

FTC ISSUES NEW RULES UNDER THE CAN-SPAM ACT OF 2003

This memo summarizes recent updates by the Federal Trade Commission (“FTC”) to its rules under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM” or the “Act”), which imposes a series of requirements on the use of commercial electronic mail (“e-mail”) messages. **The new rules will become effective on July 7, 2008.** Failure to comply with CAN-SPAM regulations can result in statutory damages of up to \$250 per e-mail violation. The Act also provides for criminal penalties, including prison terms of up to five years, depending on the nature and extent of the violations.

In sum, the FTC’s new rules: (1) revise the definition of “sender” where multiple entities advertise in a single e-mail; (2) establish more specific guidelines regarding e-mail opt-out procedures; (3) add a definition of “person” not limited to natural persons; (4) clarify that a sender’s obligation to display a “valid physical postal address” may be satisfied by an accurately registered P.O. box or private mailbox; and (5) address the application of CAN-SPAM to “forward-to-a-friend” e-mails and certain other categories of e-mail messages. Additionally, the FTC considered and rejected several other proposals noted briefly below (*e.g.*, declined to shorten the period for a company to honor opt-out requests from ten to three business days, and rejected calls to establish expiration dates for opt-out elections). *See* <http://www.ftc.gov/os/2008/05/R411008frn.pdf> for the FTC’s new rules and analyses discussed below.

Definition of “Sender”. The FTC modified the definition of “sender” to address situations where multiple entities advertise in a single e-mail message (*e.g.*, a commercial e-mail from a credit card company containing advertisements from a hotel chain and car rental company). Under the prior rules, if multiple marketers using a single e-mail message each met the definition of “sender” (*i.e.*, an entity that initiates a commercial e-mail message in which it advertises or promotes its own goods, services, or Internet website), each would need to provide an opt-out mechanism and a valid physical postal address, and each would be responsible for honoring an opt-out request by a recipient. Under the revised rules, multiple marketers using a single commercial e-mail may now choose *one* sender among them to be considered the message’s “designated sender,” whose identity will be determined by looking to the address that appears in the e-mail’s “from” line.

The designated sender is solely responsible for providing a valid physical address and opt-out link and honoring message recipients’ opt-out requests, thereby relieving the other marketers in the e-mail from the compliance burdens of CAN-SPAM. This is true only if the designated sender: (a) meets the Act’s definition of “sender;” (b) is identified uniquely in the “from” line of the message; and (c) is in compliance with the Act’s provisions applicable to “initiators” of commercial e-mails (*i.e.*, the e-mail does not contain false or misleading transmission information or a deceptive subject heading, and it contains a valid postal address, a working opt-out link, and proper identification of the message’s commercial or sexually explicit nature, if applicable).

If the designated sender has not complied with the initiator provisions, or if the marketers failed in the first instance to properly structure the message to avoid multiple senders under the revised sender definition, then *all* senders in the e-mail are obligated to comply with CAN-SPAM's requirements for senders, notably to provide a physical postal address and to honor any opt-out requests. Further, even if a designated sender is properly identified under the new rules, each marketer appearing in a single e-mail is still an "initiator" under the Act and therefore is liable under any of the provisions that apply to initiators to the extent the designated sender sends a message that is not fully compliant with CAN-SPAM requirements.

EXAMPLE: Suppose A, B, and C have goods advertised or promoted in a single e-mail message and that each is an initiator under the Act. If A's name appears in the "from" line of the message, A is considered the "sender" under the revised rules. While B and C promote their goods, services, or Internet website in the message, may control portions or all of the content of the message, and may supply e-mail addresses for A to use to address the message, neither B nor C would be considered "senders" unless A did not comply with the Act's requirements applying to "initiators."

Opt-Out Procedures. The FTC clarified that senders may not require, as a condition for honoring a recipient's opt-out request, that the recipient "pay a fee, provide information other than [the recipient's] e-mail address and opt-out preferences, or take any steps other than sending a reply e-mail or visiting a single page on an Internet website." Although some commenters argued that requiring recipients to log on to a sender's website before expressing their opt-out preferences should be permitted, the FTC disagreed, finding that "'opt out requests are specific to an entity's e-mail address, not his or her name,' and . . . certainly not to his or her account information."

Some analysts have labeled this rule change as the one that will have the greatest impact on e-mail marketers. For example, marketers who do not currently transfer recipients directly to a single web page that allows them to unsubscribe, who display an advertisement or other incentive prior to their unsubscription, who impose a fee or other obligation on recipients before effectuating an opt-out request, or who require the recipient to pass through multiple web pages on their way to opting out, will have to revise their business operations to comply with the new rules.

In light of these changes, entities sending commercial e-mail messages should ensure that their opt-out mechanisms comply with the new restrictions described above and verify that such mechanisms do not require recipients to provide information (other than the recipient's e-mail address and opt-out preferences) or to visit multiple pages before the recipient's opt-out request will be honored. Note that senders may continue to provide the recipient with a list or menu that allows the recipient to choose which commercial e-mail messages the recipient does or does not want to receive from the sender, as long as the list or menu includes an option under which the recipient may choose to opt out of *all* commercial e-mails from the sender. (CAN-SPAM Act, § 5(a)(3)(A)-(B)). This may be important in situations where consumers want to opt out of some, but not all, of a sender's messages.

Definition of “Person”. The FTC’s updated rules define the term “person” as “an individual, group, unincorporated association, limited or general partnership, corporation, or other business entity,” including non-profit associations. This new definition clarifies that the term “person” is broadly construed and not limited to natural persons. Because the industry has generally assumed all along that the term “person” applies to organizational entities, the new definition merely codifies this common understanding and therefore will likely have little impact on current marketing practices.

Definition of “Valid Physical Postal Address”. The FTC clarified that the Act’s provision requiring senders of commercial e-mails to display a “valid physical postal address” is satisfied if the sender includes in the e-mail message an accurately registered P.O. box or private mailbox established under U.S. Postal Service regulations (of course, a current street address is also still permissible).

Application of CAN-SPAM to “Forward-to-a-Friend” E-mail Messages. The FTC addressed the impact of CAN-SPAM on “forward-to-a-friend” messages -- a type of commercial e-mail that can take many forms. In its most basic form, a person (the “forwarder”) receives an e-mail message from a seller and forwards the e-mail message to another person (the “recipient”). Other scenarios include those in which a seller’s web page enables visitors to the seller’s website to provide the e-mail address of a person to whom the seller should send a commercial e-mail advertising the seller’s product, service, or website. The FTC found that, due to the myriad forms of forward-to-a-friend e-mail, CAN-SPAM’s applicability to such messages is a highly fact-specific inquiry, the central question of which is often whether the seller has “procured” the origination or transmission of the forwarded message.

A few key conclusions by the FTC in this area were: (1) if the seller pays or provides other consideration to someone (*e.g.*, by offering money, coupons, discounts, awards, additional entries in a sweepstakes, or the like) in exchange for forwarding the commercial message, the seller will have “procured” the forwarding of the e-mail (regardless of the amount of the consideration offered) and will therefore be considered the “sender” of the message; (2) if the seller “induces” the forwarding of the message -- such as by offering payment in exchange for generating traffic to a website -- it will be an “initiator,” and thus also the “sender,” of the forwarded message; and (3) a consumer-forwarder of a commercial e-mail is not swept into CAN-SPAM’s regulatory scheme if, without being offered any consideration or inducement for doing so, he/she uses a seller’s web-based forwarding mechanism or his/her own e-mail program to send isolated commercial e-mail messages to recipients.

The FTC also noted that if a website retains the e-mail address of the person to whom the message is being forwarded for a reason other than relaying the forwarded message (such as for use in future marketing efforts or otherwise), then it would not fall within the “forward-to-a-friend” exemption.

Other Proposed Changes Considered and Rejected by the FTC. The FTC considered, but ultimately rejected, several other possible changes in the areas below:

- **Time to Effectuate Opt-Out Requests Remains Ten Business Days:** The FTC declined to shorten, from ten business days to three business days, the time a sender may take before honoring a recipient's opt-out request.
- **Interpretation of "Transactional or Relationship Message" Unchanged:** The FTC declined to alter its interpretation of the Act's definition of "transactional or relationship messages." The FTC does, however, discuss the current definition's application to several specific types of e-mail messages.
- **No Expiration of Opt-Out Elections:** The FTC rejected proposals to establish a period of time after which a consumer's opt-out election would expire. Thus, opt-out elections remain *perpetual* unless and until the *consumer* changes them.
- **No Additional Aggravated Violations:** The FTC declined to specify aggravated violations (which provide for treble damages) other than those already included in the Act.
- **No Exemption for Online Groups:** The FTC rejected proposals to exempt "online groups," *i.e.*, discussion lists, listservs, mailing lists, and chat groups, from the Act's requirements.
- **No Safe Harbor for Affiliate Advertisements:** The FTC decided against the creation of a safe harbor for companies whose products, services, or websites are advertised by affiliates or other third parties.

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