

FEDERAL ANTI-SPAM LAW TAKES EFFECT JANUARY 1, 2004

Executive Summary

A new federal law regulating commercial email becomes effective January 1, 2004. On December 16, 2003, President Bush signed the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (P.L. 108-187) (the "CAN-SPAM Act"). Generally under the act, anyone responsible for sending "commercial electronic mail messages" must comply with certain labeling, content, and opt-out requirements. The act specifically preempts any state law that "expressly regulates" commercial email, but does not preempt general state laws relating to trespass, fraud, computer crime, contract, and tort. The CAN-SPAM Act establishes different levels of **criminal and civil** remedies depending on the violation at issue.

Companies and Activities Affected by this Law

Companies affected by the CAN-SPAM Act include: (i) any company that conducts, or uses third parties to conduct, email marketing or email address collection activities; (ii) any company victimized by spam, including spam-related computer hacking incidents, to such a degree that a criminal or regulatory referral might be appropriate; and (iii) any company that provides "internet access service" (as the act gives such companies a private cause of action against violators).

Summary

Scope. There are two important threshold issues regarding the CAN-SPAM Act's applicability.

1. *The Law Applies to "Commercial Electronic Mail Messages."* The CAN-SPAM Act's requirements and prohibitions apply to any "commercial electronic mail message." This term is defined as any email the "primary purpose of which is the commercial advertisement or promotion of a commercial product or service." Exempted from this definition are "transactional or relationship messages," a defined term that includes email containing information about: (i) an agreed-upon commercial transaction; (ii) product warranty, recall, or safety/security; (iii) terms, status, or account balance information relating to an "ongoing commercial relationship"; or (iv) an employment relationship.
2. *The Law Is Not Limited to Actual Senders.* The CAN-SPAM Act does not require the violator to have actually sent the illegal email. One may violate the law by "procuring" the transmission of the email.

Labeling and Content Requirements. The CAN-SPAM Act contains several prohibitions and affirmative requirements regarding the labeling and content of commercial email. The prohibitions are on: (i) using false or misleading transmission information, such as header and return address information; and (ii) using deceptive subject headings.

The affirmative requirements are that commercial email must contain: (i) clear notice that the email is an advertisement (unless the recipient has given “prior affirmative consent” to receive the email); (ii) clear notice that the recipient can opt out of further commercial email; (iii) a valid physical postal address of the sender; and (iv) in the case of emails with sexually-oriented material where the recipient has not given prior written consent, a warning label in the subject heading.

Opt-Out Mechanism Requirement. The law requires that commercial email contain clear notice of the recipient’s opportunity to opt out of future emails. The notice must include a functioning return email address or other Internet-based mechanism by which the recipient may opt out. Upon receipt of such a request, the sender then has ten (10) days to comply, after which time it would be unlawful to send additional messages to the recipient unless the recipient subsequently provides affirmative consent to receive emails again. The act provides a temporary safe harbor in the event the sender experiences a technical problem that interferes with sender’s ability to process an opt-out request.

Civil and Criminal Remedies; Enforcement. The law provides both criminal and civil remedies depending on the particular violation. By way of example, criminal fines and prison terms up to five years apply to five specific violations, including intentionally transmitting email with materially false header information and intentionally transmitting email by accessing a computer without authorization. Civil remedies for certain violations include injunctive relief and statutory damages ranging up to \$250 per email, capped at \$6 million for willful infringement. Civil remedies may be pursued by the FTC, certain federal agencies, state attorney generals, and “Internet access service providers” (who are the only private parties expressly permitted to seek recourse under the law).

Preemption of Email-Specific State Laws. The CAN-SPAM Act specifically preempts any state law that “expressly regulates” commercial email (such as state anti-spam laws), except to the extent such law regulates deceptive activity. The CAN-SPAM Act specifically does not preempt any state law that is not “specific to” email, including state trespass, computer crime, fraud, contract, and tort laws.

Other Important Aspects. The CAN-SPAM Act contains several other important provisions, such as restricting certain email address collection practices and criminalizing the unauthorized access of a protected computer while transmitting multiple emails. The law also requires the FTC to report to Congress: (i) by July 1, 2004, regarding a plan and timetable for establishing a nationwide “do-not-email” registry; and (ii) regarding the feasibility of implementing a reward plan for those providing information about violators.

Should you have any questions about this Alert, please contact Seth Traxler at 312/861-2241, the Kirkland & Ellis LLP intellectual property attorney with whom you normally work, or any of the following.

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