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B-295736

January 28, 2005

The Honorable Ted Stevens  
Chairman  
The Honorable Daniel K. Inouye  
Ranking Minority Member  
Committee on Commerce, Science, and Transportation  
United States Senate

The Honorable Joe Barton  
Chairman  
The Honorable John D. Dingell  
Ranking Minority Member  
Committee on Energy and Commerce  
House of Representatives

Subject: *Federal Trade Commission: Definitions and Implementation Under the  
CAN-SPAM Act*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Federal Trade Commission (FTC), entitled “Definitions and Implementation Under the CAN-SPAM Act” (RIN: 3084-AA96). We received the rule on January 14, 2005. It was published in the Federal Register as a final rule on January 19, 2005. 70 Fed. Reg. 3110.

The final rule implements the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM”) by defining the relevant criteria to determine the primary purpose of an electronic mail message. The rule describes types of electronic mail messages that contain commercial content or what the Act terms “transactional or relationship” content, and establishes different criteria for each type. The rule also clarifies that the definitions of certain terms taken from the Act and appearing in the rule are prescribed by particular referenced portions of the Act.

Enclosed is our assessment of the FTC’s compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review indicates that FTC complied with the applicable requirements.

If you have any questions about this report, please contact James W. Vickers, Assistant General Counsel, at (202) 512-8210. The official responsible for GAO evaluation work relating to the subject matter of the rule is Norman Rabkin, Managing Director, Homeland Security and Justice. Mr. Rabkin can be reached at (202) 512-8777.

signed

Kathleen E. Wannisky  
Managing Associate General Counsel

Enclosure

cc: Donald S. Clark  
Secretary of the Commission  
Federal Trade Commission

ANALYSIS UNDER 5 U.S.C. § 801(a)(1)(B)(i)-(iv) OF A MAJOR RULE  
ISSUED BY THE  
FEDERAL TRADE COMMISSION  
ENTITLED  
"DEFINITIONS AND IMPLEMENTATION UNDER THE CAN-SPAM ACT"  
(RIN: 3084-AA96)

(i) Cost-benefit analysis

The FTC did not perform a cost-benefit analysis of the final rule. According to the FTC, any costs attributable to CAN-SPAM are the result of the substantive requirements of the Act itself, not the interpretative final rule.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

The FTC prepared a Final Regulatory Flexibility Analysis and has concluded that the final rule will not impose an undue burden on small entities.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

As an independent regulatory and law enforcement agency, the FTC is not subject to title II of the Unfunded Mandates Reform Act of 1995.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

The final rule was issued using the notice and comment procedures found at 5 U.S.C. 553. On March 11, 2004, the FTC issued an Advance Notice of Proposed Rulemaking in the Federal Register. 69 Fed. Reg. 11776. In response, over 13,500 comments were received. On August 13, 2004, a Notice of Proposed Rulemaking was published in the Register. 69 Fed. Reg. 50091. The FTC received an additional 226 comments. The comments are discussed in the preamble to the final rule.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The final rule does not contain any information collections that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act.

Statutory authorization for the rule

The final rule is promulgated pursuant to the authority contained in the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003. 15 U.S.C. 7701-7713.

Executive Order No. 12866

As an independent agency, the FTC is not subject to the review requirements of the order. However, OMB has determined that the final rule is a major rule under the Congressional Review Act.