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New CAN-SPAM Rule

The Federal Trade Commission (“FTC”) recently issued a final rule (“Rule”) and comments on the federal CAN-SPAM Act. CAN-SPAM (or the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003) was enacted in 2003 to regulate the transmission of commercial email. Among other obligations, the Act (the “Act”) requires online marketers to provide recipients of email messages with a straightforward, Internet-based way to opt out of receiving unsolicited commercial emails.

The FTC’s final Rule (1) adds a definition for the term “person” to make it clear that the Act applies to corporate entities as well as natural persons; (2) modifies the definition of “sender” to address situations in which a single email message contains advertisements for the products, services or websites of multiple entities; (3) clarifies the definition of “valid physical postal address”; and (4) indicates that a sender cannot require recipients who validly request to opt out of receiving emails to pay a fee or provide any information beyond an email address and opt-out preference. Recipients must be able to opt out by reply email or by visiting a single page on a website. In addition, the FTC declined to shorten (or lengthen) the ten-day time limit for senders to honor a consumer’s opt-out request. In its Statement of Basis and Purpose, the FTC also discussed the applicability of the Act to certain categories of electronic marketing, such as forward-to-a-friend emails.

Multiple Marketer Emails

The FTC modified the term “sender” under the Act to address situations in which multiple marketers include their advertisements in a single email—for example, where an email from a commercial airline also contains an offer from a car rental company. The final Rule provides that multiple senders of a commercial email may designate a single “sender” for purposes of complying with the Act. The designated sender must (1) fit the Act’s definition of “sender”; (2) be uniquely identified in the “from” line of the message; and (3) be fully compliant with all of CAN-SPAM’s requirements. If the designated sender fails to comply with the Act, all the other participating marketers will be held accountable and liable. Aside from the self-policing elements of such an arrangement, specifying one designated “sender” will make clear to recipients where to direct an opt-out request. This will also eliminate the confusion caused by multiple marketers trying to coordinate efforts to honor opt-out requests in a cohesive and comprehensive manner.

Forward-to-a-Friend Emails

Although not addressed in the final Rule, the FTC provided comments on the issue of whether CAN-SPAM applies to individuals who use a website’s platform to forward emails to friends, typically through an automated conveyance function. The FTC clarified that, when an

individual requests that a website send an email to a third party, the website is not considered the “sender” of the commercial email for purposes of CAN-SPAM compliance. This is true even if the website asks the visitor to send an email to a friend.

Notwithstanding that interpretation, the Commission opined that a website that offers a visitor incentive to persuade the visitor to send an email to a friend would be considered to have “procured” the friend’s email. In that case, the site itself qualifies as the sender of the email. Ultimately, whether CAN-SPAM applies to forward-to-a-friend emails is a highly fact-specific inquiry

that turns on the question of who qualifies as the “sender” of the forwarded email. That determination depends on an examination of who is “initiating,” “procuring” or “inducing” the email forwarding.

Time Period For Processing Opt-Out Requests

The FTC declined to shorten the amount of time marketers are allotted to process consumers’ opt-out requests from ten to three business days. The Commission also rejected a proposal by certain industry groups to extend this period to 31 days.

We Can Help

The provisions of the final Rule become effective on July 7, 2008. Organizations that engage in electronic marketing should consider how the new Rule impacts their existing email marketing practices. Hunton & Williams’ Privacy and Information Management team assists clients in evaluating compliance with evolving regulatory obligations and has extensive experience advising on CAN-SPAM requirements. If you have any questions about the significance of the new CAN-SPAM Rule, or would like assistance complying with the new requirements, please contact us.

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