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e-commerce client alert

ALERT: NEW FEDERAL STATUTE REGULATES COMMERCIAL E-MAIL

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can-spam act of 2003

The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act” or “Act”), which took effect on January 1, 2004, regulates the sending of commercial electronic mail messages and imposes civil and criminal penalties on those who violate its provisions. The criminal provisions of the Act have been codified at 18 U.S.C. § 1037. The Act preempts state law that expressly regulates the use of electronic mail to send commercial messages, except to the extent that state law prohibits falsity or deception.

scope

The CAN-SPAM Act covers commercial electronic mail messages (“commercial e-mails”) sent to, from or through “protected” computers. Protected computers are those used in interstate or foreign commerce or communication. A “commercial” e-mail is any electronic mail message with the primary purpose of commercial advertisement or promotion of a commercial product or service, excluding “transactional or relationship” e-mail. “Transactional or relationship” e-mails are those which have the primary purpose of facilitating, completing or confirming a commercial transaction that the recipient has previously agreed to enter into with the sender. They also include e-mails that provide information related to an ongoing service (such as product updates) or to an employment relationship.

criminal offenses

Under the Act, it is a criminal offense to send multiple commercial e-mails¹ if in doing so:

- > the sender accesses a protected computer without authorization;
- > the sender uses a protected computer with

- intent to deceive or mislead recipients as to the origin of messages;
- > the sender materially falsifies header information;
- > the sender registers for five or more e-mail accounts or on-line user accounts, or two or more domain names, using information that materially falsifies the identity of the registrant; or
- > the sender falsely represents itself to be the registrant of five or more Internet Protocol addresses.

The possible penalties for an offense under this section of the Act include a fine, forfeiture of gross proceeds as well as equipment and software, and/or imprisonment for up to one year (up to five years under certain circumstances, such as a prior conviction for a related offense).

regulatory scheme

In addition to criminal liability, the Act creates a regulatory scheme under the primary jurisdiction of the Federal Trade Commission (FTC). The FTC is charged with prescribing regulations that will further implement the Act.

Under the Act, it is unlawful to send commercial e-mails or transactional or relationship messages unless they provide:

- > clear and conspicuous identification that the message is an advertisement or solicitation;
- > clear and conspicuous notice of the opportunity to decline to receive further commercial

- e-mails from the sender; and
- > a valid physical postal address of the sender.

prohibition against false or misleading transmission information and deceptive subject headings

Under the Act, it is unlawful to send a commercial e-mail, or a transactional or relationship message, if the message contains or is accompanied by header information that is materially misleading. Header information is materially misleading if it fails to identify accurately the computer used to initiate the message. Furthermore, header information that is technically accurate but which includes an e-mail address, domain name or Internet Protocol address that was obtained by fraudulent pretenses is materially misleading.

It is also unlawful to send a commercial e-mail that has a subject heading that is likely to mislead a recipient about a material fact regarding the contents or subject matter of the message.

opting out

Under the law, commercial e-mail messages must contain a conspicuously displayed and functioning return e-mail address or other Internet-based mechanism, which allows the recipient to submit a reply e-mail requesting not to receive future e-mails from that sender. The return e-mail address must also be capable of receiving reply messages for no less than 30 days after the transmission of the original message.

The sender of the commercial e-mail has the option of providing the recipient a list or menu from which the recipient may choose the specific types of e-mails the recipient wants to receive (or not receive) from the sender, which must include a choice not to receive any e-mails from the sender.

If a recipient makes a request not to receive commercial e-mails from a sender, it is unlawful for that sender or any person acting on behalf of the sender to send or as-

sist in sending another commercial e-mail more than 10 business days after the receipt of such request. It is also unlawful for the sender to sell, exchange or transfer an e-mail address of anyone who has requested not to be sent any more e-mails.

aggravated violations

Violations of these requirements are subject to enhanced penalties if the sender has actual or fairly implied knowledge that the electronic mail address of the recipient was obtained using an automated means from an Internet website that includes a notice stating that the operator of the website will not give, sell or transfer addresses, or using an automated means that generates possible e-mail addresses by combining names, letters, or numbers.

sexually oriented material

E-mail messages that contain sexually oriented material must include a mark or notice unless the recipient has given prior affirmative consent to receipt of the message.

businesses promoted by others using electronic mail with false or misleading transmission information

Businesses can also be held responsible for violating the Act if someone else promotes their business in violation of the Act and the business knew *or should have known* that their products or services were being promoted in that way, if they received or expected to receive an economic benefit from the promotion and took no reasonable action to prevent or detect the transmission.

enforcement

The primary enforcer of the Act is the Federal Trade Commission (FTC). In addition, certain other federal agencies, state law enforcement agencies, and Internet service providers may pursue violators to obtain injunctive relief and statutory damages. The Act does not authorize recipients of messages that violate the Act to

sue the sender, although it authorizes the FTC to provide for whistleblower incentives.

conclusion

From the perspective of e-mail marketers and other senders of commercial e-mail, a virtue of the Act is that it preempts state law. Previously, senders of commercial e-mail were potentially subject to the varying laws of each state. The Act provides a uniform and fairly straightforward set of rules. Legitimate senders of commercial e-mail should benefit from the uniformity and simplicity. Although it remains to be seen how effective the Act will be in curtailing abusive practices, in principle commercial e-mail abusers face severe penalties. In addition, legitimate senders may face penalties if they delegate their e-mail marketing function to outside service providers who violate the Act. As in other regulated areas, such as securities and money laundering, companies would be well-advised to designate an e-mail compliance officer charged with the responsibility of ensuring compliance with the Act, and to seek legal counsel.

¹Under the Act the term “multiple” means more than 100 e-mails during a 24-hour period, more than 1000 e-mails during a 30-day period, or more than 10,000 e-mails during a 1-year period.

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