

D&G Legal Development Alert: Advertising, Marketing and Promotions

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FTC APPROVES NEW RULE PROVISIONS UNDER THE CAN-SPAM ACT

On May 12, 2008, the Federal Trade Commission (FTC) announced new rule provisions under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act or Act). These new rule provisions could have a significant impact on your email practices as they modify and clarify certain key definitions and requirements of the Act. The new rule provisions are a follow-up to a Notice of Proposed Rulemaking (NPRM) on these and other CAN-SPAM topics published by the FTC in May 2005.

Who Is the Sender in Multiple Marketer Emails?

The final rule modifies the definition of "sender" to address scenarios where multiple marketers advertise their product or services in a single email (for example, when a commercial email from an airline also contains advertisements and promotions for a hotel chain or a car rental company). Prior to the FTC's adoption of the new rule, each advertiser in a multiple marketer email was required to comply with the "sender" obligations of the Act, including scrubbing the mailing list against their own do-not-email list and providing an opt-out mechanism and a valid postal address in the email.

Under the new rule, multiple marketers may designate one member of the group as the sole "sender" who will be responsible for compliance with the Act (the "designated sender"). The designated sender must:

- meet the definition of "sender" (i.e., initiates the message in which it advertises its own products, services or Internet website);
- be identified in the "from" field of the email message; and
- comply with all "sender" obligations of the Act. Notably, however, if the designated sender does not comply with the Act, all marketers in the message would be liable for non-compliance.

The new rule is intended to provide marketers with flexibility in structuring their messages and to alleviate the redundant obligations for the various marketers in a single email. For example, applying the new rule to the example above, the hotel chain and the car rental company could designate the airline as the "designated sender" and have the airline's name appear in the "from" line of the email message. In such case, even if the hotel chain and car rental company advertise their services in the email and supply the airline with email addresses, the airline and not the

hotel chain or car rental company would be responsible for honoring opt-out requests made by the recipients and providing a valid physical address in the email message. However, if the airline does not comply with the “sender” obligations of the Act, the airline, hotel chain and car rental company would all be liable for the airline’s noncompliance.

Application to “Forward-to-a-Friend” Email Campaigns

In the NPRM, the FTC provided some guidance with respect to CAN-SPAM’s impact on forward-to-a-friend email campaigns. The FTC’s latest statement provides further guidance, explaining that while the inquiry is “highly fact specific”, the application of the Act would likely turn on whether the seller has offered to pay or provide other consideration to the forwarder.

The FTC explained that the starting point of any analysis is whether the sender “initiates” the message and its product, service or Internet site is advertised in the message. The Act defines “initiate” to mean “to originate or transmit [a commercial email] or *to procure* the origination or transmission of such message but shall not include actions that constitute *routine conveyance* of such message.” Based on this definition, if the seller is only involved in a routine conveyance (which is defined as the “transmission, routing, relaying, handling, or storing, through an automatic technical process”) of such message, the seller would be exempt from the obligations of the Act. Notably, this exemption would not apply if the seller retains the email of the person to whom the message is being forwarded (such as for future marketing efforts) because such act would go beyond simply playing a technical role in routing the email.

Nor would a seller be engaging in a routine conveyance if it “procures” the transmission of an email (which is defined as “intentionally to pay or provide other consideration to, or induce another person to initiate [a commercial email] on one’s behalf”). The FTC explained that a message would be “procured” if the seller offers consideration (“something of value”), even if it is *de minimis* consideration, in exchange for the forwarding of the email. Accordingly, if the seller offers something of value to the recipient, such as money, coupons, discounts, awards, additional entries in sweepstakes or the like, in exchange for the forwarding a message, the seller would be procuring the email and, therefore, would be required to comply with the Act.

Notably, in the NPRM, the FTC suggested that a seller could be subject to the Act, without offering to provide any consideration, if it urged visitors to forward the message to a friend (e.g., “Tell-A-Friend - Help spread the word by forwarding this message to friends! To share this message with a friend or colleague, click to the Forward Email button”). The FTC’s latest comments take a different position, advising that the forcefulness or specificity of the

language used by the seller should not by itself trigger the Act. Nor should the “use of language exhorting consumers to forward a message, absent more” subject a seller to liability under the Act. This is a significant development because it means that the exhortative language in the “Tell-a friend” example above would not - by itself - trigger CAN-SPAM liability.

Definitions of “Person” and “Valid Physical Postal Address”

Though used frequently throughout the CAN-SPAM Act, the term “person” was never previously defined. The new rule defines “person” as an “individual, group, unincorporated association, limited or general partnership, corporation, or other business entity” and is intended to make clear that the term “person” should be broadly construed and is not limited to a natural person.

As noted above, the “sender” of a commercial email message must include a “valid physical postal address” in the email. The new rule clarifies the definition of “valid physical postal address” to include a post office box or a private mailbox so long as such mailboxes are registered in accordance with postal regulations. Thus, a sender of commercial email can satisfy the “valid physical postal address” by including a current street address, a post office box, or a private mailbox in its email.

Maintained 10 Day Requirement for Honoring Opt-Out Requests

After soliciting comments on the potential benefits of reducing the opt-out grace period from 10 business days to 3 business days, the FTC declined to do so. In affirming the 10 business day period, the FTC acknowledged that the 3 business day opt-out could impose substantial burdens on legitimate commercial email marketers, particularly smaller entities.

For more information, please contact Gary A. Kibel at (212) 468-4918 // gkibel@dglaw.com, Allison Fitzpatrick at (212) 468-4866 // afitzpatrick@dglaw.com or the D&G attorney with whom you have regular contact.