



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

The Collection of Public Comments Filed Electronically  
In The CAN-SPAM Rulemaking Proceeding, R411008

Privacy Impact Assessment

March 11, 2004

## Introduction

Congress has empowered and directed the Federal Trade Commission to prevent the use of unfair methods of competition, and unfair or deceptive acts or practices, in or affecting commerce, pursuant to the Federal Trade Commission Act, 15 U.S.C. §§ 41-58, *as amended*. Congress has also empowered and directed the Commission to prevent mergers, acquisitions, price discrimination, and certain other practices that may “substantially lessen competition” or “tend to create a monopoly,” in violation of the Clayton Act, 15 U.S.C. §§ 12-27, *as amended*. In addition, Congress has directed the Commission to enforce or assist with implementing a large number of other statutes.<sup>1</sup>

As one important vehicle for executing its responsibilities under these statutes, the Commission conducts rulemaking proceedings, pursuant to both the notice and comment procedures established by Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, and the procedures prescribed by Section 18 of the Federal Trade Commission Act, 15 U.S.C. § 57a. Comments from members of the public concerning proposed rules constitute an important source of information, and the Commission has therefore incorporated the solicitation and systematic consideration of such comments into those of its Rules of Practice which govern rulemaking proceedings.<sup>2</sup> Moreover, Section 553(c) of the APA, 5 U.S.C. § 553(c), expressly requires

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<sup>1</sup>*See, e.g.*, Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. 108-187 (Dec. 16, 2003) (the “CAN-SPAM Act”); Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108-159 (Dec. 4, 2003) (the “FACT Act”); Telephone Disclosure and Dispute Resolution Act of 1992 (codified in relevant part at 15 U.S.C. §§ 5701 *et seq.*); Telemarketing and Consumer Fraud and Abuse Prevention Act (codified in relevant part at 15 U.S.C. §§ 6101-6108); Home Ownership and Equity Protection Act, 15 U.S.C. § 1639; The Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501-6506; Identity Theft Assumption and Deterrence Act of 1998, (codified in relevant part at 18 U.S.C. § 1028 note); Gramm-Leach-Bliley Act (to be codified in relevant part at 15 U.S.C. §§ 6801-6809); Energy Policy and Conservation Act, 42 U.S.C. §§ 6201-6422, *as amended*; Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, *as amended*; Federal Cigarette Labeling and Advertising Act of 1966, 15 U.S.C. §§ 1331-1340, *as amended*; Truth in Lending Act, 15 U.S.C. §§ 1601-1667f, *as amended*; Fair Credit Billing Act, 15 U.S.C. 1666-1666j; Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681(u), *as amended*; Fair Credit and Charge Card Disclosure Act (codified in different sections of the U.S. Code, particularly 15 U.S.C. 1637(c)-(g)); Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f, *as amended*; Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o, *as amended*; Electronic Fund Transfer Act, 15 U.S.C. §§ 1693-1693r; Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, *as amended*; Magnuson Moss Warranty-Federal Trade Commission Improvements Act, 15 U.S.C. §§ 2301-2312; Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. §§ 4401-4408.

<sup>2</sup>The rules governing the solicitation of public comments in trade regulation rule proceedings, pursuant to Section 18 of the FTC Act, are set forth in Subpart B of the Rules of Practice at 16 C.F.R. §§ 1.10(b)(2), 1.11(a)(5), 1.13(a), while the analogous provision for rules promulgated under authority other than Section 18 of the FTC Act is set forth in Subpart C of the

agencies to give “interested persons an opportunity to participate in the rule making through submission of written data, views, [and] arguments . . .” Similarly, Sections 18(b)(1)(B) and 18(e)(1)(B) of the FTC Act, 15 U.S.C. § 57a(b)(1)(B), (e)(1)(B), respectively require the Commission to “allow interested persons to submit written data, views, and arguments, and make all such submissions publicly available. . .” and define “any written submissions” as part of the rulemaking record. Finally, Subsections 206(c) and 206(d) of the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899-2970, respectively require the Commission, to the extent practicable, to accept rulemaking comments electronically, and to establish an online system through which members of the public can access rulemaking comments submitted both electronically and in paper form.<sup>3</sup>

The CAN-SPAM Act, which became effective on January 1, 2004, imposes a series of new requirements on the use of commercial electronic mail messages; gives federal civil and criminal law enforcement authorities new tools to combat unsolicited commercial email (“UCE” or “spam”); permits state Attorneys General to enforce its civil provisions; and creates a private right of action for providers of Internet access services. In particular, the Act requires the Commission to issue a rule within twelve months following enactment “defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message,” and authorizes the Commission to issue discretionary regulations concerning certain of the Act’s other definitions and provisions. The Commission therefore has issued an Advance Notice of Proposed Rulemaking to initiate the mandatory “primary purpose” rulemaking proceeding -- by soliciting comments on issues relating to that term and its use in the Act -- and to solicit comments on the areas of discretionary regulation and on a variety of topics relevant to certain reports that the CAN-SPAM Act requires the Commission to issue within the coming two years.

In order to conduct this rulemaking proceeding in conformity with both the CAN-SPAM Act and the more general statutory and regulatory requirements outlined above, the Commission proposes to permit members of the public to file comments electronically, through a portal leading from the Regulations.gov Web site system to a Web site maintained by a Commission contractor; to preserve the information thus collected in a secure nonpublic database, for use in the rulemaking proceeding; and to place the public components of the information thus collected on the public Commission Web site at the end of the public comment period. In an effort to

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Rules of Practice at 16 C.F.R. § 1.26(b)(4).

The Commission has also incorporated the solicitation and consideration of public comments into the Rules of Practice governing administrative consent agreements (*see* 16 C.F.R. §§ 2.34(c), (e), 3.25(f)); applications for approval of proposed divestitures, acquisitions, or similar transactions subject to Commission review under outstanding orders (*see* 16 C.F.R. § 2.41(f)(2)); and requests to reopen and modify Commission rules and orders (*see* 16 C.F.R. § 2.51(c)).

<sup>3</sup>Commission Rule 4.9(b)(3)(iii), 16 C.F.R. § 4.9(b)(3)(iii), provides that the public record of the Commission includes, *inter alia*, “written statements filed with or forwarded to the Commission in connection with [Subpart B and Subpart C rulemaking] proceedings.”

make this program transparent, as well as to address any privacy concerns that may arise as a result of the program, this Privacy Impact Assessment (“PIA”) has been performed in accordance with the guidance issued by the Office of Management and Budget on September 26, 2003, M -03-22. This PIA will be updated as warranted by future developments.

## System Overview

The system is accessible through the Regulations.gov Web site, an official United States Government computer system which constitutes the central online rulemaking portal of the U.S. Government. The Web site contains a compilation of virtually all Federal Register Rule and Proposed Rule Notices soliciting public comments for which the comment periods are open. The purpose of the system is to provide a central location through which members of the public can electronically file public comments in ongoing agency rulemaking proceedings. The Web site is operated by an interagency partnership, led by the United States Environmental Protection Agency (EPA), in association with the Food and Drug Administration, the National Archives and Records Administration/Office of the Federal Register, and the Government Printing Office.

The Federal Trade Commission component of the system can be accessed only through the Regulations.gov Web site. Selecting the Commission under the “Search for Open Regulations” caption produces a list of the Commission rulemaking proceedings currently open for comment. Clicking on the “Submit a Comment on this Regulation” heading for the CAN-SPAM proceeding leads to a form which constitutes the exclusive mechanism for electronically filing a comment in that proceeding. The form and the database to which it leads have been created by and are administered by a private firm pursuant to a contract with the Commission.

The purpose of the system is to provide a mechanism for systematically collecting electronic comments concerning the CAN-SPAM rulemaking proceeding -- including both general comments and responses to more specific questions -- from members of the public; for storing the comments in a database that is both secure and readily accessible to members of the Commission staff and contract personnel, for review and analysis; and for readily separating the public from the nonpublic information in each such comment, thereby greatly facilitating the placement of the public information in each such comment on the Commission Web site. The Bureau of Consumer Protection is the business owner of the system.

## Analysis

### 1. The Information That Will Be Collected (Nature and Source)

Because the Commission solicits public comments from all members of the public, the system necessarily covers all categories of individuals and organizations, including but not limited to consumers, business owners and employees, law firms, economic consulting firms, trade associations, and public interest groups. For each comment submitted through the Regulations.gov form for the CAN-SPAM rulemaking proceeding, the system collects the following information concerning the commenter, through the completion of up to nine fields:

- |                                 |                      |                  |
|---------------------------------|----------------------|------------------|
| (1) title;                      | (2) first name;      | (3) last name;   |
| (4) organization name (if any); | (5) mailing address; | (6) city;        |
| (7) state;                      | (8) country; and     | (9) postal code. |

For each comment, the system also collects optional responses to six sets of questions, respectively addressing the following mandatory rulemaking issue (A) and discretionary rulemaking topics (B-F):

- (A) Determining whether “the primary purpose” of an email message is commercial;
- (B) Determining whether the Commission should modify or elaborate upon the CAN-SPAM Act definitions of what constitutes a “transactional or relationship message;”
- (C) Determining whether the Commission should modify the 10-business-day time period for processing opt-out requests;
- (D) Determining whether the Commission should treat additional activities or practices as “aggravated violations” associated with commercial email, in addition to the four “aggravated violations” the CAN-SPAM Act identifies;
- (E) Determining whether the Commission should issue regulations to implement various aspects of the CAN-SPAM Act, including
  - (1) Defining the “sender” of a commercial email message;
  - (2) Determining whether and to what extent “forward-to-a-friend” and similar marketing campaigns -- in which marketers rely on their customers to refer or forward commercial email to someone else -- constitute “inducing” a person to initiate a message on behalf of someone else;
  - (3) Determining whether post office boxes and commercial mail drops should be considered “valid physical postal addresses;” and
  - (4) Determining what information must, may or may not be disclosed in a message’s “from” line; and
- (F) Identifying reports required by the CAN-SPAM Act, if any, on which the commenter wishes to comment.

In addition, for each comment, the system collects optional information in two fields (10 and 11). Field 10, the “Additional Comments” field, permits each commenter to provide additional information concerning the six sets of questions above; to provide information concerning effects on small businesses and recommended regulatory alternatives, pursuant to the Regulatory Flexibility Act; and to provide any additional information he or she believes to be

relevant to the proceeding. Field 11, the “Attachment” field, permits each commenter to attach a file to the form, in any of a variety of different word processing and other formats.<sup>4</sup>

## 2. Why The Information Is Being Collected (Purposes)

The Introduction, *supra*, discusses the laws and regulations that require or permit the Commission to accept and consider public comments filed electronically in rulemaking proceedings such as the CAN-SPAM proceeding. For any given comment so filed, the information collected has been minimized as much as possible; that is, it has been limited to the text of the comment itself (and any attachment thereto); to responses to the six sets of questions that are directly relevant to the proceeding; and to the information needed to ensure that the Commission and its staff can determine the source of the comment and take steps, if necessary, to verify the accuracy of the information submitted. Moreover, once the comments are posted on the FTC Web site after the public comment period ends, members of the public will be able to review and analyze them. All comments filed electronically will necessarily be timely, because Regulations.gov automatically removes the form for public comments on a given Commission rulemaking from its Web site at the end of the day by which comments must be filed. The system will not, however, otherwise use technologies in ways that the Commission has not previously employed.

## 3. The Opportunities Individuals Will Have To Decline To Provide Information Or To Consent To Particular Uses Of The Information And How Individuals Grant Consent

The Notice that each commenter sees at the top of the form -- before reaching the above fields and questions -- makes it clear that placing information in fields 1,2, 4 through 6, 9, 10, and 11 is optional. The Notice also makes it clear that placing information in fields 3, 7 and 8 is “required in order for the FTC to fully consider [the] comment,” and that while the commenter may choose not to fill in one or more of those fields, the comment may as a result not be considered.

Some of the information submitted for comments filed by individuals (mailing address, city, and postal code) constitutes home contact information, when associated with the name of the commenter. Therefore, as the Notice advises, the Commission “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.” As a consequence, any information placed in fields 5, 6, and 9 will not be publicly available on the FTC Web site. In addition, the Notice

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<sup>4</sup>Miscellaneous system administration information is separately compiled by the regulations.gov Web site regarding visits to the site, as described in section 8, *infra*. Although it is possible the FTC or its contractor could be given access to such system information to the extent necessary, if any, for the proper implementation and operation of the Commission-sponsored form, the FTC does not have any authority or control over that information collection activity.

advises commenters that the responses they provide to the six sets of questions will not be publicly available on the FTC Web site. By contrast, as the Notice also advises commenters, any information placed in fields 1 through 4, 7, 8, 10 and 11 will be publicly available on the FTC Web site. For any given comment, the commenter will be the only source of all the information provided. Each commenter therefore will be able to control precisely which information, if any, is placed in the system and associated with his or her comment.

#### 4. Intended Uses Of The Information Collected

For a given electronic comment, the information provided in the “Additional Comments” field and the “Attachment” field (if any) -- and in the responses to the six sets of questions -- will be used to help determine the course of action the Commission should pursue in the CAN-SPAM proceeding. The remaining information provided for a given comment will facilitate assessments of the validity and significance of the comment; will permit storing the comment alphabetically by last name; and will permit the Commission or its staff to contact the commenter, should that become necessary.

#### 5. With Whom The Information Will Be Shared (Disclosures)

Although the Commission contractor will collect the electronic comments submitted through the system, the Commission will serve as the official custodian and owner of those comments, as well as of all comments filed in paper form. As already noted, except for certain portions for which there is a legal basis to redact the information, the comments are legally considered public records in accordance with the agency’s Rules of Practice, *see* 16 C.F.R. § 4.9(b), and will be routinely shared with the public (i.e., made available for public inspection) on the agency’s Web site, [www.ftc.gov](http://www.ftc.gov).

Selected Commission staff and contract personnel will have access to both the public and nonpublic data contained in the electronic database for the purposes of collecting and storing the information filed for each comment, and placing the public data in those comments on the FTC Web site. Selected members of the Commission staff and contract personnel will also have access to the public and nonpublic data for the purpose of analyzing and evaluating the information in the “Additional Comments” and “Attachment” fields, and in the responses to the six sets of questions. The General Counsel of the Commission may give Federal and state agencies access to the nonpublic data for law enforcement or other purposes, provided that the agencies certify that they will maintain the data in confidence. The Commission does not expect that any other entities will have access to the nonpublic data in the system, except as may otherwise be required or authorized by federal law or regulation.

In that regard, the Commission cannot rule out possible requests for public disclosure of any nonpublic portions of the database pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552. Under that Act and the agency’s FOIA rules, the agency may be required to make such information publicly accessible unless it is determined that such disclosure would constitute a clearly unwarranted invasion of personal privacy within the meaning of FOIA Exemption 6, 5 U.S.C. 552(b)(6), or some other exemption applies. The Commission has determined that all

of the above uses or disclosures of the data are authorized and both relevant and necessary to the purposes for which the data are collected.

## 6. Security (Administrative And Technological Controls, Including Maintenance And Disposal)

The security of the information collected through this system is reasonable and appropriate, given the nature of the information collected. As the Notice to commenters at the top of the form indicates, the information commenters place in most of the fields of the form will be made publicly available on the FTC Web site, and therefore constitutes public information. Moreover, the Notice to commenters expressly advises them not to include home contact or other personal information in any of those fields, and the form expressly does not include fields for collecting either the telephone numbers of commenters or their email addresses. In short, the only nonpublic information collected from commenters will be the information provided in the mailing address, city, postal code, and country fields, or as responses to Questions A.1 through F.

However, even if the information was inadvertently disclosed or stolen -- or had to be provided to a requester pursuant to the FOIA, as described above -- the risk of adverse consequences to the commenters affected is likely to be very low. In particular, while the mailing address information could be used to send unsolicited postal mail to the commenters involved, and the responses to the six sets of questions could be associated with the names of their submitters, neither of these circumstances is likely to have significant adverse effects on commenter privacy.

In any event, as the certification materials of the Commission's Chief Information Officer (Appendix A to this Assessment) indicate, all information technology security requirements and procedures required by federal law are being followed to ensure that the information collected through this system will not in fact be either inadvertently disclosed or stolen. The certification materials describe the administrative and technical controls that will be used to secure the information. In particular, the contractor administering the system for the Commission has embedded SSL encryption software in the form to protect the integrity and security of the information collected. Moreover, all required confidentiality, Privacy Act, and other privacy-related clauses have been inserted into the contractor's contract with the Commission.

The attached certification materials also describe the controls in place to ensure proper distribution of the nonpublic information collected, and to prevent misuse of that information by users with access to it; the individuals responsible for insuring proper use of that information; the plans in place to conduct a risk assessment of the system; and the regular monitoring, testing, and evaluating that will be effected to ensure that the security controls in place will continue to properly safeguard the information. Given the relatively low risk to privacy in this case, the FTC believes additional safeguards would be unnecessary and would not justify the additional cost to achieve such further security or privacy, if any.



The substantive components of the comments collected will constitute part of the record of the CAN-SPAM rulemaking proceeding, and the Commission disposition schedule for rulemaking record materials provides that such materials should be preserved for at least 25 years. The nonsubstantive and nonpublic components of the comments collected, however, can and will be destroyed five years after the conclusion of all legal proceedings arising from any final rule issued during the course of the CAN-SPAM rulemaking proceeding.

## 7. Privacy Act

As the foregoing discussion indicates, it will be possible to retrieve information from the system through the use of personal identifiers; that is, through the use of the names of or other identifying particulars associated with the commenters. The system is covered by an existing Privacy Act System of Records notice, which describes, in particular, System FTC I-1: Investigational, Legal, and Public Records. The categories of individuals covered by that system include, *inter alia*, “Participants in Commission . . . rulemaking proceedings.” The categories of records in the system include, *inter alia*, “Name, address, . . . [and] other investigatory information or data relating to . . . rulemaking proceedings . . .” *See generally* 57 Fed. Reg. 45,678 (October 2, 1992). The system therefore does not require a new Privacy Act System of Records notice.

In compliance with the Act, the form used to collect the information will contain the required notice of authority, purpose, routine uses, and whether the collection is voluntary or mandatory and the consequences, if any, of not providing the information. Specifically, the Notice that each commenter sees at the top of the comment form for the CAN-SPAM rulemaking proceeding explains that the FTC Act and other laws authorize the information collection; that all timely and responsive public comments with all required fields completed will be considered by the Commission; that information placed in certain fields will be publicly available on the FTC Web site, and that home contact and other personal information should not be placed in those fields; that answers to the six sets of questions will not be publicly available on the FTC Web site; that the Commission will make every effort to remove home contact information for individuals from public comments before placing the comments on the Web site; and that more information concerning the handling of the information provided, including other routine uses permitted by the Privacy Act, may be found in the FTC’s privacy policy. The Notice also advises commenters that certain fields are required in order for the FTC to fully consider a particular comment, and that while commenters may choose not to fill in one or more of those fields, if they do so, their comments may not be considered. In light of the comprehensive character of the foregoing disclosures, commenters who proceed to fill in one or more of the comment form fields are considered to have consented to the uses of the information specified in the disclosures.

## 8. Other Privacy Considerations and Analysis

The collection, use, and disclosure of information in this system has been reviewed to ensure that the agency’s practices are consistent with the privacy policy that the Commission is required to post on its Web site pursuant to the E-Government Act of 2002, Pub. L. No. 107-347,

and OMB implementing guidance (M - 03-22, Sept. 26, 2003). The Commission's privacy policy can be reviewed as Appendix B to this Assessment, and on the FTC Web site, at the following URL: <http://www.ftc.gov/ftc/privacy.htm>

The Commission notes that the Regulations.gov Web site -- through which commenters reach the Commission-maintained form -- employs software programs to monitor network traffic, in order to identify unauthorized attempts to upload or change information, or otherwise cause damage. The Web site therefore does collect summary information used for system administration and site security, including the domain name and Internet Protocol addresses from which each commenter is visiting; the type of browser and operating system being used to access the site; the pages the commenter visits; the time he or she spends at each page; and the time and date of his or her visit. The Web site uses this information to create summary statistics, which are then used to carry out functions such as assessing what information is of most and least interest, determining technical design specifications, and identifying system performance or problems.

However, consistent with federal law (Pub. L. 107-67, § 639; Pub. L. No. 108-7, § 634) and OMB guidance (M - 00-13, June 22, 2000) neither Regulations.gov nor the Web form being implemented here uses persistent tracking technology such as permanent "cookies" or otherwise permanently places software files or other information on site visitor computers. The Privacy Notice for Regulations.gov appears as Appendix C to this Assessment.

Finally, the Web form does not constitute the operation of a Web site directed toward children for purposes of the Children's Online Privacy Protection Act (COPPA), 15 U.S.C. § 6501 *et seq.*, and implementing FTC regulations, 16 C.F.R. Part 312. In accordance with those statutory and regulatory requirements, however, if Commission or contractor staff secure actual knowledge from reading a particular comment that it was submitted by a child (i.e., a person under 13 years of age), either all personal information contained in the comment will be purged from the system or parental consent to collect and keep that information will be secured.

Prepared for the Business Owner of the System, the Bureau of Consumer Protection, by

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Donald S. Clark, Secretary of the Commission

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Alexander C. Tang, Attorney  
Office of the General Counsel

Approved:

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William Marsh  
Acting Chief Information Officer  
Federal Trade Commission