

FTC Seeks Comments on Proposed Criteria for “Primary Purpose” of Email Message Under Can-Spam Act

INTRODUCTION

On August 13, 2004, the FTC announced its proposed rule (“Proposed Rule”) for determining the “primary purpose” of an email message under the CAN-SPAM Act (the “Act”). This is a key rulemaking proceeding because the Act only applies to email messages that have a “primary purpose” of advertising or promoting a product or service. If an email message is deemed to have a commercial primary purpose, the sender must comply with a number of requirements including provision of an opt-out email address and maintenance of a “do not email” list.

SUBJECT LINE’S IMPORTANCE

Having received hundreds of comments, the Commission struggled with a number of possible criteria for defining “primary purpose.” One of the most notable elements of the Proposed Rule is the focus on the email subject line. According to the Proposed Rule, any email message with a subject line that would be reasonably interpreted by a consumer as promoting or advertising a product or service will be deemed to have a commercial primary purpose and thus will be subject to the Act. In the Commission’s view, consumers should be able to rely on the subject line as an indication of whether the message is commercial and whether to open it or not.

PROPOSED RULE

The Proposed Rule identifies the following three types of email messages: (1)

messages with purely commercial content; (2) messages with commercial content and content relating to a previous transaction or relationship; and (3) messages with commercial content and non-commercial editorial or informational content that is unrelated to a transaction or relationship with the email recipient. “Transactional or relationship” information is subject matter that relates to a specific transaction and facilitates, completes, or confirms that transaction. Such messages can relate to warranty, product recall information, or safety or security information with respect to a commercial product or service. Relationship messages can also include those that relate to account balance information or similar information concerning an ongoing commercial relationship.

1. Emails With Only Commercial Content

Email messages that only contain commercial content clearly have a primary purpose that is commercial. An example is a message that contains only price lists for various prescription drugs. These emails are covered by the Act. Among other requirements, they must have commercial subject lines that are consistent with the text of the message. It will be deemed unlawful for a sender to mask a purely commercial email message with a subject line that is inconsistent with its true nature.

2. Emails With Commercial Content and Non-Commercial Content Relating to a Prior Transaction or Relationship

Some email messages contain both

commercial content and “transactional or relationship” information. For these messages, if the subject line does not signal a commercial message, the Commission will determine the primary purpose of the email from the location of the transactional or relationship content in the body of the message. The message will be deemed to have a primary purpose that is commercial if the non-commercial content does not appear at or near the beginning of the message. For example, if the subject line relates to warranty information and warranty information appears at the beginning of the body text of the email, the primary purpose would not be commercial, even though lower down in the message the email contains promotional information about related products.

3. Emails With Commercial Content and Non-Commercial Content Not Relating to A Prior Transaction or Relationship

The final category of messages contain commercial content and editorial or informational content that is not related to a prior transaction or relationship. If the subject line does not signal a commercial message, the Commission will focus on the overall net impression of the email to determine whether its primary purpose is commercial. It will be deemed to have a commercial primary purpose if a recipient reasonably interpreting the body of the message would likely conclude that the primary purpose of the message is to advertise or promote a product or service. The factors relevant to this consideration include (but are not limited to):

- the placement of the commercial content at or near the beginning of the body of the message;

- the proportion of the message dedicated to commercial content; and
- how color, type size, and style are used to highlight commercial content.

Many bona fide newsletters will fall into this category of email message. Newsletters contain editorial or informational content but may also contain accompanying advertisements. While a newsletter may have a commercial purpose, the Proposed Rule appears to recognize that a newsletter is not likely to trigger the Act’s requirements as long as the primary purpose is editorial or informational.

CALL FOR COMMENTS

The Commission is seeking comments from the public until September 13, 2004, concerning its proposed criteria for defining “primary purpose.” The Commission has also specifically asked whether a message that is purposely disguised to conceal its commercial nature should be presumed to be commercial and subject to the Act. If you have any questions about the Proposed Rule or are interested in submitting a comment on your company’s behalf, please feel free to contact us.

FOR MORE INFORMATION

Kelley Drye Collier Shannon's Advertising and Marketing practice group is on the forefront of developing marketing and advertising industry guidelines and regulations. For more information about this issue of Advertising Law Alert or to learn more about how Kelley Drye Collier Shannon can help you increase the effectiveness of your advertising and marketing, please contact one of our team members at (202) 342-8400 or via email:

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