

To the Commission:

This e-mail is in response to the Commission's request for public comments relative to its proposed rule implementing section 5(d) of the CAN-SPAM Act of 2003. The Commission has sought comment in several specific areas.

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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?

The proposed rule requires that the 27-character mark appear at the beginning of the subject line. If, however, the original recipient of the message uses the mail forwarding feature of his or her e-mail reader, the e-mail program will customarily add text such as "Fwd:" or the like to the beginning of the subject line. As written, the proposed regulation might therefore be construed to require that vendors of e-mail software modify the forwarding feature to preserve the placement of the proposed mark and retrofit the modification on all users' computers.

It would not be desirable to allow the proposed mark to appear anywhere in the subject line, however, because a spammer could pad the subject line with any information at all in the hope that a recipient's e-mail viewer would truncate the subject line to fit into the display window.

Therefore, I suggest that the rule require the proposed mark to begin within, say, the first ten character positions of the subject line.

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7. Will the inclusion of the Proposed Mark aid a filtering program in blocking or filtering e-mail messages that include sexually oriented material?

I think that the proposed mark will admirably serve this purpose. In my own self defense, I created a spam-filtering software program that operates by doing text matches within the headers of incoming e-mail messages. Popular e-mail programs, including NetScape Communicator and Microsoft Outlook and Outlook Express have filtering capabilities that likewise perform text matches within headers.

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11. How can the Commission measure the effectiveness of the proposed rule in protecting consumers from unwanted sexually oriented e-mail messages?

Frankly, I believe that consumers are now inured to receiving vast quantities of unwanted e-mail and will not consistently make complaints or follow-up on the Commission's suggestion that unwanted e-mails be forwarded to uce@ftc.gov. Thus, I don't think that statistical counting of complaints will provide a reliable guide.

A method of the effectiveness might be to measure the number of messages carrying the proposed mark which are deleted without being read. Obtaining that measure anonymously from providers like AOL or MSN might be practical. Obtaining it from private computers would be possible only by installing specially modified versions of e-mail viewing programs, which would likely raise serious privacy concerns.

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12. Please describe what effect the proposed rule will have on small entities that initiate commercial e-mail messages that include sexually oriented material.

It's my understanding that a handful of individual operators are responsible for nearly all the spam that clogs the Internet. Almost by definition, the CAN-SPAM Act, and the proposed rule, will have an enormous effect on these "small entities" by making it uneconomic for them to continue in business. That is the desired effect of the law, however, and should not be an obstacle to rule making or enforcement.

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16. Are the definitions set form 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?

As the Commission is already aware, importing the statutory definitions creates a risk that the rule may become stale if Congress amends the Act, or the sections to which the Act refers. Since the Commission would be required to advertise a formal rulemaking process to make conforming amendments, the rule would be in limbo for some period of time.

Two of the statutory definitions are especially confusing, however, and should (in my view) be clarified and explained in the order adopting the final rule.

The definition of "protected computer" in section 3(13) of the Act depends in turn on 18 U.S.C. 1030(e)(2)(B). It is anything but obvious that a typical home computer fits the definition simply because it is sometimes used in interstate communication.

The definition of "sexually oriented material" in section 5(d)(4) of the Act depends in turn on the definition of "sexually explicit conduct" in 18 U.S.C. 2256. It is not obvious without close study that an e-mail containing an image of a "lascivious display" fits this definition, since such a display would seem not to be "conduct" as the word is ordinarily used.

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