

## COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

FEDERAL TRADE COMMISSION

CAN-SPAM Rule  
CFR Part 316  
Project No. R711010

Docket No. 2017-13471

August 31, 2017

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By notice published on June 28, 2017 the Federal Trade Commission requested comments on its Controlling the Assault of Non-Solicited Pornography and Marketing (“CAN-SPAM”) Rule.<sup>1</sup> Pursuant to this notice, the Electronic Privacy Information Center (“EPIC”) submits these comments to support the continued use of the CAN-SPAM Rule.

EPIC is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging privacy and human rights related issues, and to protect privacy, the First Amendment, and constitutional values.<sup>2</sup> EPIC has been particularly involved in advocating for consumers to be protected from annoying and harassing e-mails, text messages, and phone calls.<sup>3</sup> EPIC has played a leading role in developing the authority of the

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<sup>1</sup> *CAN-SPAM Rule*, 82 Fed. Reg. 29,254 (Jun. 28, 2017) (hereinafter “CAN-SPAM Rule Review”).

<sup>2</sup> *About EPIC*, EPIC, <http://epic.org/epic/about.html>.

<sup>3</sup> Comments of EPIC, *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Jun. 30, 2017, <https://epic.org/apa/comments/EPIC-FCC-Robocall-Comments.pdf>; Comments of EPIC, *In the matter of CAN-*

FTC to address emerging privacy and security issues.<sup>4</sup> Additionally, EPIC was involved in the implementation of the CAN-SPAM Rule.<sup>5</sup> EPIC submits the following comments to emphasize the need for continued enforcement of the CAN-SPAM Rule and to suggest ways in which the rule can be improved.

The Commission asks whether there is a continuing need for the CAN-SPAM Rule.<sup>6</sup> EPIC believes that there is. Unwanted and annoying e-mails continue to plague consumers despite the enactment of the Rule. A recent report estimated that 65% of all e-mails are spam and that the amount of spam is expected to increase, especially with the increased use of botnets.<sup>7</sup>

Additionally, some spam that is sent is malicious and comes with harmful attachments which can infect computers and aid in identity theft. While the volume of spam is lower than it was just a few years ago, the need for the Rule continues. Companies and individuals still make use of the Rule and its continued enforcement, including substantial financial judgments imposed against violators, will serve to dissuade others from sending spam e-mails.<sup>8</sup>

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*SPAM Act Rulemaking (Do Not E-mail)*, Mar. 31, 2004, [https://epic.org/privacy/junk\\_mail/spam/dne.html](https://epic.org/privacy/junk_mail/spam/dne.html), [hereinafter “CAN-SPAN Do Not E-mail Comments”]; Comments of EPIC, *In the Matter of Telemarketing Rulemaking*, Apr. 10, 2002, <https://epic.org/privacy/telemarketing/tsrcomments.html>.

<sup>4</sup> See, e.g., Letter from EPIC Exec. Dir. Marc Rotenberg to FTC Comm’r Christine Varney, Dec. 14, 1995 (urging the FTC to investigate the misuse of personal information by the direct marketing industry), [http://epic.org/privacy/internet/ftc/ftc\\_letter.html](http://epic.org/privacy/internet/ftc/ftc_letter.html); DoubleClick, Inc., FTC File No. 071-0170 (2000) (Complaint and Request for Injunction, Request for Investigation and for Other Relief), [http://epic.org/privacy/internet/ftc/DCLK\\_complaint.pdf](http://epic.org/privacy/internet/ftc/DCLK_complaint.pdf); Microsoft Corporation, FTC File No. 012 3240 (2002) (Complaint and Request for Injunction, Request for Investigation and for Other Relief), [http://epic.org/privacy/consumer/MS\\_complaint.pdf](http://epic.org/privacy/consumer/MS_complaint.pdf); Choicepoint, Inc., FTC File No. 052-3069 (2004) (Request for Investigation and for Other Relief), <http://epic.org/privacy/choicepoint/feraltr12.16.04.html>; In the Matter of Snapchat, Inc. (2013) (Complaint, Request for Investigation, Injunction, and Other Relief), <https://epic.org/privacy/ftc/EPIC-Snapchat-Complaint.pdf>; In the Matter of Scholarships.com, LLC (2013) (Complaint, Request for Investigation, Injunction, and Other Relief), <https://epic.org/privacy/student/EPIC-FTC-Compl-Scholarships.com.pdf>.

<sup>5</sup> CAN-SPAM Do Not E-mail Comments; Comments of EPIC, *CAN-SPAM Act Rulemaking Project*, Jun. 27, 2005, [https://epic.org/privacy/junk\\_mail/spam/canspamcomment62705.html](https://epic.org/privacy/junk_mail/spam/canspamcomment62705.html) [hereinafter “CAN-SPAM Rulemaking Comments”].

<sup>6</sup> CAN-SPAM Rule Review at 29,255.

<sup>7</sup> *2017 Annual Cybersecurity Report*, Cisco, [https://www.cisco.com/c/dam/m/digital/1198689/Cisco\\_2017\\_ACR\\_PDF.pdf](https://www.cisco.com/c/dam/m/digital/1198689/Cisco_2017_ACR_PDF.pdf).

<sup>8</sup> Melissa Daniels, *Craigslist Wins \$60.5M Judgment In RadPad Copyright Suit*, Law360, Apr. 13, 2017, <https://www.law360.com/articles/913513/craigslist-wins-60-5m-judgment-in-radpad-copyright-suit> (noting that \$40

The Commission also asks what potential modifications can be made to the rule.<sup>9</sup> EPIC continues to believe that the Rule could be strengthened by the implementation and maintenance of a “Do Not E-mail” registry. EPIC was one of the leading voices in calling for the creation of such a registry when the CAN-SPAM rule was implemented, however, such a registry was not included in the final rule and has not subsequently been implemented.<sup>10</sup> A “Do Not E-mail” registry should be done on the basis of domain names of users that do not wish to receive e-mails, not individual e-mail addresses. Doing so will respect individual privacy, reduce the costs to consumers who may have multiple e-mail addresses and may add additional e-mail addresses, and will prevent any potential spammers from hacking the registry and obtaining a list of valid e-mails that can be used to target people.

EPIC also urges the Commission to take steps to make it easier for consumers to opt-out of being included in databases of third-party list providers. These list providers, known as “list brokers,” regularly buy, rent, and sell lists of consumer e-mail addresses. EPIC urged the Commission to take this step during the initial rulemaking process and stated that “Neither the market, nor self-regulatory initiatives are likely to produce this right [to opt-out].”<sup>11</sup> EPIC’s belief has proven to be correct and list brokers continue to operate today. In any revision to the rule, the FTC should require that consumers are able to easily opt-out of being included in such lists.

E-mail spam continues to be an issue the plagues consumers and continued use and enforcement of the CAN-SPAM Rule is necessary. The FTC should continue the use of the Rule

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million was awarded for CAN-SPAM violations); Wendy Davis, *Craigslist Awarded \$31 Million Judgment Against CAN-SPAM Violator*, Digital News Daily, Aug. 21, 2017, <https://www.mediapost.com/publications/article/306044/craigslist-awarded-31-million-judgment-against-ca.html>.

<sup>9</sup> CAN-SPAM Rule Review at 29,255.

<sup>10</sup> See CAN-SPAM Do Not E-mail Comments.

<sup>11</sup> CAN-SPAM Rulemaking Comments.

and strengthen it by implementing a domain name based “Do Not E-mail” registry and implementing mechanisms that make it easy for consumers to opt-out of having their e-mail address sold by list brokers.

Respectfully Submitted,

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