

# E-Mail Requirements Altered by FTC's Final Rule of May, 2008

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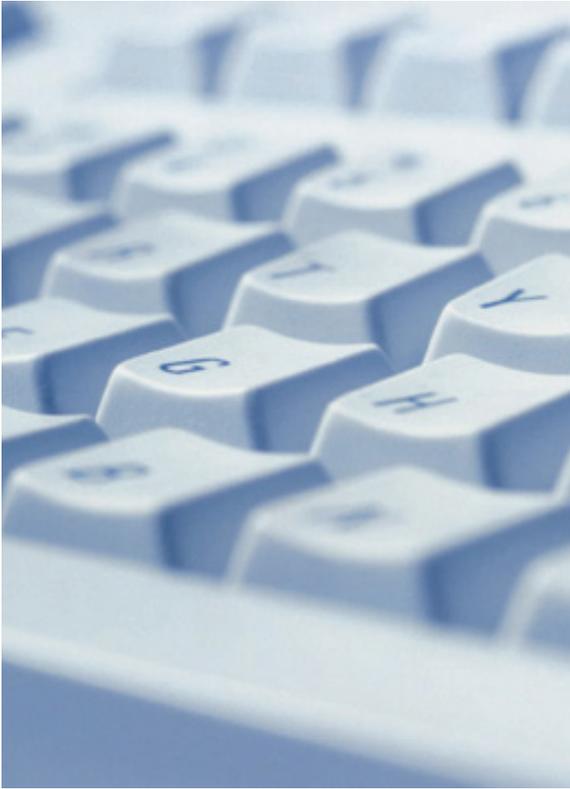
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**Background.** The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, popularly known as the CAN-SPAM Act, represents the federal government's attempt to regulate the dissemination of commercial emails. The Act does so by requiring the senders of commercial emails to comply with three main procedures: providing email recipients with clear notice of the purpose of the message; the chance to opt out of future commercial emails from the same sender; and the sender's physical postal address.

The Act defines a "commercial email" as one "the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose)." Any email that does not meet the definition of commercial email does not have to comply with the Act's three central requirements. Moreover, "transactional or relationship" emails are specifically exempt from the requirements, although senders are still under a duty not to use misleading email addresses or subject lines. Transactional or relationship emails must always be the product of a previous relationship between the email sender and recipient. For example, such an email might provide a sales receipt or warranty information regarding a previous purchase, information about a loan or other account, information about current employment, or a product update the recipient has previously agreed to receive.

**Major Changes in the Final Rule.** The Federal Trade Commission (FTC) issued its Final Rule implementing the CAN-SPAM Act in May 2008. The Final Rule contains an explanation of changes in the proposed rules that will govern the Act. The following information summarizes the major changes reflected in the Final Rule.

In perhaps the most important change to the regulations, the FTC amended the definition of "sender" to cover situations in which multiple companies advertise their goods or services in one email. The revised definition



allows multiple marketers to choose one among them to serve as the “designated sender.” The designated sender is the only one that must provide opt out capability and a physical address. To properly designate a sender, the multiple marketers must select one that advertises its own goods or services within the body of the email, is uniquely and clearly identified in the “from” line of the email and can provide an opt out mechanism and a valid physical postal address. Clear identification in the “from” line is satisfied by inclusion of a marketer’s non-deceptive name, trade name, product or service. Further, the designated sender must ensure that the commercial email does not contain false or misleading information or a deceptive subject line.

The marketers whose names do not appear in the “from” line of the email will not be considered senders of the email, although they may still provide email addresses of intended recipients. Thus, they will not have to process opt out requests or include their physical addresses in the emails. These marketers, the Final Rule clarifies, may control the contents of the body of a commercial email as it relates to their own product or service without incurring liability.

The Final Rule explains that a marketer may not escape liability by engaging an affiliate to solicit business on its behalf. In other words, a company may not avoid the CAN-SPAM three central requirements when it sends commercial emails simply by paying another entity to send such emails on its behalf, unless each of them advertises their own goods or services in the email and the other entity otherwise complies with all “designated sender” requirements.

Neither may a sender of a commercial email avoid the CAN-SPAM requirements where it sends an email to a voluntary online discussion group or listserv. The Final Rule states that most emails sent to such online communities will constitute transactional or relationship messages, but refuses to issue blanket immunity for them. Organizations must comply with the Act’s requirements for all commercial emails regardless of the manner in which their email address lists were compiled.

A rather lengthy section of the Final Rule attempts to provide guidance on what a transactional or relationship email is. Briefly, the FTC explained that most legally mandated emails will be transactional or relationship messages, but that all such emails would still have to be evaluated under the primary purpose criteria for dual purpose messages. Debt collection emails will normally be considered transactional or relationship messages. Electronic newsletters will be considered transactional or relationship emails

so long as they are solicited by recipients. Where they are not solicited, newsletters and the like will be subject to the Act where their primary purpose is commercial in nature. And, although there must be a previous dealing between sender and recipient for a message to be considered transactional or relationship, there are some instances, such as some copyright infringement notices, that may not be either commercial emails or transactional or relationship. These emails would not have to comply with the Act's three central requirements.

Individuals within a business are permitted to send commercial emails to small groups of employees within other businesses without complying with the Act's central requirements only to the extent that they have prior permission to send such emails. In other words, even isolated, person-to-person commercial emails from one businessperson to another must comply with the Act unless there exists prior consent to receive such messages.

The Final Rule also clarifies the meaning of a "valid physical postal address," the third of the main requirements for commercial emails. Under the revised rules, a valid physical postal address means any of the following three things: (1) the sender's current street address, (2) a P.O. Box registered in the sender's name with the U.S. Postal Service, or (3) a private mailbox registered with a commercial mail receiving agency that is established pursuant to USPS regulations. In essence, this means that senders of commercial emails must include in those emails an address that is in some way registered with USPS and uses the sender's name. One sender may not receive mail at a P.O. Box registered with USPS in the name of a different person.

Companies will not incur CAN-SPAM liability if they simply provide a mechanism on their websites that allows individual visitors to those websites to enter a friend's email address and thereby have an email sent to that friend. This changes, however, if the company provides the visitors with some kind of consideration, even consideration as small as sweepstakes entries or coupons, in exchange for the visitor entering the friend's email address. The same analysis would apply where a recipient of a commercial email uses her own email service to forward the email to a friend: the company must comply with the three central CAN-SPAM requirements with respect to the friend if it provides her with consideration in exchange for the forwarding.

Finally, the FTC clarified that senders of commercial emails will still have ten business days to comply with opt out requests and may not charge recipients a fee or require them to provide any



information other than their email addresses to effectuate an opt out. Moreover, once a recipient opts out of future commercial emails from a particular sender, that sender must always refrain from emailing that recipient with unsolicited commercial messages. Opt out requests, in other words, do not ever expire.

In assessing penalties for CAN-SPAM violations, the Act allows a court to consider whether a company developed and followed policies and procedures designed to effectively prevent violations. Accordingly, we recommend to companies sending commercial email that they develop these types of policies, not only to avoid violations of the Act in the first place, but also to minimize the risk of liability in the event of an incidental violation. If you would like assistance in developing these policies, please feel free to contact us.

**If you have any additional questions, please contact:**



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