



U.S. Department of Justice

Criminal Division

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

February 17, 2004

Federal Trade Commission
Office of the Secretary/Room 159-H
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

RE: Proposed Mark for Sexually Oriented Spam, Project No. P044405
Comments of the Department of Justice

The Department of Justice has reviewed the published Proposed Rule implementing Section 5(d) of the CAN-SPAM Act. As required by statute, the Federal Trade Commission (“Commission”) has consulted with the Department of Justice prior to the publication of the regulations. However, given the short time frame provided by statute, the Commission did not have the opportunity to fully consider all of the Department comments prior to publication, nor was the Department able to provide full and official comments during that period. This letter formally advises the Commission of the Department’s comments on the Proposed Rule published in the federal register.

The Department agrees with the choice of label proposed by the Commission for the same reasons articulated in the publication. The preamble to the Proposed Rule, in several places, seems to suggest that the label is required only for email containing images of sexually explicit conduct. The Department believes that the CAN-SPAM Act’s provision applies to email containing textual descriptions of sexually explicit conduct without images. As a result, the Department believes that the regulations should be amended to reflect that.

In Section 316.1(a)(2) the Commission may wish to consider replacing the words “matter in” with the words “content of” for increased clarity. We also suggest that this section provide suggestions of what “absent any further actions by the recipient” means (for example, “scrolling down or enlarging the window that appears when the recipient first opens the email.”).

Thank you for considering the Department’s comments on the Proposed Rule. We are eager to continue working with the Commission to finalize the rule.

Sincerely,

John G. Malcolm
Deputy Assistant Attorney General