

UNSOLICITED COMMERCIAL ELECTRONIC MAIL

STATUS

On December 16, 2003, President Bush signed into law the "Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003," (P.L. 108-187), the first bill aimed at the regulation of unsolicited commercial electronic mail (e-mail).

On December 16, 2004, the Federal Trade Commission approved the regulations explaining what constitutes a "commercial" email.

LAW

The CAN- SPAM Act creates an unfair and deceptive trade practice act under the Federal Trade Commission's (FTC) jurisdiction for the sending of "commercial" e-mails. ***While much of the rhetoric before passage referenced "consumers," the law references "recipients" of e-mail and therefore regulates business to business e-mails as well as business to consumers e-mails.***

First, any commercial email, as well as transactional or relationship emails, sent to a protected computer (basically any computer used in interstate commerce) must not include misleading or false header information and must not include deceptive or misleading subject headings.

Commercial electronic mail message is defined as any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose). It does not include transactional or relationship emails as will be described later.

If you transmit any commercial e-mail message the message must:

- 1) provide a clear and conspicuous identification that the message is an advertisement or solicitation;
- 2) provide a clear and conspicuous notice of the opportunity to decline to receive further commercial e-mail messages from the sender; and,
- 3) Provide a valid physical postal address of the sender.

If the recipient has given prior affirmative consent, the sender does not have to comply with the first condition, that is, you do not have to provide a clear and conspicuous identification that the message is an advertisement or solicitation.

The term "affirmative consent," when used with respect to a commercial e-mail message, means that the recipient expressly consented to receive the message, either in response to a clear and conspicuous request for such consent or at the recipient's own initiative; and if the message is from a party other than the party to which the recipient communicated such consent, the recipient was given clear and conspicuous notice at the time the consent was communicated that the recipient's e-mail address could be transferred to such other parties for the purpose of initiating commercial e-mail messages.

With respect to the "opt out" mechanism, the commercial e-mail must contain a functioning return e-mail address or other Internet-based mechanism that a recipient may use to submit a request not to receive future commercial e-mail from the sender. The e-mail address or mechanism provided must be capable of receiving messages for no less than 30 days after the transmission of the original message. After a recipient transmits to the sender a request not to receive future commercial e-mail messages, it is unlawful for the sender to further transmit commercial e-mail to the recipient more than 10 business days after receiving such request.

The conditions noted above do not apply, if the e-mail is a transactional or relationship message. The term "transactional or relationship message" means an e-mail message the primary purpose of which is:

- 1) to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;
- 2) to provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient;
- 3) to provide notification concerning a change in the terms or features of; notification of a change in the recipient's standing or status with respect to; at regular periodic intervals, account balance information or other type of account statement with respect to, a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender;
- 4) to provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, enrolled;

OR

- 5) to deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.

FTC REGULATIONS ON COMMERCIAL EMAIL

According to the FTC rules, in applying the term "commercial electronic mail message" defined in the CAN-SPAM Act, the "primary purpose" of an electronic mail message shall be deemed to be commercial based on the criteria below:

- (1) If an electronic mail message consists exclusively of the commercial advertisement or promotion of a commercial product or service, then the "primary purpose" of the message shall be deemed to be commercial.
- (2) If an electronic mail message contains both the commercial advertisement or promotion of a commercial product or service as well as transactional or relationship content as set forth in these rules, then the "primary purpose" of the message shall be deemed to be commercial if: (i) A recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message contains the commercial advertisement or promotion of a commercial product or service; or (ii) The electronic mail message's "transactional or relationship content" as set forth by these rules does not appear, in whole or in substantial part, at the beginning of the body of the message.
- (3) If an electronic mail message contains both the commercial advertisement or promotion of a commercial product or service as well as other content that is not transactional or relationship content as set forth by these rules, then the "primary purpose" of the message shall be deemed to be commercial if: (i) A recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message contains the commercial advertisement or promotion of a commercial product or service; or (ii) A recipient reasonably interpreting the body of the message would likely conclude that the primary purpose of the message is the commercial advertisement or promotion of a commercial product or service. Factors illustrative of those relevant to this interpretation include the placement of content that is the commercial advertisement or promotion of a commercial product or service, in whole or in substantial part, at the beginning of the body of the message; the proportion of the message dedicated to such content; and how color, graphics, type size, and style are used to highlight commercial content.

In applying the term "transactional or relationship message" defined in the CAN-SPAM, the "primary purpose" of an electronic mail message shall be deemed to be transactional or relationship if the electronic mail message consists exclusively of transactional or relationship content.

For the various aspects of these rules, "Transactional or relationship content" of email messages under the CAN-SPAM Act is content:

- (1) To facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;
- (2) To provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient;
- (3) With respect to a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender, to provide –(i) Notification concerning a change in the terms or features; (ii) Notification of a change in the recipient's standing or status; or (iii) At regular periodic intervals, account balance information or other type of account statement;
- (4) To provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or
- (5) To deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.

For further discussion of some of the terms, the preamble in the Federal Trade Commission's Federal Register notice of the final rules may be helpful. Go to the FTC's website at www.ftc.gov/bcp/online/edcams/spam/business