

FTC Approves New Rules for Email Marketing: Important Developments for Multiple Sender and Refer-a-Friend Emails

BY JULIE O'NEILL

The author is Special Counsel in the Washington, D.C. office of Kelley Drye. She can be contacted at joneill@kelleydrye.com.

Introduction

On May 12, 2008, the Federal Trade Commission (the “FTC” or “Commission”) announced that it had approved new rule provisions under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the “CAN SPAM Act” or “Act”).¹ The long-awaited announcement came three years to the date of the Commission’s Notice of Proposed Rulemaking (“NPRM”).² The provisions will take effect on July 7, 2008.

In addition to the new rule provisions, the Commission, in its Statement of Basis and Purpose (“SBP”) accompanying the final rule, set forth its thinking with respect to how the Act applies to refer-a-friend emails and employer-to-employee emails. In sum, as explained below, the new rule provisions and the Commission’s SBP:

- Revise the definition of the “sender” of a commercial email message, such that multiple advertisers in one message can

determine which of them is responsible for complying with the Act;

- Prohibit an email recipient from being required to pay a fee, provide personally identifying information, or take any steps other than sending a reply email or visiting one Web page in or

CONTINUED ON PAGE 4

Content HIGHLIGHTS

Canada Introduces Long Awaited Copyright Reform
by Glen A. Bloom..... 6

Litigation
10th Circuit Affirms Grant of Summary Judgment Dismissing Trademark Infringement, Unfair Competition and Cybersquatting Claims
by Diana Torres & Kendall Burr..... 7

Complete Table of Contents listed on page 2.

CONTINUED FROM PAGE 1

der to opt out of receiving commercial email from a sender;

- Permit a sender to use a Post Office box or private mail box established under Postal Service regulations to satisfy the Act's requirement that it include a valid postal address in a commercial email message;
- Keep the length of time that a sender has to honor opt-out requests at 10 days, and affirm that opt-out requests do not expire;
- Explain that a seller must comply with the Act in the refer-a-friend context only when it gives the referring friend something of value in exchange for forwarding the message; and
- Explain that most employer-to-employee emails are not "commercial" messages under the Act.

In addition to these developments, the Commission added the term "person" to the rule, to make it clear that the Act's obligations are not limited to natural persons. It also touched on a few other issues in its SBP, none of which resulted in changes to the law.³

The FTC'S New Rule Provisions

The new rule revises the definition of "sender" to cover multiple sender emails.

Under the CAN SPAM Act, a "sender" is a person who initiates a commercial email containing advertising for its products or services. The Act prohibits a sender from transmitting commercial email to any recipient who has asked not to receive it. It also requires, among other things, that the sender include its opt-out notice and postal address in the email.

In its May 2005 NPRM, the Commission recognized that the Act's definition of "sender" is, from a practical perspective, problematic for email messages that feature more than one advertiser ("multiple sender emails"). For this reason, it proposed a modification to the definition, whereby sellers in a multiple sender email could structure the transmission of the message so that only one

would be a "sender" and, therefore, responsible for the scrubbing and other requirements that the Act imposes on senders.

Specifically, the FTC's definition proposed that, for multiple sender emails, the "sender" would be the advertiser that:

- Controlled the content of the message;
- Determined the email addresses to which the message would be sent; or
- Was identified in the "from" line.

In its final rule, the Commission dropped the first two parts of its proposed test, finding the determination of who "controls the content" of the message to be overly complex, and the question of who determines the mailing list to be largely irrelevant. Under the final rule, multiple senders of a commercial message may identify one of them as the "sender," and that one sender must be the only person named in the "from" line.

The Commission explained that its focus on the "from" line is consistent with consumers' expectations about who is the sender of an email. The Commission's revision also provides marketers with flexibility when structuring multiple sender campaigns.

While the Commission dropped parts of its originally proposed rule, it also added the requirement that the designated sender comply with the core provisions of the Act. Specifically, in addition to being the only person named in the "from" line, the designated sender must:

- Scrub against its suppression list prior to transmission;
- Ensure that the message does not contain false or misleading transmission information;
- Ensure that the "subject" line is not deceptive;
- Include its opt-out mechanism and valid postal address in the message; and
- Properly identify the message as an advertisement.

If the designated sender fails to comply with any of these requirements, then all marketers in the message are liable as senders for any violations of the Act. A note about the "from" line: in

any commercial email, not just a multiple sender message, it may contain the sender's name, trade name, product or service. The Commission explained in its SBP that the "from" line does not necessarily have to contain the sender's formal or full legal name. Rather, it must simply provide the recipient with enough information to understand who is sending the message. Therefore, a product or service name may be sufficient.

The New Rule Prohibits a Sender from Imposing Requirements on Opt-outs

Consistent with its proposal in the NPRM, the Commission's final rule prohibits as a condition for accepting or honoring an email recipient's opt-out request the imposition of:

- Any fee;
- Any requirement to provide personally identifying information other than one's email address; or
- Any other obligation besides sending a reply email or visiting a single Web page.

The New Rule Permits a Sender to Disclose Its Properly Established Post Office Box or Private Mail Box in Its Emails

The Act requires that a commercial email message include the sender's valid physical postal address. The final rule requires that such an address be:

- The sender's current street address;
- A Post Office box that the sender has accurately registered with the U.S. Postal Service; or
- A private mailbox that the sender has accurately registered with a commercial mail receiving agency established pursuant to U.S. Postal Service regulations.

These requirements are intended to ensure that both email recipients and law enforcement are able to contact senders.

The New Rule Leaves the Length of Time for Honoring Opt-outs at 10 Days. Opt-out Requests Do Not Expire

In its NPRM, the Commission proposed shortening the opt-out grace period from 10 business days to three. However, it has declined to adopt that revision, so the grace period remains 10 business days. Moreover, in the SBP, the Commission reaffirmed its refusal to impose a limit on the duration of an opt-out request.

The Commission Believes that Refer-a-Friend Campaigns Must Comply with the Act Only If the Seller Has Given the Referring Friend Something of Value

"Refer-a-friend" emails are typically those in which the seller includes a link on its site or in an email, that allows the recipient to forward the email to others. In its 2005 NPRM, the Commission set out – and sought comment on – its proposed position on how the Act should apply to refer-a-friend emails. Specifically, it proposed that the Act should apply to refer-a-friend emails if:

- The email has a primary purpose that is commercial (and therefore subject to the Act); and
- The seller has "procured" the forwarding, by either:
 1. Giving the referring friend consideration for the forwarding, such as sweepstakes entries or coupons; or
 2. Inducing him or her to forward the email, such as with language encouraging the forwarding.

In its SBP for the final rule, the Commission explained that, after reviewing the comments it received on this topic, it had reconsidered when the Act should apply to refer-a-friend emails. Specifically, the Commission explained that its previous approach was unduly narrow and inconsistent with the CAN SPAM Act.

Accordingly, its current position on refer-a-friend emails is that the Act will apply only if the seller gives the referring friend consideration (something of value) for the forwarding of a commercial email. If the Act applies, then the seller

must scrub the referred friend's name against its suppression list prior to transmission, include its opt-out mechanism and postal address in the message, and otherwise comply with the Act.

The Commission Believes That Most Employer-to-Employee Emails Are Not "Commercial" Messages for Purposes of the Act

In its SBP for the final rule, the Commission explained that it had declined to revise the Act's definition of a "transactional or relationship message" to specifically include emails that an employer sends to an employee at the employee's work email account. It did provide guidance, however, on how such emails are treated under the Act:

- An email from an employer to an employee that offers an employee discount is a "transactional or relationship" email, not a "commercial" email; and
- An email from an employer to a job applicant, after the applicant has received an offer but before he/she has accepted, is most likely a "transactional or relationship" message.

However, if the email to the applicant also includes advertising, then, if the email's primary purpose is commercial, the rule's opt-out and related requirements apply. To determine whether the primary purpose is commercial, the rule's dual purpose test applies. The primary purpose is commercial if:

- The recipient would take the subject line to mean that the message contains commercial content; or
- The transactional/relationship content does not appear at the beginning of the message.

NOTES:

1. See <http://www.ftc.gov/opa/2008/05/canspam.shtm>.
2. See <http://www.ftc.gov/opa/2005/05/canspamfrn.shtm>.
3. It: (1) declined to create a "safe harbor" for companies whose products, services or website are advertised, via email, by affiliates or other third parties; (2) decided not to exempt online groups from the Act; and (3) declined to revise the

Act's definition of "transactional or relationship message" to include various categories of messages, including legally mandated notices, debt collection emails, copyright infringement notices, market research and business relationship messages – even though it noted that, in many of these cases, the emails would likely not be "commercial" for purposes of the Act.

Canada Introduces Long Awaited Copyright Reform

BY GLEN A. BLOOM

The author is a partner in the Ottawa, Canada office of Osler, Hoskin & Harcourt LLP. He can be contacted at gbloom@osler.com.

On June 12, 2008 the government of Canada introduced legislation to amend the Copyright Act. Bill C-61, An Act to Amend the Copyright Act, seeks to balance the rights of creators with the interests of consumers by extending copyright protection to works made available over the Internet and establishing new exceptions to benefit consumers and educational institutions.

The principal features of Bill C-61 are:

- * Circumventing technological measures that restrict access to works or control copying of works will be prohibited.
- * The manufacture, provision, offering for sale or rental, and distribution of circumvention tools will be prohibited.
- * Internet Service Providers (ISPs) will be exempted from copyright infringement for providing Internet access, and for caching and hosting content.
- * ISPs will be obliged to forward to a subscriber a notice received from a copyright owner claiming that the subscriber has posted or is sharing infringing material.
- * Consumers will be able to lawfully copy a book, newspaper, periodical, photograph,