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NEW ANTI-SPAM LAW HAS UNEXPECTED IMPACT ON BUSINESS E-MAIL POLICIES

by Andrew S. Rogovin

The recently enacted federal “anti-spamming” law imposes specific requirements on many conventional businesses that use e-mail to communicate with their existing and prospective customers, with severe penalties for non-compliance.

What is Covered by the Law?

The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM” for short), which became effective on January 1, 2004, covers territory that would be expected in an “anti-spamming” law, such as electronic mass-mailings, use of false or misleading information, treatment of sexually oriented material, etc.

The surprising part, however, is that CAN-SPAM also applies to certain individual e-mail messages sent by a business to prospective customers, past customers and even existing customers—if the message is commercial in nature and does not fall within one of the specific exemptions.

CAN-SPAM applies to all e-mail messages that have as their primary purpose either the advertisement or the promotion of a commercial product or service. On the other hand, if the e-mail message is primarily a “transactional or relationship” message, rather than for advertising or promotional purposes, it will be exempt. The law provides a list of purposes that will make a message an exempt transactional or relationship e-mail (and thus not a “commercial e-mail message”) – see “What are the Exemptions” on page 2.

There are two definitional problems with these categories. First, although we generally know an advertisement when we see one, it is less clear what the FTC will consider a “promotional” message. Interpreted broadly, a promotional message could include e-mail communications like newsletters and greeting cards, insofar as they promote the sender’s business. Second, determining whether the exemption applies depends on determining the “primary” purpose of the message. The lawmakers have not provided any guidance for determining which is the primary purpose of an e-mail with two or more purposes, and have requested that the FTC address this ambiguity by regulation within 12 months.

What is Required for Compliance?

In general, unsolicited individual and bulk e-mails are still permitted, so long as they contain the required information. In order to comply with the requirements of CAN-SPAM, all commercial e-mail messages must contain the following three items:

1. The message must be clearly and conspicuously identified as an advertisement or solicitation. Currently, there is no specific guidance as to the form or location of this notice.
2. The message must include a clear and conspicuous notice of the recipient's right to "opt-out" of receiving subsequent commercial e-mail messages from the sender. The sender must allow the opt-out request to be sent by either reply e-mail or must provide a link to an e-mail address to which a recipient can send an "opt-out" request. The e-mail address provided by the sender for this purpose must be maintained for at least 30 days, and the sender must stop sending commercial e-mail messages to the recipient within 10 days of an opt-out request. Further, the sender cannot sell, lease, exchange or otherwise transfer the e-mail address of any recipient that has made an opt-out request.
3. The message must include a valid physical postal address for the sender.

What are the Exemptions?

Exemptions are based on the content of each particular message, rather than on the relationship of the sender to the recipient.

An e-mail message will be exempt from the CAN-SPAM requirements if the primary purpose of the e-mail is:

- to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;
- 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;
- to provide –
 - notification concerning a change in the terms or features of;
 - notification of a change in the recipient's standing or status with respect to; or
 - 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;
- to provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or
- 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.

What are the Penalties?

The Federal Trade Commission will have the primary enforcement role, with the right to impose monetary penalties, issue consent decrees and refer violations to the Department of Justice for criminal prosecution. States may also bring enforcement actions for certain violations and may recover statutory damages of up to \$250 per individual e-mail message—up to a total of \$2 million, and Internet service providers may sue violators directly for the greater of actual damages and the statutory damages of up to \$100 per individual e-mail message—up to a total \$1 million. Both states and internet providers may be entitled to up to three times the damages otherwise recoverable if the violations were committed willfully and knowingly or if the violation was an “aggravated” violation.

A Few Other Points about CAN-SPAM

The CAN-SPAM requirements supercede state-by-state regulation of commercial e-mail, except for state laws governing false or deceptive e-mail content or practices.

CAN-SPAM also contains criminal anti-fraud provisions relating to sending bulk or multiple e-mails, obscuring the true origin of e-mail, providing materially false or misleading information in an e-mail header, sending sexually oriented material and e-mail fraud.

In addition to the sender of a commercial e-mail message, an advertising vendor acting as a conduit for an e-mail message may be liable for violations under CAN-SPAM. It is possible that if you allow a third-party, such as a vendor or marketing partner of yours, to use your e-mail as a marketing channel, you may be liable for CAN-SPAM violations (based on your degree of knowledge of the improper practices and your ability to derive an economic benefit from your participation in the advertisement or promotion).

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If you have any questions about the new anti-spam law or any other related issues not addressed in this Update, please do not hesitate to call or e-mail your contact at Hinckley, Allen & Snyder LLP or Andrew Rogovin at: arogovin@haslaw.com or 617-345-9000 x4733