

Client Alert



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FTC Clarifies What is Spam under the Federal CAN-SPAM Act

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If you send e-mail messages to customers and prospective customers, you should take note of the new Federal Trade Commission guidelines implementing the federal CAN-SPAM law which became effective on January 1, 2004. These guidelines attempt to clarify what is commercial e-mail, and therefore subject to the Act's requirements, by defining when the "primary purpose" of an email is commercial. The regulations took effect on March 28, 2005.

Licensing

Privacy & Data Protection

Background

As explained in our Client Alert dated January 26, 2004 ("Update on Anti-Spam Legislation: Has CAN-SPAM Really Canned Spam?"), the "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003," more commonly known as "CAN-SPAM" (the "Act") regulates commercial electronic mail messages ("Commercial e-Mail") which the Act defines to mean any e-mail message whose "primary purpose" is the commercial advertisement or promotion of a commercial product or service. For e-mails falling within this category, the Act requires, among other things, that e-mail recipients be provided a clear and conspicuous notice of the opportunity to opt-out by return e-mail (or other Internet mechanism) of receiving further communications from the sender, and the sender must comply with this request within ten business days of receipt.

In contrast, the other category of e-mail messages covered by the Act, "transactional or relationship" messages, are subject only to the Act's requirement that such messages not have misleading header information. However, this category of e-mail messages is more narrow than one might assume. Under the Act, in order for a message to be considered a transactional or relationship message, the "primary purpose" of that message must be to facilitate, complete, confirm or provide information regarding a transaction previously agreed to by the recipient with the sender (such as delivery of goods or services, sending warranty information on a product purchased by the recipient, or providing account information on a subscription), or to provide information regarding a current employment relationship or benefit plan.

In enacting CAN-SPAM, Congress realized that "primary purpose," a critical term delimiting the scope of the Act, needed clarification and directed the FTC to issue regulations defining the criteria for determining the primary purpose of an e-mail message.

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“Primary Purpose”

Based on this direction, and after receiving numerous comments from various persons, businesses and associations as part of its rulemaking process, the FTC adopted its final regulations (the “Regulations”) on December 16, 2004, on the issue of determining the primary purpose of an e-mail message, and in particular when an e-mail message would be considered to be Commercial e-Mail and thus regulated by CAN-SPAM.

Under these Regulations, the FTC will analyze an e-mail message to determine its primary purpose in one of four ways, depending on the content of the message:

1. An e-mail message consisting solely of commercial advertising or promotion for a commercial product or service (“Commercial Content”) will be deemed to be Commercial e-Mail.
2. An e-mail message containing both Commercial Content and transactional or relationship content as defined under the Act and Regulations (“T/R Content”) will be deemed to be Commercial e-Mail if (a) a recipient would conclude that the message contains Commercial Content based on the subject line of the message, or (b) the message’s T/R Content does not appear, in whole or in substantial part, at the beginning of the message.
3. An e-mail message containing both Commercial Content and content other than Commercial Content or T/R Content (“Other Content”) will be deemed to be Commercial e-Mail if (a) a recipient would conclude that the message contains Commercial Content based on the subject line of the message, or (b) a recipient would likely conclude that the primary purpose of the message is the commercial promotion of a commercial product or service based on factors such as placement of the Commercial Content in whole or in substantial part in the beginning of the message, the proportion of the message that is Commercial Content, and how the Commercial Content is highlighted in the message through use of color, graphics, type size and style (the “net impression” standard).

4. An e-mail message containing only T/R Content will be deemed to be a transactional or relationship message.

What You Should Know

No Hard and Fast Rule. As the criteria above suggests, the FTC declined to create any safe harbors or take any hard-and-fast approach to the determination of the primary purpose of e-mail messages, in order to avoid giving spammers a blueprint for avoidance of CAN-SPAM regulation. For example, despite commenters’ requests, the FTC declined to grant a blanket exemption to bona fide newsletters. In addition, the FTC declined to use the sender’s intent as a factor in determining an e-mail message’s primary purpose, despite requests from commenters who voiced concerns about legitimate businesses being able to comply with subjective standards.

Non-Profits Are Not Exempt. It is important to note that, under the above criteria, an e-mail message sent by a non-profit entity may be considered to be Commercial e-Mail (for example, if the message promotes a product or service for which customers pay a fee). Conversely, an e-mail message sent by a for-profit entity will not necessarily be considered Commercial e-Mail (for example, where the primary purpose of the message, using the criteria set forth above, is to inform customers, rather than to promote a product or service).

A Single Business-to-Business Email May Be Commercial e-Mail. In addition, as has always been the case under CAN-SPAM, a single e-mail message sent from one business to another could constitute Commercial e-Mail; there is no minimum threshold of recipients needed in order for an e-mail to be considered to be Commercial e-Mail under the Act, nor is there any requirement under the Act that the message be sent to an individual consumer.

The Subject Line Matters. In the Regulations, and as can be seen from the criteria, the FTC places great importance on the subject line of e-mail messages for the determination of the primary purpose of the message. This is because the subject line not only is a reliable indicator of the primary purpose of the message, but it also is the means by which a recipient decides whether or not to open or read the e-mail message. As a result, e-mail senders should take care to not include reference to Commercial

Content unnecessarily in the subject line. However, this must be balanced with the need to avoid deception, which could also subject the sender to liability under the Act and as well as pursuant to longstanding FTC standards. Thus, for example, if advertising a commercial product or service dominates the body of the e-mail, and if not stating so in the subject line would be deceptive or misleading as to the contents of the e-mail message, then the sender must identify the commercial nature of the e-mail message in the subject line.

Including Advertising in an Otherwise Non-Commercial e-Mail Does Not Necessarily Make it a Commercial e-Mail. Some amount of advertising in an e-mail message, under these Regulations, may be permissible without making the message subject to regulation as a Commercial e-Mail under the Act. The FTC notes, for example, that a reasonable recipient of a newsletter would expect some advertising to be included as part of the newsletter. Whether or not the message would be deemed to be a Commercial e-Mail would involve a fact-based consideration using the above criteria.

Obtaining Consent Does Not Avoid Many Obligations Under CAN-SPAM. Even if you have obtained your customer's affirmative consent to receiving Commercial e-Mail, you still need to comply with the opt-out and most other requirements of the Act.

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