

Client newsletter

SEPTEMBER 2008

by *Kenneth D. Farmer*

Highlights of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM)

On December 16, 2003, President Bush signed into law the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act”). The CAN-SPAM Act, which took effect on January 1, 2004, imposed a series of new requirements on the use of commercial electronic mail messages. On May 12, 2008, the Federal Trade Commission (“FTC”) issued new enforceable implementing regulations that say how the FTC will be enforcing the CAN-SPAM Act (“CAN-SPAM Rule”).

Most of the CAN-SPAM Act’s requirements apply to an email only if it is a commercial electronic mail message (“Commercial Email”) – defined as an email “the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose).”

Prohibitions

Although unsolicited Commercial Email is still legal under the new federal law, there are five basic rules under the CAN-SPAM Act that businesses must follow to ensure outbound marketing messages are in compliance. The CAN-SPAM Act forbids a sender of Commercial Email to do any of the following:

(1) Place materially false or misleading information, relating to the sender’s identity, in the header. Header

information will be considered false or misleading if:

- It contains a domain name or email address obtained through false representations, even if the information is technically accurate; or
- It disguises the originating computer’s identity because the message was re-transmitted through another computer.

(2) Place false or misleading information, relating to the email’s subject matter or contents, in the subject line.

(3) Fail to provide a return email address or other online mechanism by which the recipient can ask not to be contacted any more.

(4) Continue sending email to a person who has asked not to be contacted, or distributing that person’s email address to others for the purpose of sending spam.

(5) Fail to do all the following:

- Identify the email as an advertisement, unless the recipient has given prior affirmative consent to receiving the email;
- Advise the recipient of the right to ask not to be contacted; and

- Include the sender’s mailing address.

The following additional requirements apply to the sender of sexually-oriented email:

- Identify it with a subject label, to be prescribed by the Federal Trade Commission; and
- Ensure that the initially viewable portion of the email not include the sexually-oriented material itself.

The recently released CAN-SPAM Rule contains four new rule provisions and clarifies the FTC’s position on a number of issues. These new rule provisions and clarifications are:

Multiple Marketers

Under the CAN-SPAM Rule, multiple marketers can designate as a single “sender,” for purposes of compliance with the Act, a person who:

- meets the CAN-SPAM Act’s definition of “sender” (*i.e.*, such person initiates a commercial electronic mail message in which it advertises or promotes its own goods, services, or Internet website);
- is identified uniquely in the “from” line of the message; and

- is in compliance with the CAN-SPAM Act’s five (5) “initiators” responsibilities, which require that Commercial Emails:
 - not contain false or misleading transmission information (i.e., relate to accurate header, “from” line);
 - not contain a deceptive subject heading (i.e., relate to accurate header, “subject” line);
 - contain a functioning opt-out mechanism;
 - contain a valid physical address of the designated sender;
 - contain a clear and conspicuous identification that the message is an advertisement or solicitation; and
 - comply with the rule for sexually explicit material.

Failure to comply with anyone of the five (5) initiator responsibilities will result in all marketers being liable as senders.

Use of Affiliates

Under the CAN-SPAM Rule, the FTC declined to create a safe-harbor for companies whose products, services, or website are advertised by affiliates or other third parties. Therefore, it is important that a business who employs an affiliate or other third party to market its products or services ensure that the affiliate or third party comply with the CAN-SPAM requirements. Although a marketer who uses an affiliate cannot be said to “originate or transmit” the message, the FTC has clarified that they do “procure” the message (i.e., intentionally pay to provide or provide other consideration, or induce, another person to initiate a message on one’s behalf). Therefore, a marketer who uses an affiliate to advertise still qualifies as an “initiator” under CAN-SPAM.

When a marketer uses an affiliate, the CAN-SPAM Rule will generally treat the marketer as the “sender” because its product, service or website is promoted in the Commercial Email, and the affiliate is only an “initiator”. It is only when the affiliate promotes its own product, service or website along with the marketer that the affiliate is also a sender under the CAN-SPAM Act. In which case, the affiliate may serve as designated sender. If, however, the affiliate fails to comply with the above designated sender requirements, both the marketer and affiliate will be senders under the CAN-SPAM Act.

Transactional or Relationship Messages

Under the CAN-SPAM Act, there are five (5) broad categories of Commercial Emails that are considered “transactional or relationship messages.” The CAN-SPAM Act excludes these messages from its definition of “commercial electronic mail message,” and thus relieves them from most of the Act’s requirements and prohibitions. They include electronic mail messages the primary purpose of which is:

- (1) to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;
- (2) to provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient;
- (3) to provide —
 - a. notification concerning a change in the terms and features of;
 - b. notification of a change in the recipient’s standing or status with respect to; or
 - c. at regular periodic intervals, account balance information or other type of account statement with respect to, a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the

ongoing purchase or use by the recipient of products or services offered by the sender;

- (4) to provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or
- (5) to deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.

Valid Physical Postal Address

The FTC has clarified that the “valid physical postal address” contemplated by the CAN-SPAM Act means the sender’s current street address, a post office box the sender has accurately registered with the United States Postal Service (“USPS”), or a private mailbox the sender has accurately registered with the commercial mail receiving agency established pursuant to the USPS regulations. Under the CAN-SPAM Rule, a sender’s failure to accurately register such post office box or private mailbox in compliance with the USPS regulations will render the address invalid for purposes of the CAN-SPAM Act. Accurate registration of an address, includes, but is not limited to, accurately identify all senders on the applicable postal form and providing two (2) forms of valid photo identification when applying for the address.

Forward to a Friend

Generally, the CAN-SPAM Rule provides that where seller transmits a message through an automatic technical process to an email address provided by a forwarder, the seller, absent more, is engaged in “routine conveyance” and is therefore not an “initiator” or “sender” under the CAN-SPAM Act. Thus, the seller is exempt from liability under the CAN-SPAM Act. This scenario contemplates visitors to a website who choose to send an email advertising the seller’s products, services or

website by inputting the recipient's information.

Where a seller goes beyond serving as a technical intermediary that transmits, routes, relays, handles, or stores the email, however, the seller will be liable as the "initiator" and "sender" of a Commercial Email forwarded from its website. This scenario contemplates a seller's offer to pay or provide other consideration to a visitor to its website in exchange for forwarding a Commercial Email. Under such circumstances, the seller will be

deemed to have "procured" any such Commercial Email forwarded by the visitor.

Statutory Damages

Violations of the CAN-SPAM Act are subject to an injunction, actual monetary loss suffered, or up to \$250.00 in statutory damages. Where there are multiple recipients of a message sent in violation of the CAN-SPAM Act, damages are

calculated by multiplying each separately addressed unlawful message received by or addressed to a resident by up to \$250.00. Although statutory damages may not exceed \$2,000,000.00, the court may increase a damage award up to three (3) times the amount otherwise available under certain circumstances. In successful actions under the CAN-SPAM Act, the court may also award the state costs of the action, together with reasonable attorneys' fees.

Business Opportunities Group

Chair:

James H. Neeld, IV
jneeld@youngwilliams.com
(601) 360-9021

Members:

James H. Neeld, III
jneeld3@youngwilliams.com
(601) 360-9039

John Wesley Daughdrill, Jr.
wes.daughdrill@youngwilliams.com
(601) 360-9030

Robert L. Holladay, Jr.
rob.holladay@youngwilliams.com
(601) 360-9029

Kenneth D. Farmer
kfarmer@youngwilliams.com
(601) 360-9052

This material has been prepared for informational purposes only and does not constitute legal advice. Nor is this information intended to create an attorney-client or similar relationship. Please do not send us confidential information. Past successes cannot be an assurance of future success. Whether you need legal services and which lawyer you select are important decisions that should not be based solely upon these materials.