



Advertising and Promotions Law

ALERT

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FTC Issues New Final Rule Relating to CAN-SPAM Act

On May 12, the FTC issued the long-awaited Final Rule relating to forward-to-a-friend emails and commercial messages from multiple advertisers as well as several other important issues. The rule takes effect 45 days after being published in the Federal Register, which usually happens within a week of the FTC's press release.

The Final Rule contains four new rule provisions covering (1) emails from multiple advertisers, (2) a prohibition on requiring a sender to pay a fee or provide personal information other than an email address to submit an opt-out request, (3) using a P.O. box as the sender's physical address (the use of a P.O. box is allowed as long as the sender has accurately registered it with the USPS), and (4) defining the word "person" to include business entities. The FTC declined to alter the amount of time a sender has to comply with an opt-out request (so it remains 10 business days) and the FTC declined to create a "safe harbor" for affiliates. It also declined to impose a time limit on the duration of an opt-out request.

In addition to the new rule provisions, there are several discussions on various topics relating to CAN-SPAM including forward to a friend emails and the definition of "transactional or relationship messages"; these discussions do not have the force of law but do explain the FTC's position on a number of issues. Below, this alert describes in greater detail emails that contain ads from multiple marketers and forward-to-a-friend emails.

Multiple Advertisers

The Final Rule relating to commercial emails containing advertisements from multiple marketers is different from the rule contained in the FTC's 2005 Notice of Proposed Rulemaking (which has been relied on by many marketers while waiting for the final rule).

Under the Final Rule, multiple marketers can designate as a single "sender," for purposes of compliance with the Act, a person who: (A) meets the Act's definition of "sender" (i.e., such person initiates a commercial electronic mail message in which it advertises or promotes its own goods, services, or Internet website); (B) is identified uniquely in the "from" line of the message; and (C) is in compliance with the Act's requirements for "initiators" of commercial email, i.e., relating to an accurate header, "from" line, and "subject" line; a working opt-out mechanism; identifying the message as an advertisement and/or complying with the rule for sexually explicit material; and providing notice of the opportunity to opt-out and providing a valid physical address of the designated sender.

In the Final Rule, the FTC dropped the requirement that the designated sender control the content of the message and determine the email addresses to which the message is sent, and added the requirement that the designated sender be in compliance with the requirements mentioned above in (C).

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Thus, under the final Rule, the designated sender, but not the other marketers using the same email message, must honor opt-out requests made by recipients of the message and must provide a valid physical address of the designated sender, but not the addresses of the other marketers using the same email message.

The designated sender must be identified in the "from" line as the sole sender of the message; if two or more senders appear in the "from" line, the multi-marketer provision would not be met. The sender can be identified in the "from" line with its "non-deceptive name, trade name, product or service", that is, a name that "give[s] the recipient enough information to know who is sending the message."

According to the FTC, the Final Rule "makes it more practicable than the proposed rule for multiple marketers promoting their products in a single email to designate a single entity as the 'sender' under the Act because the marketers' decision as to which of them will appear in the 'from' line resolves the question of which will be considered a 'sender' under the Act.... The Final Rule eliminates the complex fact determination of who controls the content and the element of who determines the electronic mail addresses to which such message is sent."

Forward-to-a-Friend Emails

The FTC's discussion of forward-to-a-friend emails in the Final Rule is generally the same as its discussion in earlier documents, but the FTC does state that its earlier interpretation of the word "induce" is too narrow.

The FTC discusses two types of forward-to-a-friend scenarios: (1) a person (the "forwarder") receives a commercial email message from a seller and forwards the email message to another person (the "recipient"), and (2) a seller's web page enables visitors to the seller's website to provide the email address of a person to whom the seller should send a commercial email.

According to the FTC, the central question will often be whether the seller has "procured" the origination or transmission of the forwarded message. CAN-SPAM defines "procure" to mean "intentionally to pay or provide other consideration to, or induce another person to initiate [a commercial email] on one's behalf."

In the scenario involving a web-based mechanism, a seller that transmits a message through an automatic technical process to an email address provided by a forwarder, without providing or doing anything else, is engaged in "routine conveyance" and is exempt from liability under the Act. (In a footnote, the FTC stated that if a seller retains the email address of the person to whom the message is being forwarded for a reason other than relaying the forwarded message such as for use in future marketing efforts, the seller would not fall within the routine conveyance exemption.)

A seller is not engaged in "routine conveyance" if the seller offers to pay or provide other consideration to a visitor, or induces a visitor to forward a commercial message.

The FTC stated that its earlier explanation of "induce" to require an affirmative act or making an explicit statement that is designed to urge another to forward the message is too narrow and instead states that inducement need not take the form of an "explicit statement" or "affirmative act" specifically urging someone to send an email. The FTC noted that "where a seller offers to pay or provide consideration to someone in exchange for generating traffic to a website or for any form of referrals, and such offer results in the forwarding of the seller's email message, the seller will have 'induced,' and therefore 'procured,' the forwarding of the seller's email." However, "a seller's use of language exhorting consumers to forward a message does not, absent more, subject the seller to 'sender' liability under the Act."

In the scenario in which a person forwards a commercial email to someone else, if the seller pays or provides other consideration to someone in exchange for forwarding the commercial message, the seller will have "procured" the forwarding of the email. This is true regardless of the amount of the consideration offered and includes consideration in the form of coupons, discounts, and sweepstakes entries in exchange for forwarding a commercial email. In addition, if the seller "induces" the forwarding of the message - such as by offering payment in exchange for generating traffic to a website - it will be an "initiator," and thus also the "sender," of the forwarded message. In such a circumstance, the seller will be obligated to comply with CAN-SPAM's requirements for ensuring that the forwarded

message contains a functioning opt-out mechanism and ensuring that email is not forwarded to someone who has already opted out of receiving commercial emails from the seller.

For more information on the content of this alert, please contact a member of Loeb & Loeb's Advertising and Promotions Group.

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