

Federal Regulation: FTC Issues New Anti-SPAM Rule

The Federal Trade Commission (FTC) has issued a new rule regulating marketers who advertise goods or services via e-mail. Failure to comply can lead to fines of up to \$11,000 per violation, civil law suits, and even criminal penalties. Here's a rundown of the new rule and what you have to do to comply.

Why This Rule

The new rule further clarifies the federal anti-spam law known as CAN-SPAM -- the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003. CAN-SPAM created new requirements for e-mail whose primary purpose is "the commercial advertisement or promotion of a commercial product or service." But CAN-SPAM didn't explain how to determine when the primary purpose of an e-mail is "commercial," leaving many marketers confused.

To address this confusion, the new rule establishes criteria for determining whether the primary purpose of an e-mail is commercial and therefore subject to CAN-SPAM. The new rule takes effect March 28, 2005.

Four Categories of E-mail

Under the new rule, the FTC now classifies e-mail messages into four categories:

- 1) e-mail containing only commercial content;
- 2) e-mail containing commercial content and "transactional and relationship" content;
- 3) e-mail containing commercial content and content which is neither commercial nor "transactional and relationship";
- 4) e-mail containing only "transactional and relationship" content, which generally includes (i) messages facilitating a previously established relationship (e.g., information about an employment relationship or related benefit plan); or (ii) messages providing information about a prior transaction between sender and recipient (e.g., warranty information, product recall information, or safety or security information).

Which E-mail Categories are Primarily Commercial? The FTC deems category (1) e-mail messages - messages containing only commercial content -- to be primarily commercial. Category (1) e-mail is therefore subject to CAN-SPAM. The FTC deems category (4) e-mail messages - messages containing only "transactional and relationship" content -- not primarily commercial. Category (4) e-mail is therefore not subject to CAN-SPAM.

E-mails in categories (2) and (3) have dual purposes and are therefore more difficult to analyze. To decide whether these dual-purpose e-mails have a commercial primary purpose, the FTC devised the following tests.

Commercial content plus "transactional and relationship" content. If the e-mail has both commercial and "transactional and relationship" content, it has a commercial primary purpose if:

- (i) "A recipient reasonably interpreting the subject line ... would likely conclude that the message contains the commercial advertisement or promotion of a commercial product or service; or
- (ii) The [e-mail] message's transactional or relationship content . . . does not appear, in whole or in substantial part, at the beginning of the body of the message."

Commercial content plus neither "transactional" nor "relationship" content. If the e-mail has both commercial content as well as content that is neither "transactional" nor "relationship" content (e.g., an informational newsletter to someone with whom the sender has no relationship), the e-mail has a commercial primary purpose if:

- (i) "A recipient reasonably interpreting the subject line ... 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."

Remember that in addition to CAN-SPAM, the FTC Act and various state laws also prohibit use of misleading subject lines. So don't attempt to avoid CAN-SPAM by deploying a subject line that characterizes a commercial e-mail as a non-commercial e-mail.

In assessing how a recipient might interpret the body of the message, you should consider such factors as: the location of content that advertises or promotes a product or service - that is, whether such content is near the beginning 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.

Take Five Steps to Comply

If your e-mail falls under CAN-SPAM you will have to take 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 mailings. If you receive an "opt-out" request you must comply within 10 business days.

4. *Identify the e-mail as an advertisement or solicitation.* You must include a clear and conspicuous notice that the e-mail message is an "advertisement."

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

Conclusion. The new FTC CAN-SPAM Rule enables marketers to gauge whether their e-mail messages will be subject to CAN-SPAM. But this analysis can be very fact-specific. If you have any questions about how CAN-SPAM or the FTC's final rule applies to your e-mail marketing communications, please contact us at (646) 688-4375.

[Citations: Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. secs. 7701 et seq.; Rules Implementing the CAN-SPAM Act of 2003, 16 C.F.R. secs. 316.1 - 316.5; The Federal Trade Commission Act, 15 U.S.C. sec. 45(a)(1).]