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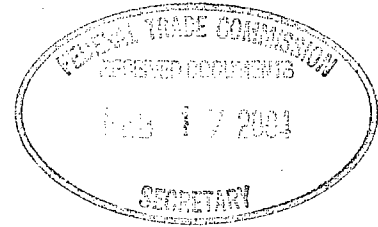
February 16, 2004

GLENN SMITH
Deputy Attorney General

E-MAIL AND FIRST-CLASS MAIL

ORIGINAL

Federal Trade Commission
Office of the Secretary
Room 159-H
600 Pennsylvania Ave., N.W.
Washington, DC 20580



Re: Proposed Rule Regarding Sexually Oriented Spam, Project No. PO 44405

Dear Sir or Madam:

I write as the Attorney General of the State of New Mexico, and am pleased to be joined in this letter by Senator Dede Feldman, chief sponsor of New Mexico's anti-Spam legislation. We welcome the opportunity to submit these comments on the Federal Trade Commission's proposed rule regarding unsolicited commercial email that contains sexually oriented or explicit materials.

First, we commend the Federal Trade Commission ("FTC" or "Commission") for seeking to address this troubling issue. Citizens throughout our country struggle with the receipt of unwanted and unsolicited commercial email that contains sexually explicit materials. We agree that the Proposed Mark, "SEXUALLY-EXPLICIT-CONTENT:", based on the definition of "sexually oriented materials" as contained in § 5(d)(4) of the "CAN-SPAM Act",¹ accurately describes the type of images that may be included in a commercial email that includes sexually explicit materials.

We respectfully suggest, however, that the Proposed Mark is not clear enough and needs to go further to adequately warn recipients of the disturbing and objectionable material that may be included with the email. While technical or

¹ Also known as the "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003", Pub. L. 108-187 (Dec. 16, 2003).

practical considerations may ultimately limit the number and configuration of characters that may be included in the subject line of any email message, we suggest the following label will more clearly and accurately provide the warning the public should receive:

“SEXUALLY-EXPLICIT-MATERIAL: MAY CONTAIN
OBJECTIONABLE ADULT ADVERTISEMENT:”

We believe this subject label, or mark, will be more readily understood by all and will more clearly warn the public, consistent with the directives of the federal law, that the email contains sexually oriented material.

We remain concerned that the federal law simply does not go far enough to adequately protect the public. As defined in the CAN-SPAM Act, the term “sexually oriented material” means “any material that depicts sexually explicit conduct (as that term is defined in section 2256 of title 18, United States Code), unless the depiction constitutes a small and insignificant part of the whole, the remainder of which is not primarily devoted to sexual matters.”² “Sexually explicit conduct” is defined as being one or more particular sexual acts or the display of specified sexual parts.³ Hence the term, “sexually oriented material”, as used in the CAN-SPAM Act, means only visual depictions of sex acts or sexual parts and the usage of visual media to carry these images through the electronic mail. Thus, although the CAN-SPAM Act and the Proposed Mark address unsolicited commercial email that contains visual depictions of sexual conduct, any other unsolicited commercial email containing advertisements for sexually oriented products or services will not be labeled under the FTC’s Proposed Mark. We believe this is a serious deficiency in the law.

Concerns over the increasing amount of unsolicited commercial email prompted the Legislature of the State of New Mexico to enact legislation last year placing restrictions upon commercial email, including commercial email that is sexually

² See Section 5(d)(4) of the CAN-SPAM Act.

³ 18 U.S.C. § 2256(2)(A).

Federal Trade Commission
Office of the Secretary
February 16, 2004
Page 3

oriented. New Mexico's law applies not only to sexually explicit images but also to advertisements for sexually oriented products or services. *See* New Mexico's Anti-Spam Act.⁴ We would urge the federal government to do the same.

We recognize that at present the Commission is constrained by the language of the CAN-SPAM Act. Until such time as the CAN-SPAM Act is amended, we believe that the Proposed Mark we suggest will provide the most accurate description of the images that may be included in a commercial email that includes sexually oriented materials. We hope the Commission will look favorably upon our suggestion to more directly and clearly warn and protect the public.

Sincerely,



PATRICIA A. MADRID
Attorney General



DEDE FELDMAN
State Senator
State of New Mexico

⁴ *See* New Mexico's Unfair Trade Practices Act NMSA 1978, § 57-12-23, Unsolicited Facsimiles or Email Prohibition; *see also* § 57-12-23 (B)(4).