

# E-mail Marketing: CAN-SPAM Act Compliance

*The following is an excerpt from a Practice Note on our website that examines the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act) requirements for commercial e-mails. This Note also addresses enforcement of the CAN-SPAM Act and best practices for compliance.*

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The widespread consumer acceptance of online communication provides marketers with a number of benefits compared to traditional direct marketing campaigns, including:

- Lower costs.
- Almost instantaneous delivery.
- A more interactive experience generally allowing users to immediately click through to the marketer's website.

However, the ease and efficiency of e-mail marketing also brings drawbacks. The high volume of unsolicited commercial e-mail messages (spam) received by consumers makes it difficult for individual marketers to stand out. In addition, consumers do not want their inboxes full of spam, which, in some cases, are fraudulent or contain offensive content.

In 2003, Congress enacted the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM Act) to regulate unsolicited commercial e-mail (15 U.S.C. § 7701-13). The CAN-SPAM Act does not flatly prohibit all unsolicited commercial e-mail. Instead, it sets out specific requirements for the content of these messages. It also requires that consumers be able to opt out of receiving them.

This Note examines the federal CAN-SPAM Act, including:

- The scope of the CAN-SPAM Act.
- The CAN-SPAM Act requirements, including certain Federal Trade Commission (FTC) and Federal

Communications Commission (FCC) implementing regulations and rules.

- How the CAN-SPAM Act applies to certain common e-mail marketing practices.
- Enforcement of the CAN-SPAM Act, including penalties for violations.
- Best practices for marketers' compliance with the CAN-SPAM Act.

Companies using e-mail to market and advertise their products and services also must pay careful attention to compliance with other applicable laws, including, for example, those addressing traditional marketing and advertising practices and privacy and data security.

## SCOPE OF THE ACT

The CAN-SPAM Act regulates the transmission of all commercial e-mail messages, not just unsolicited messages. A commercial e-mail message is defined as any e-mail that has a "primary purpose of ... commercial advertisement or promotion of a commercial product or service" (15 U.S.C. § 7702(2)(A)). This includes commercial e-mails sent to business e-mail accounts, as well as those sent to individual consumers.

The CAN-SPAM Act authorizes the FTC to issue regulations implementing the CAN-SPAM Act's provisions (16 C.F.R. part 316). Similarly, the FCC has authority under the CAN-SPAM Act to issue rules addressing unsolicited commercial messages sent to consumers' wireless devices (see below *E-mail Sent to a Wireless Device*).

## IS IT A COMMERCIAL MESSAGE?

The first step in evaluating whether the CAN-SPAM Act applies to an e-mail message is to determine whether the e-mail is a commercial message. Not every e-mail message from a business is deemed a commercial message under the CAN-SPAM Act. Rather, the e-mail's primary purpose must be the commercial advertisement or promotion of a product or service.

In particular, messages sent to consumers that have a primary purpose relating to a specific transaction or relationship between the sender and the consumer are expressly exempted from the CAN-SPAM Act requirements for commercial messages (15 U.S.C. § 7702(2)(B)). To qualify as a transactional or relationship message, the e-mail's primary purpose must be to do one or more of the following:

- Facilitate, complete or confirm a commercial transaction previously agreed to by the e-mail recipient.
- Provide warranty, product recall, safety or security information for a product purchased by the e-mail recipient.
- Provide certain information permitted under the CAN-SPAM Act regarding a subscription, membership, account, loan or similar ongoing relationship concerning the e-mail recipient's ongoing purchase or use of the sender's products or services (for example, notification of a change in terms of a membership or subscription, or periodic account information).
- Provide information regarding an employment relationship or related benefit plan in which the e-mail recipient is currently involved, participating or enrolled.
- Deliver goods or services (for example, updates or upgrades) that the e-mail recipient is entitled to receive as a result of a previously agreed on transaction.

(15 U.S.C. § 7702(17)(A).)

If the message includes content only in one or more of the above categories, it is not a commercial message under the

CAN-SPAM Act. If a message contains both transactional or relationship content and commercial content, the CAN-SPAM Act commercial e-mail requirements apply if the message's primary purpose is commercial.

The CAN-SPAM Act also contains compliance obligations and prohibitions for transactional or relationship messages (see below *Transmission Information*), but these are less rigorous than the rest of the requirements specific to commercial messages (see below *Commercial Messages*).

## IS THE MESSAGE'S PRIMARY PURPOSE COMMERCIAL?

Even if the e-mail does include some commercial content, the CAN-SPAM Act commercial e-mail requirements apply only if the message's primary purpose is commercial. The FTC has clarified the analysis for determining a message's primary purpose as follows:

- **Messages containing only advertising content.** These messages have a commercial primary purpose.
- **Messages containing both advertising and transactional or relationship content.** These messages have a commercial primary purpose if either:
  - the recipient would interpret the subject line to mean that the message contains commercial advertising; or
  - a substantial part of the transactional or relationship content does not appear at the beginning of the message.
- **Messages containing both advertising content and other non-transactional or non-relationship content.** These messages have a commercial primary purpose if either:
  - the recipient would interpret the subject line to mean that the message contains commercial advertising; or
  - the recipient would determine from the body of the message that

the message's primary purpose is commercial advertising.

In making this determination, factors to consider include:

- the placement of the commercial advertising at the beginning of the message;
  - the proportion of the message dedicated to commercial advertising; and
  - how prominent the commercial advertising is (for example, highlighted through use of graphics, type size and style).
- **Messages containing only transactional or relationship content.** These messages do not have a commercial primary purpose. (16 C.F.R. § 316.3.)

## WHO MUST COMPLY WITH THE CAN-SPAM ACT?

Any person, including business entities and nonprofit associations, that initiates commercial e-mail messages must comply with the CAN-SPAM Act requirements. Certain other requirements, such as those relating to opt-out methods, apply specifically to senders (see below *Opt-out Requirements* and *Other Requirements*).

### Initiators

As defined by the CAN-SPAM Act, a person is an "initiator" of a commercial e-mail message if it either:

- Originates or transmits the e-mail.
- Procures the transmission of the e-mail, meaning that it either intentionally pays or provides other consideration to, or induces, another person to transmit the e-mail on its behalf.

The CAN-SPAM Act contains an exception, however, when the person initiating the commercial e-mail is involved solely in routine conveyance. This is when the person's actions only relate to the transmission, routing or storage of the message through an automatic technical process and the person is not involved in identifying or providing the recipients' addresses for the message.

## BEST PRACTICES FOR E-MAIL MARKETING

Practical tips for CAN-SPAM Act compliance are set out below.

### REQUIREMENTS FOR ALL COMMERCIAL MESSAGES

#### Mailing List

- The mailing list should include only persons who have affirmatively agreed (opted in) to receive commercial e-mail from the business. While this is not a legal requirement under the CAN-SPAM Act, it is an industry best practice.
- The mailing list must not include any recipient who has previously asked not to receive commercial e-mail from the business (opted out).
- The mailing list should be scrubbed against the business's "do not e-mail" list at the last possible, commercially reasonable moment before the e-mail is sent.

#### E-mail Message

- The message must include complete and accurate transmission and header information.
- The "From" line must identify the business as the sender. This does not have to include the business's formal name. For example, it may contain the business's name, trade name or product or service name. The key requirement is that the "From" line provides the recipient with enough information to understand who is sending the message.
- The "Subject" line must accurately describe the message's content.
- The message must clearly include the business's valid, current physical postal address. This can be a:
  - street address;

- post office box that the business has accurately registered with the US Postal Service; or
- private mailbox that the business has accurately registered with a commercial mail receiving agency established pursuant to US Postal Service regulations.
- The message must disclose that it is an advertisement or solicitation unless it is sent only to recipients who have affirmatively agreed (opted in) to receive these messages from the business.

#### Opt-out Mechanism

- The message must clearly explain that the recipient may opt out of receiving future commercial messages from the business.
- The message must include either an e-mail address or other online mechanism that the recipient may use to opt out. The mechanism must not require the recipient to:
  - do anything more than reply to the e-mail or visit a single web page to opt out; or
  - make any payment or submit any personal information, including account information (other than an e-mail address), to opt out.
- The opt-out mechanism must work for at least 30 days after the e-mail is sent.
- The explanation of how a recipient can opt out should be easy to read and understand.
- The business may include a menu of opt-out options that permit the recipient to select the types of commercial messages it would like to continue receiving. However, one option must permit opting out of all commercial messages from the business.

### Senders

A "sender" is an initiator whose own product or service, or internet website, is advertised or promoted in the commercial message. A commercial e-mail can have more than one initiator or sender. For example, where a business engages a third-party service provider to send a commercial e-mail advertising the business's products, both parties are initiators under the CAN-SPAM Act. The business is also a sender under the CAN-SPAM Act.

For specific issues related to determining whether a person is an initiator or sender under the CAN-SPAM Act, see below *Common Marketing Practices*.

## REQUIREMENTS AND PROHIBITIONS

### TRANSMISSION INFORMATION

It is a violation of the CAN-SPAM Act to initiate the transmission of a commercial message or a transactional or relationship message that contains false or

misleading transmission information, which includes the "From," "To," "Reply to" and routing information (also known as the header information) of an e-mail. This information must be correct and identify the person initiating the message (15 U.S.C. § 7704(a)(1)).

### COMMERCIAL MESSAGES

#### Prohibition on Deceptive Subject Headings

The CAN-SPAM Act prohibits a person from initiating a commercial e-mail with

- All opt-out requests should be honored within ten business days.
- Opt-out requests must not expire. An opt out can be overridden only by the recipient's subsequent express request (opt in) to receive commercial e-mail.
- The business's opt-out list should not be sold, shared or used for any reason other than to comply with the law.

### Monitoring Opt-out Capabilities

The business should implement procedures to ensure that its opt-out capabilities work. An example of a basic procedure to test the opt-out procedure is as follows:

- Establish e-mail accounts with several major private e-mail account providers (for example, Gmail, Yahoo, Hotmail, AOL and so on) and add these e-mail addresses to the business's mailing list.
- For each e-mail address created for monitoring purposes, use the business's opt-out mechanism to remove the e-mail address from the mailing list.
- Repeat this procedure on a regular basis (for example, at least every two weeks).
- Examine the e-mail received by each monitoring e-mail account to confirm that the:
  - opt-out mechanism works;
  - opt-out request is honored within ten business days; and
  - monitoring e-mail account no longer receives commercial messages from the business.
- If the monitoring and testing process reveals problems, the business should immediately fix the issues.

a deceptive subject heading. This means that the initiator of the message cannot have actual knowledge (or knowledge fairly implied under the circumstances) that the subject heading would be likely to mislead the recipient about a material fact regarding the message's contents or subject matter (15 U.S.C. § 7704(a)(1)).

### Opt-out Requirements

The CAN-SPAM Act requires initiators of commercial e-mail to include the following elements in each commercial e-mail:

- Clear notice of the recipient's right to not receive (opt out of) future messages from the sender.
- One of the following mechanisms for opting out:
  - a functional return e-mail address, allowing the recipient to simply reply to the e-mail indicating the recipient's opt out; or
  - another internet-based opt-out mechanism (for example, a link to a separate web page containing the opt-out mechanism).

### Third-party Marketing Affiliates or Service Providers

When using third-party service providers, including affiliate marketers, the business should:

- Ensure that the written contract with the service provider clearly sets out each party's responsibilities for compliance with the CAN-SPAM Act and includes appropriate and adequate remedies for non-compliance.
- Monitor their compliance with the CAN-SPAM Act. Both the company whose product or service is advertised as well as the individual or entity sending the message are potentially liable for violations of the CAN-SPAM Act.

### ADDITIONAL REQUIREMENTS FOR MESSAGES SENT TO WIRELESS DEVICES

When sending commercial messages to wireless devices, the business should:

- Ensure that it has the recipient's prior, affirmative consent (opt in) to receive the commercial message. The consent can be oral, written or electronic.
- Ask for consent in a way that involves no cost to the recipient. For example, the business:
  - should not send the request to the wireless device; and
  - should allow the recipient to respond in a way that involves no cost (such as an online, e-mail or postal mail sign-up).
- When seeking consent, make it clear that the recipient:
  - is agreeing to receive commercial e-mail on its wireless device;
  - may be charged to receive the e-mail; and
  - can revoke its consent at any time.

The opt-out mechanism must be functional for at least 30 days after the message is sent. However, if the return e-mail address or other mechanism is unexpectedly and temporarily unable to receive messages or process opt-out requests resulting from a technical problem beyond the sender's control, it is not a violation of the CAN-SPAM Act opt-out requirements if the problem is corrected within a reasonable time (15 U.S.C. § 7704(a)(3)(C)).

A sender of a commercial e-mail cannot require the recipient to do any of the following to submit, or have the sender honor, an opt-out request when using any of the opt-out methods required by the CAN-SPAM Act:

- Pay a fee.
- Provide any information other than the recipient's e-mail address and opt-out preferences.
- Take any steps other than sending a reply message or visiting a single website.

(16 C.F.R. § 316.5.)

If the message recipient submits a request to opt out of receiving future messages from a sender, all of the following apply:

- The opt out must become effective within ten business days. After this time, the sender (or anyone on its behalf) may not send further commercial e-mail messages falling within the scope of the opt-out request to that recipient, unless the recipient subsequently requests to receive (opts in to) these messages.
- The opt out never expires.
- The sender (and any other person that knows the recipient has opted out of further commercial messages) cannot sell, exchange or otherwise transfer the recipient's e-mail address except as required by law unless that recipient has explicitly opted in to permitting the sale, exchange or transfer.

(15 U.S.C. § 7704(a)(3)-(5)(A)(i)-(iv).)

### Other Requirements

Initiators must also include the following elements in each commercial e-mail:

- Clear identification that the message is an advertisement or solicitation.
- The sender's valid physical postal address. This is typically the sender's street address, but can also be a post office box that the business has accurately registered with the US Postal Service or a private mailbox that the business has accurately registered with a commercial mail receiving agency established

pursuant to US Postal Service regulations.

(15 U.S.C. § 7704(a)(3)-(5)(A)(i)-(iii).)

### SEXUALLY-ORIENTED MATERIAL

The CAN-SPAM Act and the FTC's related rules set out additional restrictions on initiators of commercial e-mails containing sexually-oriented material. These restrictions relate to the e-mail's:

- Subject line.
- Content.

However, these restrictions do not apply if the e-mail recipient has given prior affirmative consent to receive these messages from the sender.

The CAN-SPAM Act defines sexually-oriented material as any material that "depicts sexually-explicit conduct ... unless the depiction constitutes a small and insignificant part of the whole" where the remaining content is not primarily devoted to sexual matters (15 U.S.C. § 7704(d)(4)).

#### Message Subject Line

The FTC's Adult Labeling Rule requires that the:

- Subject line of a commercial e-mail does not contain any sexually-oriented material.
- The phrase "SEXUALLY-EXPLICIT:" appears in capital letters as the first characters in the subject line of any commercial e-mail message that contains sexually-oriented material.

(16 C.F.R. § 316.4(a).)

#### Message Content

To prevent recipients from being exposed unintentionally to sexually-oriented material in a commercial message, the FTC rule also limits the content that can be initially visible by a recipient. The content of these messages must only contain:

- The phrase "SEXUALLY-EXPLICIT:".
- The same required information as for other commercial e-mails, including:
  - clear and conspicuous identification that the message is an advertisement or solicitation;

- clear notice of the recipient's ability to opt out of receiving future messages and a valid opt-out mechanism (either a functioning return e-mail address or other internet-based mechanism) that remains operational for no less than 30 days after the e-mail was sent; and
- the sender's valid physical postal address, clearly and conspicuously displayed.

- Any necessary instructions identifying how the recipient may access the sexually-oriented material. If the e-mail includes these instructions, they must come after a clear and conspicuous statement that to avoid viewing the sexually-oriented material, a recipient should delete the message without following the instructions.

(16 C.F.R. § 316.4(a)(2).)

## COMMON MARKETING PRACTICES

### "FORWARD-TO-A-FRIEND" E-MAILS

Marketers use a common practice to enable recipients of a commercial e-mail to forward the message (or a similar one) to one or more friends. These "forward-to-a-friend" e-mails are typically sent using one of two methods:

- A web-based mechanism provided by the business that originally sent or provided the content (either in an e-mail or on a website).
- The consumer's own e-mail program.

When using forward-to-a-friend e-mails as a marketing tool, a business must determine whether it is an initiator or sender of these messages under the CAN-SPAM Act (see above *Who Must Comply with the CAN-SPAM Act?*). If the web-based mechanism merely provides a method for a recipient to forward the message along to a friend, or if the recipient forwards the message using a personal e-mail program, absent more, the originator is not likely the initiator of the forwarded message and is not subject to the CAN-SPAM Act. In this

case, the business's role would probably be considered solely routine conveyance. Where the recipient forwards the message using a personal e-mail program, without consideration or inducement, the business likely is not involved at all.

The FTC has clarified that a business's use of language merely encouraging a consumer to forward a message to a friend does not, without more, subject the business to the CAN-SPAM Act requirements for senders of commercial e-mails (see FTC's discussion at *73 Fed. Reg. 29654, 29671*).

However, if the business "procures" the forwarding of a message, it is considered to be the initiator or sender, and the commercial message must comply with the CAN-SPAM Act. A business can procure the forwarding of a message through several actions, including by either:

- Offering the recipient money, coupons, discounts, awards, additional entries in a sweepstakes or similar consideration for forwarding the message.
- Intentionally inducing the recipient to forward the message, for example, by paying a marketing affiliate, who in turn uses sub-affiliates, to send commercial messages to drive traffic to the business's website (see below *Affiliate Marketing*). Although no direct relationship between the business and the sub-affiliate exists, if the business intentionally induces the forwarding of the commercial messages through the affiliate, it is considered to be the sender.

## MULTIPLE SENDERS

The FTC rules also clarify CAN-SPAM Act requirements when a single e-mail contains commercial messages from multiple senders (*73 Fed. Reg. 29654, 29655*).

When multiple businesses' products or services, or internet websites, are advertised or promoted in a single message, each business is a sender for purposes of CAN-SPAM Act compliance, unless the businesses have designated a single sender of the commercial message by complying with all of the following requirements:

### PRACTICE NOTES

### DOCUMENTS

### CLAUSES

### CHECKLISTS

### ARTICLES

The following related Practice Notes are available on [practicallaw.com](http://practicallaw.com)

>> **Simply search the title OR resource number**

[Advertising: Overview or 2-501-2799](#)

[Online Marketing and Advertising or 4-500-4232](#)

[Direct Marketing or 5-500-4203](#)

[US Privacy and Data Security Law: Overview or 6-501-4555](#)

[Privacy and Data Security: Breach Notification or 3-501-1474](#)

- The single business meets the CAN-SPAM Act's definition of sender. This is the person that initiates the message and whose products or services, or internet websites, are advertised or promoted in the message.
- The single business is identified in the "From" line as the sole sender of the message.
- The single business is in compliance with the:
  - prohibition on false or misleading transmission information;
  - prohibition on deceptive subject headings;
  - requirement to include a functioning opt out;
  - requirement to include clear and conspicuous identification that the message is an advertisement or solicitation, a clear and conspicuous notice of the opportunity to opt out and a valid physical postal address of the sender; and
  - requirement to include warning labels on commercial e-mails that contain sexually-oriented material.

(*16 C.F.R. § 316.2(l)*.)

In this instance, only the designated sender must comply with the CAN-SPAM Act requirements for senders, including the obligation to scrub against any opt-out lists maintained by the sender and to honor opt-out requests. Only the designated sender's valid physical postal address must appear in the message. If the above requirements are not complied

with, each business must comply with the CAN-SPAM Act requirements for senders (including the obligation to scrub against each of the senders' opt-out lists).

Even where a single sender is designated, the other businesses will be deemed initiators of the commercial e-mail for CAN-SPAM Act purposes.

## AFFILIATE MARKETING

A commercial e-mail can have more than one initiator or sender (see above *Who Must Comply with the CAN-SPAM Act?*). Companies often engage third-party affiliate marketers to increase traffic to the company's website. These affiliates are typically paid based on the number of individuals who, directed by the affiliates, ultimately visit the business's website or make a purchase on the website.

The FTC has brought several claims against both companies whose product or service was advertised in the commercial e-mail as well as the affiliate that sent the message. In these situations, the company is deemed the sender of the commercial e-mail. The affiliate, who typically originates or transmits the e-mail message, is an initiator. If the affiliate also advertises its own services or products, it is also a sender under the CAN-SPAM Act and the rules concerning multiple senders apply.

A company also may be liable for violations of the CAN-SPAM Act's prohibition on false or misleading transmission information (see above *Transmission Information*) by a marketing affiliate or other third party promoting the company's

business or its products or services if the company:

- Knows (or should have known) of the violations.
- Profits from the prohibited practice.
- Fails to stop or report the violations.

(15 U.S.C. § 7705(a).)

## E-MAIL SENT TO A WIRELESS DEVICE

The FCC is authorized by the CAN-SPAM Act to regulate communication to wireless devices and has enacted regulations addressing certain commercial messages sent to these devices (47 C.F.R. § 64.3100).

In contrast to the general opt-out requirements set out in the CAN-SPAM Act and FTC rules, the FCC prohibits sending commercial messages to certain e-mail addresses provided by wireless carriers specifically for mobile messaging services, for example, “customer@wirelesscompany.com” (referred to as mobile service commercial messages), unless the subscriber gives express prior authorization (opts in), which can be written or oral.

Specifically, the FCC maintains a list of domain names for wireless messaging services posted on its website (available at [fcc.gov/cgb/policy/DomainNameDownload.html](http://fcc.gov/cgb/policy/DomainNameDownload.html)). Wireless carriers are required to update this list periodically. Unless a recipient has given express prior authorization, a person must not initiate

commercial e-mail to any address with a domain name that has been on the list for at least 30 days before the message is sent or otherwise knowingly initiate a mobile service commercial message.

When requesting express prior authorization, an initiator of a mobile service commercial message must, among other things:

- Clearly state the identity of the entity that will be sending the messages.
- Notify the subscriber that he may be charged by the wireless carrier for receipt of these messages.
- Disclose that the subscriber can revoke his authorization at any time.

(47 C.F.R. § 64.3100(d).)

Once a recipient expressly authorizes these messages, similar to the FTC’s rules for commercial messages, any person initiating a mobile service commercial message must include:

- Clear notice of the recipient’s ability to opt out of receiving future messages from the sender of the e-mail.
- A clearly and conspicuously displayed functional return e-mail address or internet-based method for the subscriber to opt out.

A sender must stop sending further messages within ten days after receiving an opt-out request. Like the FTC’s rules, the opt-out methods must be functional for at least 30 days after the message was sent.

In addition, the FCC rule requires that where recipients have electronically provided express prior authorization (for example, by dialing a short code) they must be able to opt out of future e-mails by the same electronic method. The initiator of the message must also ensure that at least one opt-out option is provided that does not result in additional charges to the mobile service subscriber.

(47 C.F.R. § 64.3100(b).)

## ENFORCEMENT AND PENALTIES

Although the FTC is the primary enforcer of the CAN-SPAM Act, various federal, state and private parties can bring claims for violations. Penalties for non-compliance vary based on:

- The party bringing the claim, for example, the FTC, the FCC and other federal agencies, state attorneys general and private actions brought by internet service providers.
- Whether the violation was willful, knowing or aggravated.

>> For more information on enforcement of the CAN-SPAM Act at both the federal and state levels, as well as civil and criminal penalties for violations of the Act, see the complete, continuously maintained online version of this Practice Note. Visit [practicallaw.com](http://practicallaw.com) and search **E-mail Marketing: CAN-SPAM Act Compliance**.



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