

ELIMINATING NUISANCE EMAIL: THE CAN-SPAM ACT OF 2003

Though less ambitious than many had hoped, the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "CAN-SPAM" Act) outlaws the most egregious types of spam. Unfortunately, the Act also creates compliance burdens for many legitimate businesses that use email for marketing purposes.

WHO IS AFFECTED

Essentially, the Act governs all electronic communications the "primary purpose of which is the commercial advertisement or promotion of a commercial product or service." Note that, at this time, there are no definitions for "primary purpose", "advertising" or "promotion" in the Act or FTC rules, so it is possible that some electronic communications that one normally would not think of as Spam could be governed by the Act. Therefore, many emails your business sends must comply with the Act.

The Act specifically exempts from most rules "transactional or relationship messages," that is, emails regarding very specific activities or a current customer's account (such as emails that discuss account status, product recalls and product upgrades). However, there currently is no broad exemption for emails to recipients with whom the sender has a pre-existing relationship.

THE REQUIREMENTS

As its name suggests, the CAN-SPAM Act seeks to protect individuals from electronic junk mail. Unfortunately for the many legitimate companies that use email to advertise to and communicate with current and prospective customers, the Act creates new rules that will dramatically change the face of the company's electronic commercial mailings.

Though a comprehensive discussion of the Act's requirements is beyond the scope of this advisory, in brief the CAN-SPAM Act:

- Requires that all commercial emails contain a functioning return address or link that allows individuals to easily unsubscribe or "opt-out" of the mailing list for at least 30 days after the transmission of the email.

- Prohibits persons from using materially false or misleading header information (such as the source or return address), or using fraudulent or deceptive subject lines intended to mislead or confuse the recipient as to the message's content or origin.
- Will punish not only spammers, but all companies who "procure" their services. Accordingly, you should verify that all emails sent by your company, as well as emails sent on its behalf by outsourced marketers and business affiliates, comply with the Act.
- Outlaws the use of email addresses if the user knows these were "harvested" from web sites or automatically generated (so-called "dictionary attacks").
- Requires that all commercial emails contain the sender's physical mailing address and clearly and conspicuously identify the message as an ad or solicitation.

PENALTIES FOR NON-COMPLIANCE

In addition to setting out strict requirements for acceptable commercial email practices, the Act imposes severe civil and even criminal penalties on offenders. State Attorneys General are empowered to sue violators for up to \$250 per offending email to a total penalty of \$2,000,000. Further, Internet Service Providers can sue offenders for up to an additional \$100 per email to a total of \$1,000,000. The Act also makes the unauthorized use of email servers or addresses to send spam a crime, punishable by 3 to 5 years in Federal prison.

In April, the Federal government filed its first criminal charges under the Act. The complaint accuses four men of sending hundreds of thousands of emails that marketed fraudulent diet patches and other medical products under phony names, generating over 10,000 complaints to the FTC. Also, the Commonwealth of Massachusetts recently filed the first state suite under the Act for, among other things, failing to comply with the Act's "opt out" requirements.

Clearly, compliance with the Act is essential for all legitimate businesses. If you have questions regarding which of your electronic communications are subject to the Act, please do not hesitate to contact us.

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