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The Good News for Email Marketers

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The FTC's CAN-SPAM policy will change on July 7, 2008. Here are specifics on how those changes might affect you.

The Federal Trade Commission (FTC) is responsible for issuing rules to implement the federal commercial email statute, Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 or "CAN-SPAM." On May 12th, three years after issuing proposed rules, the FTC issued a final rule covering several important topics, including commercial email messages from multiple advertisers, and forward-to-a-friend email programs.

In general, the final rule for messages from multiple advertisers is more flexible than the rule proposed by the FTC in 2005, and it should be easier for marketers to comply with. Also, the FTC's new approach to forward-to-a-friend emails is somewhat more lenient than the approach outlined previously in the proposed rule. This article explains these important new provisions, which will take effect on July 7, 2008.

Multiple Advertisers

When CAN-SPAM was enacted, advertisers were concerned about its effect on multiple-advertiser mailings. Interpreted literally, the Act required all advertisers whose goods or services were advertised in a single email message to include their own opt-out mechanisms, scrub the mailing list against their own do-not-email lists, and otherwise comply with all "sender" obligations. In the new rule,

the FTC has said that a single advertiser that meets certain criteria can be the "designated sender" of the multiple-advertiser message and thus the only advertiser that needs to scrub its mailing list and include an opt-out mechanism.

The designated sender must meet CAN-SPAM's definition of "sender" (i.e., initiate a commercial electronic mail message in which it advertises or promotes its own goods, services or internet website) and must be the only advertiser identified in the "from" line of the message. If two or more senders appear in the "from" line, the multi-marketer provision would not be met. In addition, the designated sender must comply with CAN-SPAM's other requirements for senders, such as including a working opt-out mechanism and providing a valid physical address.

In the new rule, the FTC dropped the requirement in the earlier proposed rule that the designated sender control the content of the message and determine the email addresses to which the message is sent. The FTC acknowledged that multiple advertisers sometimes had difficulty determining who controlled the content and allowing a single advertiser to determine the distribution list for the commercial message.

Forward-To-A-Friend Emails

The FTC described two types of forward-to-a-friend scenarios: (1) a person (the "forwarder") receives a commercial

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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.

In previous documents, the FTC stated that a seller who induced someone to forward a commercial message or who provided some kind of consideration for forwarding a commercial message would be subject to the "sender" requirements of CAN-SPAM. Now, under the final rule, the critical issue is whether the seller provides some form of benefit to the forwarder, no matter how small, to forward the message.

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 sender liability under CAN-SPAM unless the seller retains the email address of the person to whom the message is being forwarded for use in future marketing efforts.

By contrast, a seller is not engaged in "routine conveyance" if the seller offers to pay or provide other consideration to a visitor for forwarding the message, regardless of the amount of the consideration offered; this includes consideration in the form of coupons, discounts and sweepstakes entries. 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."

Likewise, 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.

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 the "initiator" and "sender," of the forwarded message. In such circumstances, the seller will need to comply with CAN-SPAM's requirements for ensuring that the forwarded message contains the seller's 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.

In the new rule the FTC also stated that it will not alter the time period in which a marketer must honor an opt-out request, so it remains 10 business days. (In 2005, the FTC had proposed changing this time period from 10 business days to three business days.)

And the new rule prohibits requiring the recipient of commercial email to pay a fee or provide personal information other than an email address to submit an opt-out request. In addition, the new rule confirms that a sender may use a P.O. box as its physical address in the email (a requirement of CAN-SPAM) as long as the sender has accurately registered it with the United States Postal Service.

Conclusion

The FTC's long-awaited final rule implementing CAN-SPAM should provide email marketers some relief, particularly if they use multiple advertiser mailings or forward-to-a-friend campaigns. The new rule, in contrast to the FTC's earlier proposed rule, does provide clear guidance to marketers but allows them some greater measure of flexibility in structuring and implementing their campaigns.

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