

§ 315.8

§ 315.8 Prohibition of certain waivers.

A prescriber may not place on a prescription, or require the patient to sign, or deliver to the patient, a form or notice waiving or disclaiming the liability or responsibility of the prescriber for the accuracy of the eye examination. The preceding sentence does not impose liability on a prescriber for the ophthalmic goods and services dispensed by another seller pursuant to the prescriber's correctly verified prescription.

§ 315.9 Enforcement.

Any violation of this Rule shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act, 15 U.S.C. 57a, regarding unfair or deceptive acts or practices, and the Commission will enforce this Rule in the same manner, by the same means, and with the same jurisdiction, powers, and duties as are available to it pursuant to the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*

§ 315.10 Severability.

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

§ 315.11 Effect on state and local laws.

(a) State and local laws and regulations that establish a prescription expiration date of less than one year or that restrict prescription release or require active verification are preempted.

(b) Any other State or local laws or regulations that are inconsistent with the Act or this part are preempted to the extent of the inconsistency.

PART 316—CAN-SPAM RULE

Sec.

316.1 Scope.

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316.4 Requirement to place warning labels on commercial electronic mail that contains sexually oriented material.

316.5 Prohibition on charging a fee or imposing other requirements on recipients who wish to opt out.

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316.6 Severability.

AUTHORITY: 15 U.S.C. 7701–7713.

SOURCE: 73 FR 29677, May 21, 2008, unless otherwise noted.

§ 316.1 Scope.

This part implements the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act”), 15 U.S.C. 7701–7713.

§ 316.2 Definitions.

(a) The definition of the term “affirmative consent” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(1).

(b) “Character” means an element of the American Standard Code for Information Interchange (“ASCII”) character set.

(c) The definition of the term “commercial electronic mail message” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(2).

(d) The definition of the term “electronic mail address” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(5).

(e) The definition of the term “electronic mail message” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(6).

(f) The definition of the term “initiate” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(9).

(g) The definition of the term “Internet” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(10).

(h) “Person” means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(i) The definition of the term “procure” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(12).

(j) The definition of the term “protected computer” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(13).

(k) The definition of the term “recipient” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(14).

(l) The definition of the term “routine conveyance” is the same as the

definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(15).

(m) The definition of the term “sender” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(16), *provided that*, when more than one person’s products, services, or Internet website are advertised or promoted in a single electronic mail message, each such person who is within the Act’s definition will be deemed to be a “sender,” except that, only one person will be deemed to be the “sender” of that message if such person: (A) is within the Act’s definition of “sender”; (B) is identified in the “from” line as the sole sender of the message; and (C) is in compliance with 15 U.S.C. 7704(a)(1), 15 U.S.C. 7704(a)(2), 15 U.S.C. 7704(a)(3)(A)(i), 15 U.S.C. 7704(a)(5)(A), and 16 CFR 316.4.

(n) The definition of the term “sexually oriented material” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7704(d)(4).

(o) The definition of the term “transactional or relationship messages” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(17).

(p) “Valid physical postal address” means the sender’s current street address, a Post Office box the sender has accurately registered with the United States Postal Service, or a private mailbox the sender has accurately registered with a commercial mail receiving agency that is established pursuant to United States Postal Service regulations.

§ 316.3 Primary purpose.

(a) In applying the term “commercial electronic mail message” defined in the CAN-SPAM Act, 15 U.S.C. 7702(2), the “primary purpose” of an electronic mail message shall be deemed to be commercial based on the criteria in paragraphs (a)(1) through (3) and (b) of this section:¹

(1) If an electronic mail message consists exclusively of the commercial advertisement or promotion of a commercial product or service, then the “pri-

mary purpose” of the message shall be deemed to be commercial.

(2) If an electronic mail message contains both the commercial advertisement or promotion of a commercial product or service as well as transactional or relationship content as set forth in paragraph (c) of this section, then the “primary purpose” of the message shall be deemed to be commercial if:

(i) A recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message contains the commercial advertisement or promotion of a commercial product or service; or

(ii) The electronic mail message’s transactional or relationship content as set forth in paragraph (c) of this section does *not* appear, in whole or in substantial part, at the beginning of the body of the message.

(3) If an electronic mail message contains both the commercial advertisement or promotion of a commercial product or service as well as other content that is not transactional or relationship content as set forth in paragraph (c) of this section, then the “primary purpose” of the message shall be deemed to be commercial if:

(i) A recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message contains the commercial advertisement or promotion of a commercial product or service; or

(ii) A recipient reasonably interpreting the body of the message would likely conclude that the primary purpose of the message is the commercial advertisement or promotion of a commercial product or service. Factors illustrative of those relevant to this interpretation include the placement of content that is the commercial advertisement or promotion of a commercial product or service, in whole or in substantial part, at the beginning of the body of the message; the proportion of the message dedicated to such content; and how color, graphics, type size, and style are used to highlight commercial content.

¹The Commission does not intend for these criteria to treat as a “commercial electronic mail message” anything that is not commercial speech.