



PRIVACY & SECURITY LAW



REPORT

CAN-SPAM Act

FTC Final Rules

Recently released Federal Trade Commission final rules that take effect July 7 address tricky compliance issues raised by the CAN-SPAM Act. For example, the rules modify the term “sender” and define “person,” make clear that non-profit commercial e-mail senders are not exempt from the rules, and affirm that the deadline for honoring opt-out requests remains 10 days. The rules and accompanying Statement of Basis and Purpose contain some of the FTC’s most important guidance on compliance with the CAN-SPAM Act, according to attorneys from DLA Piper US LLP.

New FTC Rules Clarifying CAN-SPAM Compliance to Take Effect July 7

By JIM HALPERT AND MICAH THORNER

On May 12, the Federal Trade Commission (FTC) issued final rules in its discretionary rulemaking proceeding addressing compliance questions raised by the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act). The rulemaking, which took more than three years for the FTC to complete, provides helpful clarification on a number of tricky compliance issues raised by the CAN-SPAM Act’s confusing definitions, which were hastily crafted in Congress’ rush in 2003 to preempt California’s strict liability opt-in spam law. The final rules appear to reflect an appreciation by the FTC that the CAN-SPAM Act definitions should not be interpreted in a hyper-technical manner that burdens legitimate commercial e-mail. At the same time, however,

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the final rules rejected a request from non-profit senders of commercial e-mail for an exemption from the rules.

The end result is consistent with the overall intent of the CAN-SPAM Act—strong prohibitions against tactics perpetrated by deceptive spammers, easy-to-exercise consumer opt-out rights, and a workable set of rules for non-deceptive commercial e-mailers who respect consumer opt-outs.

In general, the final rule for messages from multiple advertisers is more flexible than the rule proposed by the FTC in 2005, and it should be easier for marketers to comply with the new regulations. Also, the FTC’s new approach to forward-to-a-friend e-mails is somewhat more lenient than the approach outlined previously in the proposed rule. This article explains these important new provisions, which will take effect July 7.

The highlights of the new rules are as follows:

- Most importantly, the FTC modified the definition of the term “sender” in its rules to make it easier for just one of multiple parties advertising in a single e-mail message to be responsible for complying with the Act’s opt-out requirements.

- Second, the FTC decided to reject a suggestion in its notice of proposed rulemaking to shorten the proposed deadline for honoring opt-out requests from ten to three days.
- Third, the final rule clarifies that a sender may comply with the Act's requirement to provide a valid physical address in an e-mail by using either a post office box or a private mailbox, provided that the sender meets U.S. Postal Service registration requirements for the box in question.
- Fourth, the final rule includes a definition of the word "person" that clarifies the types of entities to which the Act applies, and includes non-profit associations that send commercial e-mail.
- Fifth, e-mail recipients cannot be required to pay a fee, provide information other than their e-mail address and opt-out preferences, or take any steps other than sending a reply e-mail message or visiting a single Internet Web page to opt-out of receiving future messages from a sender.
- Finally, the rule includes clarifications in an accompanying Statement of Basis and Purpose (SBP) which shed light on the FTC's interpretation of a "transactional or relationship message"; its determination not to designate additional "aggravated violations" under the Act; and how the rules apply "forward-to-a-friend" e-mail marketing campaigns.

These modifications and clarifications are discussed in greater detail below.

Modification of the Term 'Sender'

When CAN-SPAM was first enacted, advertisers were concerned about its effect on multiple-advertiser mailings. Interpreted literally, the Act required all advertisers whose goods or services were advertised in a single e-mail message to include their own opt-out mechanisms, scrub the mailing list against their own do-not-e-mail lists, and otherwise comply with all "sender" obligations. In the new rule, the FTC has said that a single advertiser that meets certain criteria can be the "designated sender" of the multiple-advertiser message and thus the only advertiser that needs to scrub its mailing list and include an opt-out mechanism.

The final rule thus narrows the meaning of the term "sender" (the person responsible for honoring opt-outs). The statutory definition in 15 U.S.C. § 7702(16)(A) is "a person who initiates [a commercial electronic] mail message and whose product, service, or Internet Web site is advertised or promoted by the message." In cases where a single e-mail message contains advertisements for the products, services, or Web sites of multiple entities, the rule clarifies that there can be a "single sender" for compliance purposes if certain conditions are met:

- That the "single sender" falls within the statutory definition of a "sender" set forth above;
- That the "single sender" is identified in the "from" line of the e-mail as the sole sender of the message;
- That, if sexually oriented material appears in the message, then the term "sexually explicit" is placed in a clear and conspicuous manner in the message; and
- That the "single sender" complies with the CAN-SPAM Act's prohibitions against deceptive transmission information and deceptive subject lines,

required return path, and required elements to include in a commercial e-mail messages set forth in 15 U.S.C. § 7704(A)(1),(2),(3) and (5).¹

The final rule thus allows multiple "senders" of a commercial e-mail to designate one among them to serve as the sole sender responsible for honoring opt-out requests. If these conditions are met, the designated sole sender, but not the other marketers listed in the same e-mail message, must honor opt-out requests made by recipients of the message, thereby simplifying handling opt-outs in many joint marketing scenarios. The address of the designated sender must also appear in the e-mail, whereas the physical addresses of the other marketers do not.

Honoring Opt-Out Requests

The FTC declined to shorten the time required for marketers to honor a consumer's opt-out request from ten to three business days. The CAN-SPAM Act established a statutory presumption that marketers are allowed ten business days to process an opt-out request and during this period may continue to send commercial electronic mail to someone who has opted out. However, the Act authorized the FTC to modify that period if the agency determined that a different time frame would be more appropriate. The FTC had suggested in its Notice of Proposed Rulemaking (NPRM) that it might shorten the deadline to comply with an opt-out to three business days, raising some concerns in the business community. In the end, the FTC decided to reject both this suggestion and a request by some industry groups to extend the period for honoring opt-out requests to 31 days—the amount of time given to telemarketers to adjust to changes to the do-not-call registry.

The FTC found that shortening the opt-out grace period from ten to three days would not necessarily advance the privacy interests of consumers. Based on its analysis of the comments received in response to the NPRM, the FTC concluded that the time period for processing opt-out requests required by legitimate commercial e-mailers varies, and often exceeds three business days depending upon a number of factors, including the size of the business, the existence of third-party marketing agreements, and the maintenance of multiple e-mail databases. The FTC also did not find any evidence to suggest that "e-mail bombing"—barraging an e-mail address with commercial messages in the days immediately following an opt-out request—is a wide-scale tactic deployed by commercial e-mailers who honor opt-outs, or that shortening the opt-out grace period would reduce consumers' risk of being

¹ This skips the requirement actually to honor opt-out requests set forth in 15 U.S.C. § 7704(a)(4). Section 7704(a)(1) prohibits transmission of any e-mail that contains false or misleading header or "from" line information. Section 7704(a)(2) prohibits the transmission of commercial e-mail messages with false or misleading subject headings. Section 7704(a)(3) requires that a commercial e-mail message contain a functioning return e-mail address or similar Internet-based mechanism for recipients to use to "opt out" of receiving future commercial e-mail messages. Section 7704(a)(5) prohibits the initiation of a commercial e-mail message unless it contains three disclosures: (1) clear and conspicuous identification that the message is an advertisement or solicitation; (2) clear and conspicuous notice of the opportunity to decline to receive further commercial e-mail messages from the sender; and (3) a valid physical postal address of the sender.

subject to such tactics. Accordingly, the FTC declined to adopt a final rule that would reduce the statutory grace period to honor opt-out requests. By the same token, it found, based on the record, that senders of commercial e-mail were not “unduly burdened” by the ten-day period established by Congress.

Definition of a ‘Valid Postal Address’

The NPRM clarified that a sender may comply with the requirement that any commercial e-mail message include the sender’s “valid physical postal address” by providing any one of the following: (1) the sender’s current street address; (2) a Post Office box the sender has registered with the U.S. Postal Service; or (3) a private mailbox the sender has registered with a commercial mail-receiving agency that is established pursuant to U.S. Postal Service regulations. The final rule allows for the use of Post Office or private mailboxes, but clarifies that the sender must accurately register such mailboxes pursuant to postal regulations to be considered a “valid postal address” under the Act.

Clarification of the Term ‘Person’

In the NPRM, the FTC also proposed adding a definition of the term “person,” to clarify that the term used throughout the Act means “an individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.”² Several commenters had sought to exempt all messages sent by non-profit entities. The FTC refused to accept this exemption, and the definition in the final rule is identical to the one that appears in the NPRM, so that e-mail messages sent by non-profits advertising a commercial product or service are subject to the Act.

Opt-Out Requirements

In the NPRM, the FTC proposed to prohibit the imposition of any fee, obligation to provide one’s personally identifying information (beyond an e-mail address), or any other requirement as a condition for accepting or honoring a recipient’s opt-out request. Despite some commenters’ assertions that additional personally identifying information was sometimes necessary for consumers to opt-out in order to prevent typographical errors, computer security issues, online identity theft, and sabotage by competitors, the FTC concluded that the imposition of additional requirements on consumers wishing to opt-out would do little to minimize the risks of these problems. Some commenters also asserted that it would be difficult to verify the identity of a recipient because some commercial suppression lists are linked to consumer account information rather than consumer e-mail addresses. The FTC rejected these arguments, stating that “according to CAN-SPAM, opt-out requests are specific to a recipient’s e-mail address, not his or her name,” and certainly not his or her account information.

Aggravated Violations, Transactional or Relationship E-mails, and Forward-to-a-Friend Messages

In the new Statement of Basis and Purpose, the FTC also commented on a number of other topics, shedding

² This definition of the term “person” is identical to the definition of the term that appears in the Telemarketing Sales Rule.

light on several ambiguities in the statutory language of the CAN-SPAM Act pertaining to aggravated violations, “transactional or relationship” e-mails, and “forward-to-a-friend” messages.

The most important of these clarifications addressed forward-to-friend scenarios. In the most basic forward-to-a-friend scenario, a seller sends a commercial e-mail to a consumer who then, using his or her own e-mail program, forwards the message to a recipient. Typically, the seller will have no liability under CAN-SPAM for the original recipient’s forwarding of an e-mail. It is only where the seller “initiates” the forwarding of the message that it will be deemed the “sender” of the forwarded message under the Act.

In previous documents, the FTC stated that a seller who induced someone to forward a commercial message or who provided some kind of consideration for forwarding a commercial message would be subject to the “sender” requirements of CAN-SPAM. Now, under the final rule, the critical issue is whether the seller provides some form of benefit to the forwarder, no matter how small, to forward the message.

Due to the wide variety of other forms “forward-to-a-friend”³ e-mails can assume, in the final rule the FTC concluded that CAN-SPAM’s applicability to such messages is a highly fact-specific inquiry. As explained below, the central question in such an analysis will now be whether the seller has “procured” the origination or transmission of the forwarded message. Generally, if the initiator or original sender offers something of value in exchange for forwarding a commercial message, he or she is viewed as having procured the origination of that message and therefore must comply with CAN-SPAM requirements, such as honoring opt-out requests.

In the NPRM, the Commission examined the meaning of the term “procure” and concluded that a seller “procures” an e-mail by either: (1) providing a forwarder with consideration (such as money, coupons, discounts, awards, additional entries in sweepstakes, or the like) in exchange for forwarding a commercial e-mail message, or (2) intentionally inducing the initiation of a commercial e-mail through an affirmative act or an explicit statement that is “designed to urge another to forward the message.”⁴

The Statement of Basis and Purpose accompanying the final rule adopts a somewhat narrower view of the second prong of the analysis proposed in the NPRM. Under the final rule, a seller’s use of language exhorting consumers to forward a message does not, absent more, subject the seller to “sender” liability under the Act.

The FTC also confirmed that a seller who offered a Web-based “click-here-to-forward” mechanism that did not exhort visitors to forward a message or offer to pay or provide other consideration for them to do so would be engaged in the “routine conveyance” of the message, would not be considered an “initiator” of the message, and would not be subject to the restrictions of the CAN-SPAM Act.

³ “Forward-to-a-friend” e-mails can generally be defined as instances in which someone either receives a commercial e-mail message and forwards the e-mail to another person, or uses a Web-based mechanism to forward a link to or copy of a Web page to another person.

⁴ NPRM, 70 Fed. Reg. at 25441 n.178.

The final rule does not provide for any additional aggravated violations beyond those already specified in the Act. While the NPRM did not propose any changes to the Act's definition of "transactional or relationship message," it posed a series of questions about the interpretation and potential expansion of this definition. However, the FTC concluded that the definition would remain unchanged in the final rule.

Conclusion

The FTC's rule changes and accompanying Statement contain some of the Commission's most important

guidance on compliance with the CAN-SPAM Act. Companies that conduct advertising and promotional campaigns by means of e-mail should review their compliance programs between now and the compliance date for the new rule provisions. All in all, the final rule and Statement of Basis and Purpose provide helpful clarifications of ambiguous features of the CAN-SPAM Act, simplifying for-profit entities' compliance burdens.