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FEDERAL TRADE COMMISSION

16 CFR 316

[Project No. R411008]

RIN 3084-AA96

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

AGENCY: Federal Trade Commission (FTC)

ACTION: Extension of period to submit comments in response to advance notice of proposed rulemaking under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act” or “the Act”).

SUMMARY: In a Federal Register notice published March 11, 2004, the FTC requested comment on various topics related to §§ 3(2)(C), 3(17)(B), 5(c)(1), 5(c)(2), and 13 of the CAN-SPAM Act. In addition, the FTC requested comment on topics relevant to certain reports to Congress required by additional provisions of the CAN-SPAM Act. In response to a request for an extension of the comment period received April 1, 2004, the Commission has extended the comment period until April 20, 2004.

DATES: Comments addressing any aspect of the CAN-SPAM Act (except the Do Not Email Registry Report the FTC must prepare and submit to Congress pursuant to § 9 of the CAN-SPAM Act) must be submitted on or before April 20, 2004. (The deadline for receipt of comments on the Do Not Email Registry Report was March 31, 2004.)

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, CANSPAM 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 159-H, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Comments containing confidential material must be filed in paper form. An electronic comment can be filed by (1) clicking on <http://www.regulations.gov>; (2) selecting "Federal Trade Commission" at "Search for Open Regulations;" (3) locating the summary of this Notice; (4) clicking on "Submit a Comment on this Regulation;" and (5) completing the form. For a given electronic comment, any information placed in the following fields -- "Title," "First Name," "Last Name," "Organization Name," "State," "Comment," and "Attachment" -- will be publicly available on the FTC Web site. The fields marked with an asterisk on the form are required in order for the FTC to fully consider a particular comment. Commenters may choose not to fill in one or more of those fields, but if they do so, their comments may not be considered. 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 with all required fields completed, 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 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>.

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, N.W., Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION: The CAN-SPAM Act directs the Commission to issue regulations, not later than 12 months following the enactment of the Act, “defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message.”¹ The CAN-SPAM Act also provides discretionary authority for the Commission to issue regulations concerning certain of the Act’s other definitions and provisions. 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;”²
- modify the 10-business-day period prescribed in the Act for honoring a recipient’s opt-out request;³
- specify activities or practices as aggravated violations (in addition to those set forth as such in § 5(b) of the CAN-SPAM Act) “if the Commission determines that those

¹CAN-SPAM Act, § 3(2)(C). The term “the 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 promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose.)” CAN-SPAM Act, § 3(2)(A) (emphasis supplied).

²CAN-SPAM Act, § 3(17)(B).

³CAN-SPAM Act, § 5(c)(1)(A)-(C).

activities or practices are contributing substantially to the proliferation of commercial electronic mail messages that are unlawful under subsection [5(a) of the Act]”;⁴ and

- “issue regulations to implement the provisions of this Act.”⁵

On March 11, 2004 the Commission published an advance notice of proposed rulemaking (“ANPR”) to initiate the mandatory “primary purpose” rulemaking proceeding by soliciting comment on issues relating to that term and its use in the Act.⁶ In addition, the notice solicited comments on the several areas of discretionary regulation listed above. Finally, the Commission also solicited comment in this ANPR on a variety of topics relevant to certain reports that, pursuant to the mandate of the CAN-SPAM Act, the Commission must issue within the coming two years.⁷

On April 1, 2004 the Commission received a letter from Ronald L. Plessner of Piper Rudnick requesting, on behalf of the American Association of Advertising Agencies, the Association of National Advertisers, the Consumer Bankers Association, the Direct Marketing Association, and the Magazine Publishers of America, that the Commission extend the comment period to April 20, 2004. In support of this request, the letter states that an extension of time would allow the requesting entities more time to contact their members to further evaluate the ANPR. The letter also explains that, in light of upcoming religious holidays, a short extension of

⁴CAN-SPAM Act, § 5(c)(2).

⁵CAN-SPAM Act, § 13.

⁶69 FR 11776 (Mar. 11, 2004).

⁷CAN-SPAM requires the Commission to prepare and submit to Congress four separate reports within the next two years: a report on establishing a “Do Not Email” Registry to be submitted by June 16, 2004; a report on establishing a system for rewarding those who supply information about CAN-SPAM violations by September 16, 2004; a report setting forth a plan for requiring commercial email to be identifiable from its subject line by June 16, 2005; and a report on the effectiveness of CAN-SPAM by December 16, 2005.

time is needed for the requesting entities to adequately present their views.

In response to this request, the Commission has determined to extend the comment period on all topics set forth in the Advance Notice of Proposed Rulemaking, except the Do Not Email Registry report, until April 20, 2004.⁸

By direction of the Commission.

C. Landis Plummer

Acting Secretary

⁸The deadline for comments on the Do Not Email Registry report was March 31, 2004. The parties that requested extension of the ANPR comment period did not request extension of the comment period on the Do Not Email Registry report.