (PJWx) (C.D. Cal. filed May 27, 2004). For other deceptive format enforcement actions brought by the Commission, *see FTC* v. *Direct Mktg. Concepts, Inc.*, Civ. No. 04–11136–GAO (D. Mass. filed June 1, 2004); *Mega Sys., Int'l., Inc.*, 125 F.T.C. 973 (consent order) C–3811 (June 8, 1998); *Olsen Laboratories, Inc.*, 119 F.T.C 161 (consent order) C–3556 (Feb. 6, 1995); *Wyatt Mrktg.Corp.*, 118 F.T.C. 86 (consent order) C–3510 (July 27, 1994); *Synchronal Corp.*, 116 F.T.C. 989 (consent order) D–9251 (Oct. 1, 1993); *Nat'l. Media Corp.*, 116 F.T.C. 549 (consent order) C–3441 (June 24, 1993); *CC Pollen Co.*, 116 F.T.C. 206 (consent order) C–3418 (March 16, 1993) (consent order); *Nu-Day Enterprises, Inc.*, 115 F.T.C. 479 (consent order) C–3380 (Apr. 22, 1992); *Twin Star Productions*, 113 F.T.C. 847 (consent order) C–3307 (Oct. 2, 1990) (consent order); *JS&A Group, Inc.*, 111 F.T.C. 522 (consent order) C–3248 (Feb. 24, 1989).

[100] *See* proposed Rule § 316.3(a)(1): ''If an electronic mail message contains only content that advertises or promotes a product or service, then the ''primary purpose'' of the message shall be deemed to be commercial.''

content as well as content that is neither commercial nor transactional/relationship gives guidance to email marketers but also retains flexibility to allow the standard to reflect recipients' perceptions of the primary purpose of the messages they receive.[101]

Standards Based on Whether Commercial Content Finances Other Aspects of an Email Message—The ANPR also asked whether a message's commercial content financially supporting its other aspects might be useful to determine the primary purpose of the message. In requesting comment on this possible standard, the Commission noted that, in the case of an electronic newsletter funded by advertising within the newsletter, ''[s]uch advertising arguably would not constitute the primary purpose of the newsletter.'' [102]

A small number of commenters argued that it may be proper to treat a message as commercial when commercial content funds noncommercial content.[103] Most commenters, however, were generally negative in responding to the ANPR's question regarding a standard for determining the primary purpose of an email message based upon whether noncommercial content was financially supported by commercial content.[104] Commenters criticized such a standard as, among other things, unworkable.[105] The Commission agrees that the mere fact that noncommercial content is financially supported by accompanying commercial content is not enough to decide the question of an email message's primary purpose.

Other commenters attacked this standard as contrary to legislative intent regarding CAN–SPAM's intended scope, citing comments from the floor debate that indicate intent to limit CAN–SPAM's reach to only commercial email.[106] The Commission does not dispute that CAN–SPAM, by its terms, encompasses only commercial and ''transactional or relationship'' email messages.[107] Nevertheless, the Commission appreciates the concern raised by Cox, ABM and CASRO that spammers could avoid regulation under the Act by adding informational content to their commercial messages. The Commission's proposed criteria with respect to messages containing commercial content as well as content that is neither commercial nor transactional/relationship provide needed flexibility to ensure that such marketers will not evade CAN–SPAM's compliance obligations.

''Sender's Identity'' as Determining the ''Primary Purpose'' of an Email Message—The ANPR posed the question of whether an email sender's identity should be an element that affects the determination of the primary purpose of an email message. Relatively few commenters addressed this question. Only two consumers supported using the sender's identity to determine if an email had a commercial primary purpose.[108] Some industry commenters supported using the sender's identity, arguing that an identity test could be used to exempt nonprofit entities' messages from compliance with the Act.[109] The majority of comments opposed using the sender's identity as a way to determine ''the primary purpose.'' [110] The Commission agrees with commenters who oppose using the sender's identity to help determine a message's primary purpose. The sender's identity is not a reliable indicator of whether the primary purpose of an email message is commercial. Any sender of email messages—regardless of its identity—may send messages that advertise or promote a product or service. The Commission believes that its proposed ''primary purpose'' criteria provide a more sensible approach because they focus on characteristics of the message rather than the sender.

D. Section 316.5—Severability

This provision, which is identical to the analogous provision included in the Sexually Explicit Labeling Rule, provides that if any portion of the Rule is found invalid, the remaining portions will survive. This provision would pertain to the entirety of the proposed Rule, not just the provisions containing the Sexually Explicit Labeling requirements.

III. Invitation to Comment

All persons are hereby given notice of the opportunity to submit written data, views, facts, and arguments addressing the issues raised by this NPRM. Written comments must be submitted on or before Monday, September 13, 2004. Comments should refer to ''CAN–SPAM Act Rulemaking, Project No. R411008'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, CAN–SPAM Act, Post Office Box 1030, Merrifield, VA 22116–1030. Please note that courier and overnight deliveries cannot be accepted at this address. Courier and overnight deliveries should be delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H–159, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

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[101] 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 control over the content of their messages' subject lines and their messages' presentation of content. A marketer who has concerns about the net impression of an email message with both commercial and noncommercial content could always copy test a planned email to determine whether the reasonable recipient would interpret it to have a primary purpose that is commercial.

[102] 69 FR at 11780.

[103] *See* ABM; CASRO. These commenters seemed most concerned with preventing a marketer from evading CAN–SPAM by adding minimal noncommercial content, or by masking commercial content as noncommercial information content. The Commission believes the proposed ''primary purpose'' criteria would prevent such illegitimate conduct from being successful.

[104] *See, e.g.*, DMA; Cox; MasterCard; Nextel; CFC.

[105] *See* Nextel; Experian; NetCoalition.

[106] NEPA; Cox. ''Specifically, the [CAN–SPAM] legislation concerns only commercial and sexually explicit email and is not intended to intrude on the burgeoning use of email to communicate for political, news, personal and charitable purposes.'' Rep. Sensenbrenner's comments are available at *149 Cong. Rec. H12186, H12193* (Nov. 21, 2003). The text of the Act is in accord with this statement; the Act focuses on ''commercial'' email messages—messages the primary purpose of which is the advertisement or promotion of a product or service. The Act's limited regulation of ''transactional or relationship'' messages—see note 27 above for this definition—only prohibits use of false or misleading header information. Thus, emails that are not commercial, and are not sent pursuant to a designated transaction or a relationship between the sender and the recipient—*e.g.*, messages that do no more than solicit charitable contributions, or promulgate political or other non-commercial content—are not regulated under CAN–SPAM.

[107] SIIA's comment noted that the FTC stated at a Congressional hearing on spam that legislation should distinguish emails consisting of newspaper articles and advertising from messages that most consumers would consider ''spam.'' SIIA. The comments of BCP Bureau Director, Howard J. Beales, III, are available at *http://energycommerce.house.gov/108/action/108–35.pdf* (July 9, 2003).

[108] *See* R. Fowler; Sachau.

[109] *See* IS; ABA. The Commission's views on how its proposed ''primary purpose'' standard would apply to email messages sent by or on behalf of nonprofit entities are discussed above.

[110] *See* Microsoft; NetCoalition; MasterCard. Nextel asserted that an identity test would violate the First Amendment. Other commenters argued that it would be an unreliable criterion because many for-profit businesses send email for noncommercial purposes. *See* NAA; SIIA.

Comments containing confidential material must be filed in paper form, and the first page of the document must be clearly labeled ''Confidential.'' [111]

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

V. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506) (''PRA''), the Commission has reviewed the proposed Rule. The proposed Rule does not impose any recordkeeping, reporting, or disclosure requirements or otherwise constitute a ''collection of information'' as it is defined in the regulations implementing the PRA. *See* 5 CFR 1320.3(c).

[111] 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).

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601–612, requires an agency to provide an Initial Regulatory Flexibility Analysis (''IRFA'') with a proposed rule and a Final Regulatory Flexibility Analysis (''FRFA'') with the final rule, if any, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 603–605.

The Commission requested comment in the ANPR regarding whether CAN–SPAM regulations would have a significant economic impact on a substantial number of small entities. Although the Commission received very few responsive comments, the Commission has determined that it is appropriate to publish an IRFA in order to inquire into the impact of the proposed Rule on small entities. Therefore, the Commission has prepared the following analysis.

A. Reasons for the Proposed Rule

The proposed Rule was created pursuant to the Commission's mandate under the CAN–SPAM Act, 15 U.S.C. 7701 *et seq.* The Act seeks to ensure that senders of commercial email not mislead recipients as to the source or content of such messages, and to ensure that recipients of commercial email have a right to decline to receive additional commercial email from a particular source. Specifically, Section 7702(c) of the Act requires the Commission to issue regulations defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message.

B. Statement of Objectives and Legal Basis

The objective of the proposed Rule is to implement the CAN–SPAM Act, 15 U.S.C. § 7701 *et seq.* Specifically, the proposed Rule sets forth the criteria by which the primary purpose of an email message can be ascertained. The legal basis for the proposed Rule is the CAN–SPAM Act, 15 U.S.C. § 7701 *et seq.*[112]

C. Description of Small Entities to Which the Proposed Rule Will Apply

The proposed CAN–SPAM Rule, which incorporates by reference many of the CAN–SPAM Act's definitions, applies to ''senders'' of ''commercial electronic mail messages'' and, to a lesser extent, to ''senders'' of ''transactional or relationship messages.'' [113] Under the Act, and the proposed Rule, a ''sender'' is ''a person who initiates [a commercial electronic mail message] and whose product, service, or Internet web site is advertised or promoted by the message.'' [114] To ''initiate'' a message, one must ''originate or transmit such message or * * * procure the origination or transmission of such message.''[115] The Act does not consider ''routine conveyance'' (defined as ''the transmission, routing, relaying, handling, or storing through an automatic technical process, of an electronic mail message for which another person has identified the recipients or provided the recipient addresses'') to be initiation.[116]

Any company, regardless of industry or size, that sends commercial email messages or transactional or relationship messages would be subject to the proposed Rule. This would include entities that use email to advertise or promote their goods, services, or websites, as well as entities that originate or transmit such messages. Therefore, numerous small entities across almost every industry could potentially be subject to the proposed Rule. For the majority of entities subject to the proposed Rule, a small business is defined by the Small Business Administration as one whose average annual receipts do not exceed $6 million or which has fewer than 500 employees.[117]

Although it is impossible to identify every industry that sends commercial email messages or transactional or relationship messages, some surveys suggest that an ever-increasing number are using the Internet. A recent Harris Interactive poll, for example, found that about 70 percent of small businesses have an online presence or plan to have one by 2005.[118] A 2001 study by the National Federation of Independent Business found that, at that time, 57 percent of all small employers used the

[112] 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).

[113] 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.''

[114] 15 U.S.C. 7702(16)(A); Proposed Rule § 316.2(n).

[115] 15 U.S.C. 7702(9).

[116] 15 U.S.C. 7702(9) and (15).

[117] 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-whatis.html>.*

[118] *See <http://www.ecommercetimes.com/story/35004.htm>.*

Internet for business-related activities.[119] While these statistics do not quantify the number of small businesses that send commercial email messages or transactional or relationship messages, they suggest that many small businesses are using the Internet in some capacity. The Commission is aware of at least one survey, conducted by a web hosting provider, Interland, that suggests that 85 percent of small businesses surveyed communicate with existing customers via email, and 67 percent of those small businesses communicate with potential buyers via email.[120]

Given the paucity of data concerning the number of small businesses that send commercial email messages or transactional or relationship messages, it is not possible to determine precisely how many small businesses would be subject to the proposed Rule. Accordingly, the Commission believes that a precise estimate of the number of small entities subject to the proposed Rule is not currently feasible, and specifically requests information or comment on this issue.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The proposed Rule would not impose any specific reporting, recordkeeping, or disclosure requirements within the meaning of the Paperwork Reduction Act. The CAN–SPAM Act establishes a comprehensive regulatory scheme for commercial and transactional or relationship email messages, and is enforceable by the FTC as though it were an FTC Rule. The proposed Rule sets forth the criteria by which the primary purpose of an email message would be ascertained. The proposed Rule does not impose substantive compliance obligations.

In any event, as explained further below, after considering various alternatives, the Commission has determined to propose criteria designed to enable regulated entities to determine as clearly and objectively as possible when ''the primary purpose'' of an email message is commercial and subject to CAN–SPAM. Such criteria, in the Commission's view, should help reduce any interpretive uncertainty that could potentially contribute to compliance costs, and ensure that the scope of the proposed Rule will not sweep any more broadly than reasonably necessary to carry out the purpose and intent of the CAN–SPAM Act. The Commission invites comment and information on the proposed ''primary purpose'' criteria, including ways, if any, that the Commission might further minimize their possible scope and impact while still satisfying the Act's mandate.

E. Identification of Other Duplicative, Overlapping, or Conflicting Federal Rules

The FTC has not identified any other federal statutes, rules, or policies that would conflict with the proposed Rule's provisions, which, as noted above, set forth the criteria by which the primary purpose of an email message can be ascertained. The FTC seeks comment and information about any statutes or rules that may conflict with the proposed requirements, as well as any other state, local, or industry rules or policies that may overlap or conflict with the requirements of the proposed Rule.

F. Discussion of Significant Alternatives

As discussed above, the CAN–SPAM Act primarily seeks to ensure that senders of commercial email not mislead recipients as to the source or content of such messages, and to ensure that recipients of commercial email have a right to decline to receive additional commercial email from a particular source. The Act, not the proposed Rule, imposes these obligations. The Commission nonetheless has considered and is proposing to adopt a provision setting out criteria to facilitate the determination of when an email message has a commercial primary purpose. Although the proposed criteria do not impose any compliance burden, they should help avoid legal or other costs that could otherwise result from uncertainty, if any, about what the proposed Rule covers or requires.

As noted in its ANPR, the Commission also considered other criteria for determining when the primary purpose of an email message is commercial, including, for example, the identity of the sender, the use of commercial content to fund noncommercial content, and various approaches based on the relative importance of the commercial content (*i.e.*, more important than all other purposes combined, more important than any other single purpose, or more than incidental). As noted earlier, the Commission has instead determined to propose criteria that it believes will be clearer, more objective, and easier to interpret and apply. This should help ease compliance burdens by avoiding interpretive uncertainty and by ensuring that the Rule extends no further than reasonably necessary to implement the purpose and intent of the CAN–SPAM Act. The Commission nonetheless seeks comment on any significant alternatives that should be further considered in order to minimize CAN–SPAM's impact on entities under the Rule, including small entities.

VII. Questions for Comment on the Proposed Rule

The Commission seeks comment on various aspects of the proposed Rule. Without limiting the scope of issues on which it seeks comment, the Commission is particularly interested in receiving comments on the questions that follow. In responding to these questions, include detailed, factual supporting information whenever possible.

A. General Questions for Comment

Please provide comment, including relevant data, statistics, or any other evidence, on each proposed change to the Rule. Regarding each proposed provision commented on, please include answers to the following questions:

1. What is the effect (including any benefits and costs), if any, on consumers?

2. What is the impact (including any benefits and costs), if any, on individual firms that must comply with the Rule?

3. What is the impact (including any benefits and costs), if any, on industry?

4. What changes, if any, should be made to the proposed Rule to minimize any cost to industry or consumers?

5. How would each suggested change affect the benefits that might be provided by the proposed Rule to consumers or industry?

6. How would the proposed Rule affect small business entities with respect to costs, profitability, competitiveness, and employment?

B. Questions on Proposed Specific Provisions

In response to each of the following questions, please provide: (1) Detailed comment, including data, statistics, and other evidence, regarding the problem referred to in the question; (2) comment as to whether the proposed changes do or do not provide an adequate solution to the problems they were intended to address, and why; and (3) suggestions for additional changes that might better maximize consumer protections or minimize the burden on industry.

[119] *See <http://www.nfib.com/object/2937298.html>*.

[120] *See* Electronic Commerce News, Mar. 15, 2004, ''Gearing Up for Next Front In the War on Spam.'' SBA also cited studies that show that 83 percent of small businesses use email.''

1. Section 316.1—Scope

Does the proposed section appropriately describe the scope of the CAN–SPAM rules? If not, how should it be modified?

2. Section 316.3—Primary Purpose

a. Does the Commission's ''primary purpose'' standard provide sufficient guidance as to when a message will be considered ''commercial'' under the CAN–SPAM Act? When a message will be considered ''transactional or relationship''? Why or why not? What ''primary purpose'' standard would provide better guidance?

b. Does the Commission's ''primary purpose'' standard fail to cover any types of messages that should be treated as commercial messages under the Act? If so, what types of messages are not covered? Does the standard cover any types of messages that should not be treated as commercial? If so, what types of messages are covered? Is there some other ''primary purpose'' standard that would provide more appropriate coverage, and if so, what is it?

c. The Commission's proposed criteria identify three categories of email messages that contain commercial content: those that contain only commercial content; those that contain both commercial content and transactional/relationship content; and those that contain both commercial content and content that is neither commercial nor transactional/relationship. The Commission's approach proposes different criteria for each category of email messages. Is this approach useful for determining the primary purpose of email messages? Why or why not? Should the Commission use a single set of criteria for all email messages? Why or why not?

d. Does the proposed approach to email messages containing only commercial content provide criteria to facilitate the determination of the primary purpose of an email message? Why or why not? Would a different approach better accomplish this goal? Why or why not?

e. Does the proposed approach to email messages containing both commercial and transactional/relationship content provide criteria to facilitate the determination of the primary purpose of an email message? Why or why not?

f. Would a different approach better facilitate the determination of the primary purpose of an email message that contains both commercial and transactional/relationship content? Why or why not? Are there any additional legal or factual issues that support an approach based on either (1) calculating whether a fixed percentage of the message is dedicated to transactional/relationship content, or (2) an exclusively ''net impression'' test? Are there any arguments supporting these approaches to which the Commission did not give adequate weight? Should the Commission consider additional factors to determine the primary purpose of an email message that contains both commercial and transactional/relationship content—such as whether the transactional/relationship content is clearly and prominently displayed, or whether the commercial content interferes with, detracts from, or otherwise undermines the presentation of the transactional/relationship content? Why or why not?

g. Does the proposed approach to email messages containing both commercial content and content that is neither commercial nor transactional/relationship provide criteria to facilitate the determination of the primary purpose of an email message? Why or why not? Would a different approach better accomplish this goal? Why or why not?

h. The Commission's proposed criteria for email messages containing both commercial content and content that is neither commercial nor transactional/relationship identify placement of commercial content, proportion of message dedicated to commercial content, and how color, graphics, type size, and style are used to highlight commercial content as factors to consider in assessing the net impression of an email message. Are these factors appropriate? Should additional factors be considered? Why or why not? Should the sender's identity be considered as a factor, and if so, how? Why or why not? Should the sender's intent be considered as a factor? Why or why not? If so, how? And if so, how should the sender's identity be measured?

i. The Commission suggests that a message with a noncommercial ''net impression'' may still be deemed to have a commercial primary purpose if the sender deliberately structures his message to create a mistaken impression in the mind of a reasonable recipient that the message has a noncommercial primary purpose. Should the sender's deliberate structuring of a message affect ''primary purpose'' analysis under CAN–SPAM, and if so, how? Why or why not?

j. The Commission's proposed criteria use the subject line in one criterion to determine the primary purpose of ''dual-purpose messages.'' Is this an appropriate criterion for this determination? Why or why not?

k. The Commission's proposed criteria do not use the subject line as a criterion to determine the primary purpose of messages that contain only commercial content. Is this choice proper? Why or why not?

l. Do *bona fide* email marketers use a message's subject line to highlight the fact that the message is advertising or promoting a product or service when that is a purpose of the message? Why or why not?

m. Do *bona fide* e-mail marketers use a message's subject line to highlight the fact that their message is a transactional or relationship message when that is a purpose of the message? Why or why not?

n. Are there potential loopholes in the proposed ''primary purpose'' standard? If so, what are they, and how might they be eliminated?

o. The Commission suggests that spammers could add unrelated noncommercial content (or paragraphs of random words) to commercial e-mail messages if doing so might mean that CAN–SPAM would not apply to their messages. Is this likely? Why or why not?

p. Should the same three-category ''primary purpose'' criteria be applied to messages sent by for-profit entities and nonprofit entities alike? Why or why not?

q. Where a recipient has entered into a transaction with a sender that entitles the recipient to receive future newsletters or other electronically delivered content, should such e-mail messages be deemed to be transactional or relationship messages? Why or why not? Should the inclusion of commercial content affect this analysis? If so, how?

3. Renumbering of Provisions of the Sexually Explicit Labeling Rule and Integration of Those Provisions Into the Proposed CAN–SPAM Rule

a. Is the Commission's proposal to renumber and integrate into the Proposed CAN–SPAM Rule the provisions of the previously-adopted Sexually Explicit Labeling Rule a good solution? If not, why not? What other approach would be better? Why?

IX. Proposed Rule

List of Subjects in 16 CFR Part 316

Advertising, Computer technology, Electronic mail, Internet, Trade practices.

Accordingly, it is proposed that chapter 1 of title 16 of the Code of Federal Regulations, be amended by

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 Scope.

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 Definitions.

(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 conveyance'' is the same as the definition of that term in the CAN–SPAM Act, 15 U.S.C. 7702(15).

(l) 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).

(m) 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).

(n) 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).

§ 316.3 Primary purpose.

(a) In applying the term ''commercial electronic mail message'' defined in the CAN–SPAM Act, 15 U.S.C. § 7702(2), the ''primary purpose'' of an electronic mail message shall be deemed to be commercial based on the following criteria:

(1) If an electronic mail message contains only content that advertises or promotes a product or service, then the ''primary purpose'' of the message shall be deemed to be commercial;

(2) If an electronic mail message contains content that advertises or promotes a product or service as well as content that pertains to one of the functions listed in paragraph (b) of this section, then the ''primary purpose'' of the message shall be deemed to be commercial if:

(i) A recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message advertises or promotes a product or service; or

(ii) The electronic mail message's content pertaining to one of the functions listed in paragraph (b) of this section does *not* appear at or near the beginning of the message;

(3) If an electronic mail message contains content that advertises or promotes a product or service as well as other content that does not pertain to one of the functions listed in paragraph (b) of this section, then the ''primary purpose'' of the message shall be deemed to be commercial if:

(i) A recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message advertises or promotes a product or service; or

(ii) 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. Factors illustrative of those relevant to this interpretation include 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.

(b) Transactional or relationship functions of e-mail messages under the CAN–SPAM Act are:

(1) To facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;

(2) To provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient;

(3) To provide—

(i) Notification concerning a change in the terms or features of;

(ii) Notification of a change in the recipient's standing or status with respect to; or

(iii) At regular periodic intervals, account balance information or other type of account statement with respect to, a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender;

(4) To provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or

(5) To deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.

§ 316.4 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:

[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.

(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 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.

§ 316.5 Severability.

The provisions of this part 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.

By Direction of the Commission.

Donald S. Clark,

Secretary.

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BILLING CODE 6750–01–P

[2] This phrase consists of nineteen (19) characters and is identical to the phrase required in § 316.4(a)(1).

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

19 CFR part 101

Extension of Port Limits of Rockford, IL

AGENCY: Customs and Border Protection; Department of Homeland Security.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs and Border Protection (CBP) Regulations pertaining to the field organization of CBP by extending the geographical limits of the port of Rockford, Illinois, to include the City of Rochelle, Illinois. The Union Pacific Railroad Company has a new intermodal facility in Rochelle. The proposed change is part of CBP's continuing program to more efficiently utilize its personnel, facilities, and resources, and to provide better service to carriers, importers, and the general public.

DATES: Comments must be received on or before October 12, 2004.

ADDRESSES: Comments must be submitted to Bureau of Customs and Border Protection, Office of Regulations and Rulings (Attention: Regulations Branch), 1300 Pennsylvania Avenue NW., (Mint Annex), Washington, DC 20229. Submitted comments may be inspected at 799 9th Street, NW., Washington, DC during regular business hours.

FOR FURTHER INFORMATION CONTACT: Dennis Dore, Office of Field Operations, 202–927–6871.

SUPPLEMENTARY INFORMATION:

Background

The Union Pacific Railroad Company has a new state-of-the-art intermodal rail facility that is located 25 miles south of Rockford in Rochelle, Illinois. This facility provides the capacity necessary to support the efficient interchange of shipments to and from rail connections, and expedite the operations of trains and containers. In order to accommodate this new facility and provide better service to carriers, importers, and the public, the Bureau of Customs and Border Protection (CBP) is proposing to extend the port limits of the port of Rockford, Illinois, to include the City of Rochelle, Illinois.

Current Port Limits of Rockford, Illinois

The current port limits of Rockford, Illinois, are described as follows in Treasury Decision (T.D.) 95–62 of August 14, 1995:

Bounded to the north by the Illinois/Wisconsin border; bounded to the west by Illinois State Route 26; bounded to the south by Illinois State Route 72; and bounded to the east by Illinois State Route 23 north to the Wisconsin/Illinois border.

Proposed Port Limits of Rockford, Illinois

The new port limits of Rockford, Illinois, are proposed as follows: Bounded to the north by the Illinois/Wisconsin border; bounded to the west by Illinois State Route 26; bounded to the south by Interstate Route 88; bounded to the east by Illinois State Route 23 to the Wisconsin/Illinois border.

Proposed Amendment to CBP Regulations

If the proposed port limits are adopted, CBP will amend § 101.3(b)(1), CBP Regulations (19 CFR 101.3(b)(1)) to reflect the new boundaries of the Rockford, Illinois port of entry.

Authority

This change is proposed under the authority of 5 U.S.C. 301 and 19 U.S.C. 2, 66 and 1624.

Signing Authority

The signing authority for this document falls under § 0.2(a), CBP Regulations (19 CFR 0.2(a)) because this port extension is not within the bounds of those regulations for which the Secretary of the Treasury has retained sole authority. Accordingly, the notice of proposed rulemaking may be signed by the Secretary of Homeland Security (or his or her delegate).

Comments

Before adopting this proposal, consideration will be given to any written comments that are timely submitted to CBP. All such comments received from the public pursuant to this notice of proposed rulemaking will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552) and § 103.11(b), CBP Regulations (19 CFR 103.11(b)) during regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, Customs and Border Protection, Department of Homeland Security, 799 9th Street, NW., Washington, DC. Arrangements to inspect submitted documents should be made in advance by calling Mr. Joseph Clark at 202–572–8768.