

Bebchick Law

Law Alert

June 2008

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Dear Clients, Colleagues and Friends,

This Law Alert is designed to provide you with some general information about new legal developments likely to impact your business. We are planning to send these out periodically, and hope that you find this Alert useful. We welcome your feedback.

Best regards,

Baruch M. Bebchick

CAN-SPAM Update

New FTC Guidance on Commercial E-Mails

The Federal Trade Commission ("FTC") recently issued its long-anticipated Final Rule to the Federal anti-spam law – Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM" or "the Act"). The Final Rule provides the most significant guidance of CAN-SPAM compliance requirements since the FTC's Notice of Proposed Rulemaking ("NPRM") issued some three years ago. In particular, the Final Rule clarifies several ambiguous provisions of the Act which have left many online marketers uncertain of how to comply. Since a failure to comply can result in fines of up to \$11,000 per violation, civil law suits, and even criminal penalties, the clarifications offered by the Final Rule are quite welcome.

Before discussing the major provisions of the Final Rule, a quick summary of the Act's core requirements is provided for context:

Background – What Does CAN-SPAM Require?

If the primary purpose of your e-mail communication is the advertisement or promotion of a commercial product or service, your e-mail falls under CAN-SPAM, and you must take the following five steps to comply:

1. *Use accurate "from" "to" and routing information.* Don't include false or misleading names.
2. *Use accurate "subject" line.* Don't mislead the recipient about the content or subject matter of the message.
3. *Include clear and conspicuous "opt-out" mechanism.* E-mail covered by CAN-SPAM must provide a procedure for a recipient to ask you not to send future e-mail to that address. Your opt-out procedure must be available to process requests for at least 30 days after you send your e-mail. If you receive an "opt-out" request you must comply within 10 business days.
4. *Properly Identify the e-mail.* You must include a clear and conspicuous notice that the e-mail is an

"advertisement" or "solicitation".

5. *Include your physical postal address.* You must include your company's business address in the body of the e-mail.

Final Rule Highlights

The Final Rule has clarified in several cases who is subject to the Act's restrictions and how those subject can comply. The following are several important issues addressed by the Final Rule:

- **Forward-to-a-Friend Messages.** In the NPRM, the FTC suggested that forward-to-a-friend messages were subject to CAN-SPAM's restrictions if a party offering such functionality (a "sender") provided the person forwarding the message (a "forwarder") with either "consideration" or an "inducement" to forward the e-mail to a third party. The bar for "inducement" was deemed to be extremely low, and would be met even if a sender merely encouraged a forwarder to forward an e-mail by stating anything beyond a generic instruction of "click-here-to-forward".

The Final Rule reverses the standard proposed by the NPRM and provides that a sender's use of language encouraging a forwarder does not, absent more, subject such forwarder or the sender to the Act's requirements. However, senders who do provide consideration (such as money, coupons, discounts, awards, extra sweepstakes entries and the like) to forwarders will be subject to the Act.

- **Multi-Party Marketers.** The NPRM suggested that in the case of an e-mail that is provided by multiple marketers (such as where a commercial e-mail from an airline also contains advertisements or promotions for a hotel chain, car rental company and restaurant), each marketer would have to comply with the Act's requirements. This proposed requirement created widespread confusion among multi-party marketers regarding compliance. For example, whose address would be inserted in the "from" line of the e-mail, and if a recipient opted-out of a multi-party e-mail, would each marketer have to scrub this e-mail address from its own list?

The Final Rule provides that multiple-party marketers may designate one party to be the sole sender and be responsible for CAN-SPAM compliance. If, but only if, that designated party fully complies with the Act's requirements (e.g., opt-out mechanism, listing of address, and accurate header information), then the other marketers participating in the multi-party communication will not have to separately comply with the Act.

- **Address.** The NPRM proposed that the Act's requirement that "a valid physical postal address" be included in the text of a sender's e-mail would not be satisfied by the listing of a post office box or private mailbox, but rather only by the sender's street address. However, the Final Rule broadens this requirement and permits senders to list an accurately-registered post office box or a private mailbox established under USPS regulations.

- **Opt-Outs.** The Final Rule specifies that an e-mail recipient cannot be required to pay a fee or provide personal information (other than his or her e-mail address) in order to opt-out from future messages of the sender. The Act also prohibits requiring recipients to take any steps in order to opt-out from receiving a sender's future e-mails, other than to (a) send the recipient a reply e-mail or (b) visit a single website page where such an opt-out request can be communicated. Finally, while the NPRM had proposed that the time in which a sender must process opt-out requests be lowered from 10 business days to three, the Final Rule maintains the original 10 day period.

Conclusion

The Final Rule enables marketers to better gauge whether their e-mails either are subject to or in compliance with the requirements of CAN-SPAM. However, bear in mind that the full details of the Final Rule are not covered in this Alert, and that the assessment of how CAN-SPAM provisions apply is often highly fact-specific. If you have any questions about the impact of CAN-SPAM or the Final

Rule on your e-mail marketing communications, please contact Baruch M. Bebchick at (646) 688-4375 or baruch@bebchicklaw.com.

What We Do

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Our core practice involves corporate and intellectual property matters, with a focus on technology, media, marketing, e-commerce, software, entertainment and privacy. Bebchick Law regularly counsels clients about how to most effectively organize and reorganize, structure entrepreneurial ventures, and commercially protect and exploit their intellectual property and other assets. We pride ourselves at bringing you value added services – whether by crafting practical solutions to your legal and business problems or by providing sound advice of how to minimize risk and prevent problems in the first instance – in a skillful and efficient manner.

We invite you to learn more about us at www.bebchicklaw.com.

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