

How to Comply with the Spam Law

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The new "CAN-SPAM Act" attempts to control "unsolicited commercial email" by, among other things, requiring that such email: (1) clearly identify itself as an advertisement; (2) include opt-out instructions; and (3) contain the sender's physical address.

While the new law contains a number of ambiguities, certain steps can be taken by legitimate companies to try to comply with the law.

I. Types of Email Regulated.

A. "Commercial Electronic Mail Messages."

The new law's regulatory focus is on the term "commercial electronic mail message," which is defined as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service . . .

"Effective February 18, 2005, the FTC clarified the term "primary purpose." First, if an email contains only an advertisement or the promotion of a product or service, then the email would be a regulated commercial email. Second, if the email contains both commercial and "transactional or relationship" content (defined immediately below), then the email will be a regulated "commercial" email if either: (i) the email recipient would think the email content is an advertisement, or (ii) the "transactional or relationship" content appears at the end of the email.

B. "Transactional or Relationship Messages."

The new law provides an exemption for "transactional or relationship messages," and therefore, the definition of that phrase is extremely important.

Such messages are defined as emails the primary purpose of which is:

1. to facilitate a commercial transaction that the recipient has previously agreed to enter into with the sender;
2. to provide warranty information, or safety information with respect to a product or service used by the recipient;
3. to provide: (a) notification concerning a change in the terms or features of, or (b) at regular periodic intervals, account information with respect to, a subscription, membership, account or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender; and
4. to deliver goods or services, including product 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.

The definition means just what it says: "transaction" or "relationship" is defined by the terms of the definition, and not by the fact that the email recipient may have been a former customer or client of the company, or even have had a prior, long-standing relationship with the email sender.

II. Requirements for Regulated Emails.

A. No False or Misleading Transmission Information.

Neither "commercial electronic email messages" nor "transactional and

relationship messages" may be sent if the message contains header information that is materially false or misleading.

B. No Deceptive Subject Headings.

It is unlawful to send a "commercial electronic mail message" if the sender has knowledge that a subject heading of the message would likely mislead a recipient about the contents of the message.

Companies must ensure that the subject headings they use are not inadvertently deceptive. The use of "creative" subject headings to encourage recipients to open emails they would otherwise delete may result in liability.

C. Opt-Out Requirements.

Recipients of commercial email messages, but not "transactional or relationship" emails, must be provided a means to request not to receive future emails from the sender. Such "opt-out" mechanism must be a return email address or other Internet-based mechanism that is clearly and conspicuously displayed that allows the recipient to indicate it does not want to receive future emails from that sender at the email address where the message was received.

Opt-out requests must be complied with within 3 business days after they are received.

D. Advertisement Identifier, Opt-Out Notice, and Address Requirements.

The new law requires senders to provide in each "commercial electronic mail message" (but not "transactional or relationship messages"): (1) clear and conspicuous identification that the message is an advertisement or solicitation; (2) clear and conspicuous notice of the opportunity to opt-out from receiving further emails from the sender; and (3) a valid physical postal address of the sender.

If the recipient has given prior affirmative consent to receive the message (e.g., they have previously opted-in to an email distribution list) then the message need not contain the clear and conspicuous identification that the message is an advertisement or solicitation, but must still include notice of the opt-out opportunity and a valid postal address of the sender.

III. Aggravated Violations.

The Act defines certain actions as aggravated violations for which penalties may be increased. Aggravated violations include:

1. Initiating the transmission of an email, or assisting in the "origination" of the email, if the recipient's email address was obtained using an automated means that generates possible email addresses;
2. Using automated means to register for multiple email accounts or online user accounts from which to transmit an unlawful email; and
3. Relaying an unlawful email from a computer that was accessed without authorization.

Because this aggravated liability applies to those who "assist in the origination of the email message" if they had actual knowledge, or reasonably should have known, of the violation, companies who hire third parties to send emails on their behalf will need to assess how the email addresses were obtained.

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