

CAN-SPAM Discretionary Rule Released

MARY ELLEN CALLAHAN AND CHRISTINE A. VARNEY

The Federal Trade Commission has released a final rule and commentary providing guidance to companies that send commercial e-mails.

Three years to the day after it first released a notice of proposed rulemaking (“NPRM”) relating to discretionary rulemaking under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act”), the Federal Trade Commission released its final rule and commentary related to the proposed discretionary rules. Generally, the final rule provides clear guidance to companies that send commercial e-mails, and helps clarify certain complicated fact patterns in e-mail marketing.

THE RULE

Multiple-Sender E-mails

In the final rule, the FTC spelled out and simplified its test for who is the “sender” of a commercial e-mail when more than one entity could be considered a sender under CAN-SPAM. Under CAN-SPAM, a sender is

Mary Ellen Callahan, a partner in the Washington, D.C., office of Hogan & Harston LLP, counsels online companies, trade associations, and other corporations and represents them before government agencies on a wide range of antitrust, e-commerce, and privacy-related issues. Christine A. Varney, who also is a partner in the firm’s Washington, D.C., office, heads its Internet practice group. The authors can be reached at mecallahan@hhlaw.com and cvarney@hhlaw.com, respectively.

the person whose commercial product or service is being promoted in the e-mail. It is the sender's responsibility to provide the e-mail recipient an opportunity to opt out of receiving additional commercial e-mails, and to provide the sender's valid physical postal address. There may be circumstances where more than one commercial product or service is promoted in a commercial e-mail. For example, there could be a promotion for airfare to Florida to join a cruise through the Caribbean being sponsored by an alcoholic beverage company. In that circumstance, the airline, cruise company, and drink manufacturer all are promoting their product or service in the e-mail, and therefore could be considered "senders" under CAN-SPAM.

The FTC test in the final rule for who is the sender in a multisender commercial e-mail is straightforward. A single advertiser can assume the role of sole CAN-SPAM sender if the advertiser: (1) meets the definition of sender under CAN-SPAM; (2) is the only advertiser identified in the "from" line of the e-mail; and (3) complies with all of the other CAN-SPAM sender requirements, including providing an opt out (unsubscribe) to stop receiving future commercial e-mails, and listing a valid physical postal address.¹ The other advertisers in a multisender e-mail still have "initiator" responsibility but do not need to offer an opt out or mailing address.

The FTC's reliance on the "from" line to be one of the dispositive factors indicates the FTC considers consumer perceptions when drafting CAN-SPAM rules and guidance. As part of the statutorily required "primary purpose" rule issued in December 2004, the FTC identified the "subject line" of an e-mail to be relevant to whether an e-mail with more than one purpose was considered to be primarily a commercial e-mail, a transactional or relationship e-mail, or an e-mail containing editorial content. In the same way, the FTC has identified the "from" line to be a major factor for consumers to understand what the e-mail is about, and who it is from.

Opt-Out Obligations

The FTC also stated that senders must provide recipients with an easy, unburdened way to unsubscribe from a commercial e-mail.² Specifically, senders of commercial e-mails must *not* require any recipient to pay any fee or provide any more information other than an e-mail address, or make

the recipient visit more than one single Internet web page in order to unsubscribe from receiving additional commercial e-mails from the sender. This requirement will not allow companies to make inquiries into why the person is unsubscribing, or ask for confirmation whether they really intended to opt out from receiving commercial e-mails. This requirement is the same as it was in the NPRM, and may compel some companies to alter their opt-out processes to restrict the information requested and pages viewed.

Other Requirements

Two other CAN-SPAM regulations in this final rule include clarifying that a “person,” for purposes of CAN-SPAM, will be defined as an individual, group, incorporated association, limited or general partnership, corporation, or other business entity, and that a “valid physical postal address” includes post office boxes and private mailboxes when the sender has accurately registered with the sender’s proper identification. Neither of these regulations is surprising, and they do not vary from the plain meaning of the Act.

Importantly, the FTC did *not* modify the statutorily required period to honor opt outs (requests to unsubscribe); that time period remains 10 business days, despite the FTC’s proposal in the NPRM to reduce the time period to three business days. With regard to opt outs, the FTC is of the opinion that an opt out does not terminate unless a consumer affirmatively consents to receiving commercial e-mail in the future. In sum, an opt out is forever, unless the consumer decides differently.

GUIDANCE PROVIDED

The FTC also provided “guidance” relating to its interpretation of the CAN-SPAM Act. This guidance is not binding, but reveals the intentions of the agency with regard to enforcement activities.

Forward-to-a-Friend E-mails

The most anticipated guidance relates to when an e-mail that is sent using “forward-to-a-friend” functionality on a web site is considered to be

a “commercial e-mail.” Many web sites provide technology to assist one consumer to send information to another consumer; there was much confusion over whether such assistance would be considered a “routine conveyance” under CAN-SPAM and thus not a commercial e-mail, or whether a company would need to compare its unsubscribe list to the list of consumer-generated e-mails prior to sending the forwarded message, and to provide an unsubscribe option and postal address to the recipient. The guidance indicates if the web site provides “consideration” to the sending consumer to transmit the e-mail — even if the consideration is *de minimis* — that is procurement beyond routine conveyance, and thus the forwarded e-mail is a commercial e-mail.³ If, however, the web site provides the technology, and even if it verbally encourages consumers to utilize the technology but gives no further incentive or consideration to the consumer to do so, that service would be routine conveyance of the forwarded message, and is outside of CAN-SPAM.

Transactional or Relationship E-mails

The FTC has clarified that, to qualify for the transactional or relationship exception under CAN-SPAM, the company and the consumer need not have engaged in transactions involving “consideration” per se.⁴ A commercial transaction can include circumstances in which there has been no exchange of consideration between the sender and the recipient. Interestingly, in this guidance the FTC has an expansive view of the transactional exception by not requiring consideration to apply to “commercial transactions.” This too may be consistent with consumer expectations.

The FTC also specifically addressed newsletters, and whether they are to be considered commercial e-mails or transactional or relationship e-mails. Applying the same standard discussed above, if a consumer subscribes to an e-mail newsletter or periodical, the e-mail is a transactional e-mail if the newsletter contains exclusively or primarily informational content. If the newsletter is unsolicited, there is no underlying transaction, therefore the e-mail is commercial.

Business-to-Business E-mails

Several companies had asked the FTC to modify the transactional or relationship exception to add business-to-business e-mails relating to commercial products. There is no statutory exception for business-to-business e-mails, even if there is a pre-existing business relationship. The FTC refused to expand the transactional or relationship exception to include business-to-business e-mails. Its reasoning was quite convoluted, and discussed the presumption that one business person has provided affirmative consent to receive commercial e-mails from a business person at another company. The inference of this unclear guidance is that the FTC considers business-to-business e-mails to be an incredibly low priority for enforcement actions under CAN-SPAM. Companies engaging in ordinary business-to-business e-mail relationships — even when there is not affirmative consent to receive the commercial e-mails — likely have little to no risk of being investigated by the FTC.

The rule will be final 45 days after it is published in the *Federal Register*. At the writing of this article, the rule had not yet been published.

NOTES

¹ The NPRM had a much more complicated test to determine whether only one advertiser could be the sender in multisender e-mails; this revision is much easier for compliance purposes.

² 16 CFR § 316.4.

³ Examples of consideration provided by the FTC include offers of money, coupons, discounts, awards, additional entries in a sweepstakes, or the like in exchange for forwarding a message.

⁴ Transactional exceptions include when an e-mail's primary purpose is to "facilitate, complete, or confirm a commercial transaction," and when it is to "deliver goods and services [...] that the recipient is entitled to receive under the terms of a transaction." 16 CFR § 316.3(c).