

# ALERT



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## New FTC Rules Clarify CAN-SPAM Act

The FTC recently approved four new rule provisions that clarify certain requirements of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM”). The new rules provide the following clarifications:

- (1) Parties to a multiple-party email can identify one as the “sender” responsible for compliance with CAN-SPAM;
- (2) Advertisers cannot require recipients who wish to opt out of receiving future emails to pay any fee or provide any personal information;
- (3) An official U.S. Post Office Box counts as a “valid physical postal address” for notification; and,
- (4) The definition of “person” under the Act is not limited to a natural person.

In addition, the Statement of Basis and Purpose accompanying the new rules clarifies the Commission’s position on so-called “forward-to-a-friend” emails and the requirement that the seller must provide some consideration or inducement for CAN-SPAM to apply.

In general, the CAN-SPAM Act prohibits transmission of a commercial email message to any recipient who has asked not to receive it. Specifically, the Act requires that commercial email messages contain a functioning return email address or other Internet-based mechanism for opting out; it also prohibits sending commercial email messages to a recipient more than ten days after the recipient has opted out. 15 U.S.C. 7704(a). In addition, the Act prohibits transmitting messages that contain false or misleading subject line or header information. To that end, it requires that commercial email messages feature specific disclosures, including: (1) clear and conspicuous identification that the message is an advertisement (*e.g.*, by placing ADV in the subject line), (2) clear and conspicuous notice of the opportunity to opt out of receiving future messages, and (3) a valid physical postal address of the sender.

Under the CAN-SPAM Act, the person who is liable for compliance with the Act’s notice and opt-out requirements is called a “sender.” The new rules address the question of who the “sender” is when multiple advertisers are featured in an email, for example when an email from an airline includes advertisements or promotions for a hotel chain and car rental company. Under the new rule, the parties may designate one of the advertisers as the sender. The designated sender must be the person or entity who initiates the commercial email message in which it advertises or promotes its own goods, services, or Internet website (in addition to the products and services of others), and must be the only person identified in the “from” line of the message. Among other obligations, the designated sender must properly identify the message as an advertisement, ensure that the message does not contain false or misleading information, scrub the mailing list against *its* suppression list and honor opt-out requests made by recipients of the message. If the designated

sender fails to comply with any of these requirements, all of the marketers in the message may be liable as senders for any violations of the Act.

The new rules also address the scope of a sender's opt-out requirements. They clarify that an advertiser cannot require an email recipient to pay a fee; provide information other than his or her email address and opt-out preferences; or take any steps, other than sending a reply email or visiting a single Internet Web page, to opt out of receiving future emails. The final rules also allow the sender to use a U.S. Post Office box that is accurately registered with the U.S. Postal Service to comply with the requirement that a commercial email message include the sender's "valid physical postal address." The rules also clarify that the Act's obligations are not limited to natural persons.

In addition to creating new rules, the FTC also provided helpful guidance in the accompanying Statement of Basis and Purpose ("SBP") on how it will apply CAN-SPAM to forward-to-a-friend situations. Typically, a forward-to-a-friend situation occurs when a person ("the forwarder") receives a commercial email message from a seller and forwards it to another person ("the recipient"). As the SBC clarifies, when a seller "pays or provides other consideration" to the forwarder in exchange for forwarding the message, the seller will have "procured" the forwarding of the email and will be responsible for compliance with CAN-SPAM (*e.g.*, the notice and opt-out requirements and the duty to scrub the referred friend against the sender's suppression list before sending). This is true regardless of the amount of consideration offered. Even *de minimis* consideration in the form of coupons, discounts, sweepstakes entries and the like in exchange for forwarding a commercial email constitutes "procurement," and subjects the sender to potential CAN-SPAM liability. The Commission also clarified that a seller "procures" the forwarding of a message when it "induces" another to forward the message, and explained that inducement occurs when the seller somehow influences or encourages the act of forwarding an email even though it

does not pay directly for, or otherwise provide consideration for, the specific act of forwarding the email. Inducement is broader than direct consideration. It also "need not take the form of a 'explicit statement' or 'affirmative act' urging someone to send an email." In fact, the SBP noted that words alone are not often likely to constitute inducement.

In another forward-to-a-friend scenario, a seller's Web site enables a visitor to the site ("the forwarder") to provide an email address of another person to whom the seller would automatically forward an email. The FTC confirmed that a seller's use of language on his Web site asking consumers to forward a message does not, without more, subject the seller to "sender" liability for "inducement." The SBC is also clear that payment for generating traffic to a Web site, while not "consideration" paid for forwarding a message, may nevertheless induce the sending of the message by the forwarder. For example, in an affiliate program, if the seller offers an affiliate compensation for increasing traffic to the seller's Web site and this results in the affiliate sending an email promoting the seller's products and services, the seller will be deemed to have "induced" the affiliate's email, requiring the seller to comply with CAN-SPAM.

The SBP also explains the Commission's decision not to alter the length of time a "sender" of commercial email has to honor an opt-out request (still 10 days); discusses the Commission's determination not to designate additional "aggravated violations" under the Act; and provides some additional guidance (but no new rules) regarding the five broad categories of messages that constitute "transactional or relationship messages," which are exempt from CAN-SPAM.

These new CAN-SPAM rules, which went into effect on July 7, 2008, are the culmination of the FTC's efforts to implement the 2003 Act. With this additional clarity in the rules, look for the FTC to continue vigilant enforcement of the Act.

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