

**FEDERAL TRADE COMMISSION**

**RIN 3084-AA96**

**16 CFR Part 316**

**Label For E-mail Messages Containing Sexually Oriented Material.**

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

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**SUMMARY:** In this document, the Federal Trade Commission (“FTC” or “Commission”) seeks comment on the proposed rule setting forth the mark that is to be included in commercial electronic mail (“e-mail”) that includes sexually oriented material. Section 5(d) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. 108-187 (Dec. 16, 2003) (“CAN-SPAM Act” or “the Act”) directs the Commission to prescribe, within 120 days of enactment of that law, clearly identifiable marks or notices to be included in or associated with commercial e-mail that contains sexually oriented material. Pursuant to this mandate and its authority under § 13(a) of the Act, the Commission issues this Notice of Proposed Rulemaking and requests public comment on the proposed rule requiring that the prescribed mark be placed on certain commercial e-mail.

**DATES:** Written comments will be accepted until February 17, 2003. **Due to the time constraints of this rulemaking procedure, the Commission does not contemplate any extensions of this comment period or any additional periods for written comments or rebuttal comment. Comments that are not timely submitted and directly responsive to the specific questions set forth in Section G of this document may not be considered.**

**ADDRESSES:** Comments should refer to “Proposed Mark for Sexually Oriented Spam, Project No. P044405.” Comments filed in paper form should also include this reference on their envelopes, and should be mailed or delivered, as prescribed in Section C of the Supplementary Information section, to the following address: Federal Trade Commission/Office of the Secretary, Room 159-H, 600 Pennsylvania Avenue, N.W., Washington, DC 20580. Comments filed in electronic form (except comments containing any confidential material) should be sent, as prescribed in Section C of the Supplementary Information section, to the following email box: [adultlabel@ftc.gov](mailto:adultlabel@ftc.gov). All federal government agency rulemaking initiatives are also available online at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Jonathan Kraden, (202) 326-2614 (email: [adultlabel@ftc.gov](mailto:adultlabel@ftc.gov)), Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:**

**Section A. The CAN-SPAM Act of 2003**

On December 16, 2003, the President signed into law the CAN-SPAM Act. In enacting this legislation, Congress found, *inter alia*, as set forth in § 2 of the Act, that “some commercial e-mail contains material that many recipients may consider vulgar or pornographic in nature.”<sup>1</sup>

Indeed, citizens across the country have expressed concern over the increasing amount of unsolicited commercial e-mail that they receive and, most notably, the sexually explicit images

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<sup>1</sup>CAN-SPAM Act at § 2(a)(5).

that are often included in these e-mails.<sup>2</sup> This concern has prompted eighteen (18) states to enact legislation in recent years requiring a label to be attached to unsolicited commercial e-mails that include sexually explicit or obscene materials. While all of these state labeling requirements contain some variation on the words “ADULT” and “ADVERTISEMENT,” the requirements often differ on the placement and spelling of these words.<sup>3</sup> The CAN-SPAM Act creates a federal labeling requirement for such e-mail messages, and § 5(d) of the Act directs the Commission to prescribe clearly identifiable marks or notices to be included in or associated with commercial e-mail that contains sexually oriented material.

#### **Section B. Proposed Mark For E-mail Messages Including Sexually Oriented Material**

Pursuant to its mandate under § 5(d) of the Act and its authority under § 13(a) of the Act, and after consulting with the Department of Justice, the Commission hereby proposes that the phrase “SEXUALLY-EXPLICIT-CONTENT: ” (hereinafter “Proposed Mark”) be required to be displayed in capital letters as the first twenty-seven (27) characters in the subject line of any commercial e-mail message that includes sexually oriented material.<sup>4</sup> The Commission believes

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<sup>2</sup>A study done by FTC staff found that 17% of pornographic offers sent in a sampling of unsolicited commercial e-mail contained images of nudity that appeared automatically when a consumer opened the e-mail message. Over 40% of these sampled e-mails contained false statements in their “From” or “Subject” lines, making it more likely that recipients would open the messages without knowing that pornographic images would appear. *False Claims In Spam*, April 30, 2003, available at <http://www.ftc.gov/opa/2003/04/spamrpt.htm>.

<sup>3</sup>The different state labels are “ADV:ADLT” (Alaska, Illinois, Indiana, Kansas, Maine, Missouri, New Mexico, South Dakota, and Tennessee); “ADV:ADULT” (Arkansas and Utah); “ADV-ADULT” (Louisiana, Minnesota, North Dakota, Oklahoma, and Pennsylvania); “ADV: ADULT ADVERTISEMENT” (Texas); and “ADULT ADVERTISEMENT” (Wisconsin).

<sup>4</sup>The phrase “SEXUALLY-EXPLICIT-CONTENT” comprises 25 characters, including the dashes between the three words. The colon (:) and the space following the phrase are the 26<sup>th</sup> and 27<sup>th</sup> characters and are included to set off the Proposed Mark and help make it more prominent.

that this phrase, which is derived from the definition of sexually oriented materials in § 5(d)(4) of the CAN-SPAM Act, will provide the most accurate description of the images included in a commercial e-mail that includes sexually oriented materials.<sup>5</sup> For that reason, the Commission believes that the Proposed Mark will most clearly, conspicuously and effectively alert the recipient to the fact that an e-mail includes sexually oriented material that he or she may find objectionable.

In addition, the Commission added hyphens between the words in order to facilitate appropriate filtering. Specifically, the Commission is concerned that a filter set to block a simple English phrase like “sexually explicit content” could prevent delivery of an email from an anti-pornography group that used the phrase within the content of their message. Use of hyphens creates a unique mark calculated to avoid this problem. In addition, the Commission believes that the addition of dashes between the three words and a colon and a space after the phrase “SEXUALLY EXPLICIT CONTENT” will serve to set off the Proposed Mark and help to make it more unique and prominent.

The Commission also considered proposing use of the mark “adult advertisement.” While many states across the country have labeling requirements that use abbreviated variations of the words “adult” and “advertisement,” the Commission believes that use of the word “adult” in the proposed mark would not necessarily provide a recipient with the most effective notice of what that e-mail contains. There are many products or services (such as tobacco, alcohol, and

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<sup>5</sup>See § 5(d)(4) of the Act. Although the definition of “sexually oriented material” refers to “sexually explicit conduct,” the Commission proposes substituting the word “content” for the word “conduct” in the Proposed Mark because the substance of an e-mail message is more accurately defined by use of the word “content.”

gambling) that could be considered “adult” in nature. For this reason, the Commission believes that any proposed mark or notice must include some mention of the “sexual” images that a recipient can expect to see should he or she decide to open a labeled e-mail.

In addition to establishing the required mark, the proposed rule tracks the elements of § 5(d)(1) of the Act, requiring that an e-mail message that contains sexually oriented material include: clear and conspicuous identification that the message is an advertisement or solicitation; a clear and conspicuous opt-out notice; a functioning return e-mail address or other Internet-based mechanism for opt-outs; a valid physical postal address of the sender; and a clear and conspicuous statement that to avoid viewing the sexually oriented material, a recipient should delete the email message without following a sender’s provided instructions on how to access, or activate a mechanism to access, the sexually oriented material.

The proposed rule also tracks § 5(d)(2) of CAN-SPAM by exempting situations where a recipient has given his or her prior consent to receipt of a message. In addition, the proposed rule clarifies that certain terms taken from the Act and appearing in the proposed rule have the definitions prescribed by particular referenced sections of the Act.<sup>6</sup> Finally, § 316.1(d) is a severability provision that provides that if any portion of the rule is found invalid, remaining portions will survive.

### **Section C. Invitation To Comment**

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<sup>6</sup>Most of the terms listed in § 316.1(c) occur in the text of the proposed rule; several of them are not in the rule text, but are listed there because CAN-SPAM incorporates and defines them within the definition of another term. For example, the term “procure” is listed in the proposed rule’s definitions [at § 316.1(c)(7)] because the Act defines and includes that term in another defined term, “initiate,” defined in the rule at § 316.1(c)(5).

All members of the public are hereby given notice of the opportunity to submit written data, views, facts, and arguments concerning the Proposed Mark and the proposed rule. The Commission invites written comments to assist it in ascertaining the feasibility and effectiveness of the Commission's Proposed Mark and proposed rule. Comments may be filed with the Commission in either paper or electronic form, and must be filed on or before February 17, 2003.

1. A public comment filed in paper form should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room 159-H, 600 Pennsylvania Avenue, N.W., Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. If the comment contains any material for which confidential treatment is requested, it must be filed in paper (rather than electronic) form, and the first page of the document must be clearly labeled "Confidential."<sup>7</sup>
2. A public comment that does not contain any material for which confidential treatment is requested may instead be filed in electronic form (in ASCII format, WordPerfect, or Microsoft Word), as part of or as an attachment to an email message sent to the following email box: [adultlabel@ftc.gov](mailto:adultlabel@ftc.gov)
3. Regardless of the form in which they are filed, all timely and responsive comments will be considered by the Commission, and will be available (with confidential material

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<sup>7</sup>Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. See Commission Rule 4.9(c), 16 CFR 4.9(c).

redacted) for public inspection and copying on the Commission web site at [www.ftc.gov](http://www.ftc.gov) and at its principal office. As a matter of discretion, 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.

**Section D. 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).

**Section E. Paperwork Reduction Act**

The Commission has determined that the proposed rule does not include a collection of information subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320). The Proposed Mark that the proposed rule requires to be displayed in the subject line "is information originally supplied by the federal government." See 5 CFR 1320.3(c)(2).

**Section F. 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 FTC does not expect that the Proposed Mark will have a significant economic impact on a substantial number of small entities. This document serves as notice to the Small Business Administration of the agency's certification of no effect. Nonetheless, 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.

1. Reasons for the proposed rule.

Section 5(d) of the CAN-SPAM Act directs the Commission to prescribe, within 120 days of enactment of that law, clearly identifiable marks or notices to be included in or associated with commercial e-mail that contains sexually oriented material. The proposed rule is intended to fulfill the obligations imposed by § 5(d).

2. Statement of objectives and legal basis.

The objectives of the proposed rule are discussed above. The legal basis for the proposed rule is § 5(d) of the CAN-SPAM Act.

3. Description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.

In general the proposed rule will apply to any person or entity who initiates, originates or transmits a commercial e-mail message that contains sexually oriented material. Determining a precise estimate of the number of small entities subject to the proposed rule, or describing those entities, is not readily feasible because the assessment of whether an e-mail message contains sexually oriented material turns on a number of factors that will require factual analysis on a case-by-case basis. The Commission invites comment and information on this issue.

4. Description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement of including the Proposed Mark and the type of professional skills that will be necessary for inclusion of the Proposed Mark.



The proposed rule does not impose any reporting or any specific recordkeeping requirements within the meaning of the Paperwork Reduction Act. The Proposed Mark would be included as the first twenty-seven (27) characters of the subject line of any commercial e-mail message that contains sexually oriented material. The Commission does not believe that the insertion of additional characters into the subject line of an e-mail will create a significant burden on persons or entities who initiate a commercial e-mail message that includes sexually oriented material. However, the Commission, as noted below, seeks further comment on the professional skills that will be needed to implement the proposed rule, the actual costs or expenditures, if any, of including the Proposed Mark in the subject line of commercial e-mail that contains sexually oriented material, and the extent to which these costs may differ or vary for small entities.

5. 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 requirement that the Proposed Mark be included as the first twenty-seven (27) characters of the subject line of any commercial e-mail message that contains sexually oriented material. However, the Commission is requesting comment and information about any statutes or rules that may duplicate or conflict with the proposed rule, as well as any state, local, or industry rules or policies that require labeling on commercial e-mail messages that include sexually oriented material.

6. Discussion of significant alternatives to the proposed rule that would accomplish the stated objectives of the CAN-SPAM Act and that would minimize any significant economic impact of the proposed rule on small entities.

Section 5(d) of the CAN-SPAM Act directs the Commission to prescribe clearly identifiable marks or notices to be included in or associated with commercial e-mail that includes sexually oriented material. The proposed rule is intended to fulfill the obligations imposed by § 5(d). However, the Commission recognizes that there are a number of variations and alternatives to the wording contained in the Proposed Mark and also considered the phrases “adult advertisement” and “sexually oriented material” before ultimately deciding on the Proposed Mark. The FTC welcomes comment on any significant alternatives, consistent with the purposes of the CAN-SPAM Act, that would minimize the economic impact of the proposed rule on small entities.

#### **Section G. Specific Issues for Comment**

The Commission seeks comment on the proposed rule as set forth in this Notice. The Commission is particularly interested in receiving comments on the questions that follow. In responding to these questions, include detailed and factual supporting information whenever possible.

1. Are there any technical reasons why the Proposed Mark cannot be included in the subject line of e-mails that include sexually oriented materials?
2. Are there any technical reasons why the proposed rule will not be effective?
3. Are there any technical ways to make the proposed rule more effective?
4. Are there other notices or marks that would be more effective in achieving the objective of the statute, including, but not limited to, “ADULT ADVERTISEMENT” and “SEXUALLY ORIENTED MATERIAL”? Why?

5. Is the proposed rule adequate to inform a recipient that an e-mail may include content that is objectionable or offensive due to its sexual nature?
6. Is there additional information that a mark or notice should include to ensure that a recipient is made aware that an e-mail includes sexually oriented material?
7. Will the inclusion of the Proposed Mark aid a filtering program in blocking or filtering e-mail messages that include sexually oriented material?
8. Is there additional information that a mark or notice should include to ensure that a filtering program can effectively and efficiently filter such an e-mail?
9. Does the inclusion of punctuation (such as a colon or a dash) in the Proposed Mark in any way affect the ability of a filtering program to filter such an e-mail?
10. Would the proposed rule unduly burden either entities selling sexually oriented material through e-mail messages or those consumers who were interested in purchasing sexually oriented material offered to them through e-mail messages? How? Is this burden justified by offsetting benefits to consumers?
11. How can the Commission measure the effectiveness of the proposed rule in protecting consumers from unwanted sexually oriented e-mail messages?
12. Please describe what effect the proposed rule will have on small entities that initiate commercial e-mail messages that include sexually oriented material.
13. Please describe what costs will be incurred by small entities to “implement and comply” with the rule, including expenditures of time and money for: any employee training; acquiring additional professional skills; attorney, computer programmer, or other professional time; and preparing and processing relevant materials.

14. Are there ways the proposed rule could be modified to reduce the costs or burdens for small entities while still being consistent with the requirements of the CAN-SPAM Act?

15. Please identify any relevant federal, state, or local rules that may duplicate, overlap or conflict with the proposed rule. In addition, please identify any industry rules or policies that require small entities or other regulated entities to include clearly identifiable marks or notices with commercial e-mail that contains sexually oriented material.

16. Are the definitions set forth referencing the CAN-SPAM Act acceptable or would commenters prefer that the legal definitions themselves be imported into the proposed rule from the CAN-SPAM Act?

## **List of Subjects**

### **16 CFR Part 316**

Advertising, Business and industry, Computer technology, Consumer Protection, Labeling

Accordingly, the Commission proposes to add a new part 316 of title 16 of the Code of Federal Regulations as follows:

### **PART 316—RULES IMPLEMENTING THE CAN-SPAM ACT OF 2003**

Sec. 316.1 Requirement to place warning labels on commercial electronic mail that contains sexually oriented material.

Authority: Pub. L. 108-187.

#### **§ 316.1 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) include in the subject heading for the electronic mail message the phrase “SEXUALLY-EXPLICIT-CONTENT: ” in capital letters as the first twenty seven (27) characters at the beginning of the subject line;<sup>1</sup> and

(2) provide that the matter in 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:

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

(ii) clear and conspicuous identification that the message is an advertisement or solicitation;

(iii) clear and conspicuous notice of the opportunity of a recipient to decline to receive further commercial electronic mail messages from the sender;

(iv) a functioning return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed, that -

(A) a recipient may use to submit, in a manner specified in the message, a reply electronic mail message or other form of Internet-based communication requesting not to receive future commercial electronic

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<sup>1</sup>The phrase “SEXUALLY-EXPLICIT-CONTENT” comprises 25 characters, including the dashes between the three words. The colon (:) and the space following the phrase are the 26<sup>th</sup> and 27<sup>th</sup> characters.

<sup>2</sup>This phrase consists of twenty seven (27) characters and is identical to the phrase required in § 316.1(a)(1) of this rule.

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) 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) does not apply to the transmission of an electronic mail message if the recipient has given prior affirmative consent to receipt of the message.

(c) Definitions:

(1) The definition of the term “affirmative consent” is the same as the definition of that term in § 3(1) of the CAN-SPAM Act of 2003, Pub. L. 108-187 (Dec. 16, 2003).

(2) The definition of the term “commercial electronic mail message” is the same as the definition of that term in § 3(2) of the CAN-SPAM Act of 2003, Pub. L. 108-187 (Dec. 16, 2003).

(3) The definition of the term “electronic mail address” is the same as the definition of that term in § 3(5) of the CAN-SPAM Act of 2003, Pub. L. 108-187 (Dec. 16, 2003).

(4) The definition of the term “electronic mail message” is the same as the definition of that term in § 3(6) of the CAN-SPAM Act of 2003, Pub. L. 108-187 (Dec. 16, 2003).

- (5) The definition of the term “initiate” is the same as the definition of that term in § 3(9) of the CAN-SPAM Act of 2003, Pub. L. 108-187 (Dec. 16, 2003).
- (6) The definition of the term “Internet” is the same as the definition of that term in § 3(10) of the CAN-SPAM Act of 2003, Pub. L. 108-187 (Dec. 16, 2003).
- (7) The definition of the term “procure” is the same as the definition of that term in § 3(12) of the CAN-SPAM Act of 2003, Pub. L. 108-187 (Dec. 16, 2003).
- (8) The definition of the term “protected computer ” is the same as the definition of that term in § 3(13) of the CAN-SPAM Act of 2003, Pub. L. 108-187 (Dec. 16, 2003).
- (9) The definition of the term “recipient” is the same as the definition of that term in § 3(14) of the CAN-SPAM Act of 2003, Pub. L. 108-187 (Dec. 16, 2003).
- (10) The definition of the term “routine conveyance” is the same as the definition of that term in § 3(15) of the CAN-SPAM Act of 2003, Pub. L. 108-187 (Dec. 16, 2003).
- (11) The definition of the term “sender” is the same as the definition of that term in § 3(16) of the CAN-SPAM Act of 2003, Pub. L. 108-187 (Dec. 16, 2003).
- (12) The definition of the term “transactional or relationship messages” is the same as the definition of that term in § 3(17) of the CAN-SPAM Act of 2003, Pub. L. 108-187 (Dec. 16, 2003).
- (13) The definition of the term “sexually oriented material” is the same as the definition of that term in § 5(d)(4) of the CAN-SPAM Act of 2003, Pub. L. 108-187 (Dec. 16, 2003).

(d) Severability - The provisions of this Rule 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