

## Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003<sup>1</sup>

### Introduction

Under Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM or Act)<sup>2</sup>, the Federal Trade Commission (FTC) is charged with issuing regulations for implementing CAN-SPAM.<sup>3</sup> The FTC has issued regulations, effective as of March 28, 2005, that provide criteria to determine the primary purpose of electronic mail (e-mail) messages. The FTC has also issued regulations that contain criteria pertaining to warning labels on sexually oriented materials, which became effective as of May 19, 2004.

The goals of the act are to:

- Reduce spam and unsolicited pornography by prohibiting senders of unsolicited commercial e-mail messages from disguising the source and content of their messages.
- Give consumers the choice to cease receiving a sender's unsolicited commercial e-mail messages.

Compliance authority was expressly granted to the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Federal Reserve Board, and the Office of Thrift Supervision to be enforced under Section 8 of the Federal Deposit Insurance Act. The National Credit Union Association was granted authority through the Federal Credit Union Act 12 USC 1751.

The FTC has researched and determined that a "Do Not Spam" registry (similar to the highly effective "Do Not Call" registry) would not be effective or practicable at this time.

### Key Definitions

**"Affirmative Consent"** (usage: commercial e-mail messages)

- The recipient expressly consented to receive the message, either in response to a clear and conspicuous request for such consent or at the recipient's own initiative; and

<sup>1</sup> This section fully incorporates the examination procedures issued under DSC RD Memo 05-047: Procedures for Examination Compliance with Controlling the Assault of Non-Solicited Pornography and Marketing Act and Telephone Consumer Protection Act.

<sup>2</sup> 15 USC 7701 - 7713

<sup>3</sup> Final rules relating to the established criteria for determining when the primary purpose of an e-mail message is commercial were published in the Federal Register on January 19, 2005 (70 FR 3110). Final rules relating to governing the labeling of commercial e-mail containing sexually oriented material was published in the Federal Register on April 19, 2004 (69 FR 21024).

- If the message is from a party other than the party to which the recipient communicated such consent, the recipient was given clear and conspicuous notice at the time the consent was communicated that the recipient's e-mail address could be transferred to such other party for the purpose of initiating commercial e-mail messages.

**"Commercial E-mail Message"** Any e-mail message the primary purpose of which is to advertise or promote for a commercial purpose, a commercial product or service (including content on the Internet). An e-mail message would not be considered to be a commercial e-mail message solely because such message includes a reference to a commercial entity that serves to identify the sender or a reference or link to an Internet Web site operated for a commercial purpose.

**"Dictionary Attacks"** Obtaining e-mail addresses by using an automated means that generates possible e-mail addresses by combining names, letters, or numbers into numerous permutations.

**"Harvesting"** Obtaining e-mail addresses using an automated means from an Internet Web site or proprietary online service operated by another person, where such service/person, at the time the address was obtained, had provided a notice stating that the operator of such Web site or online service would not give, sell, or otherwise transfer electronic addresses.

**"Header Information"** The source, destination, and routing information attached to the beginning of an e-mail message, including the originating domain name and originating e-mail address.

**"Hijacking"** The use of automated means to register for multiple e-mail accounts or online user accounts from which to transmit, or enable another person to transmit, a commercial e-mail message that is unlawful.

**"Initiate"** To originate, transmit or to procure the origination or transmission of such message but shall not include actions that constitute routine conveyance. For purposes of the Act, more than one person may be considered to have initiated the same message.

**"Primary Purpose"** The FTC's regulations provide further clarification regarding determination of whether an e-mail message has "commercial" promotion as its primary purpose. [16 CFR 316.3]

- (1) The primary purpose of an e-mail message will be deemed to be commercial if it contains only the commercial advertisement or promotion of a commercial product or service (commercial content);
- (2) The primary purpose of an e-mail message will be deemed to be commercial if it contains both commercial content