

NEW FTC STAFF GUIDANCE ON MULTI-PARTY COMMERCIAL E-MAILS

The debate over regulation of e-mail messages containing multi-party advertisements came into sharper focus last month when the FTC staff issued an informal "Guidance." The Guidance clarifies the responsibility of an advertiser who is not the "Sender" of a message which contains advertisements from different companies to a recipient who has given permission to receive advertisements via e-mail. The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act") sets forth specific requirements for sending e-mail advertisements or promotions, but it does not make clear whether advertisers need to independently comply with the Act when they contribute to an e-mail advertisement.

Guidance Addresses Specific Scenario

The Guidance addresses the scenario where: "1) the recipient has provided permission to receive the e-mail; 2) the e-mail message contains one or more advertisements from a company other than the one to which the recipient provided consent to send the e-mail; 3) the entity which received the consent follows the requirements of the CAN-SPAM Act for the e-mail . . . and 4) the advertiser does not know who specifically will receive the e-mail." The advertiser who knows its advertisements will be included in e-mail to recipients who have given consent to receive such e-mail does have certain responsibilities, but they are less than the responsibilities of the Sender of the e-mail.

Guidance Distinguishes "Sender" from Included Advertisers

In a multi-party commercial e-mail, the Sender is the party: 1) who solicited and received a recipient's affirmative consent to receive such a message; 2) whose address appears in the "from" field of the message; and 3) whose product, service, or Web site is promoted in the message.

A Sender is responsible for (1) complying with the disclosure obligations of the Act (indicating that the e-mail message is an advertisement or promotion and including the Sender's physical address); (2) verifying that the e-mail message does not contain false or misleading transmission information or deceptive subject headings; and (3) providing an opt-out mechanism that can process, within 10 business days, any opt-out requests from recipients. Note: Senders should keep a record of affirmative consents they receive, and ensure that their opt-out mechanisms work.

Advertisers who contribute to a single message sent by an authorized Sender must ensure that commercial messages to which they contribute do not contain false or misleading transmission information or deceptive subject headings and do contain required disclosures, including an opt-out mechanism that will be honored by the designated Sender. Advertisers who are not the Sender are not required to provide the opt-out mechanism or their physical addresses in the message, and they are not required to process and honor opt-out requests.

Conclusion

The Guidance should be read only as a suggested course of action; it embodies the opinions of FTC staff only, and is not binding on the FTC itself. Nonetheless, the Guidance is instructive and provides significant comfort for advertisers to use multiple party commercial e-mails where there is a clearly designated Sender in the "from" line who can be relied upon to meet all of the Sender's obligations under the CAN-SPAM Act.

If you have questions about the issues raised in this article, please contact us at (646) 688-4375.