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Congress Passes Anti-Spam Legislation

The "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003," also known as the "CAN-SPAM Act of 2003," has now passed both chambers of Congress and is on its way to the President's desk for signature. This new law will take effect on January 1, 2004, and it largely preempts California's new anti-spam law.

Scope

The law imposes a number of requirements on the transmission of "commercial electronic mail messages," defined as e-mail messages with the primary purpose of advertising or promoting a commercial product or service. Commercial e-mail messages, however, do not include "transactional or relationship messages," which are messages with the primary purpose of (1) facilitating or confirming an agreed-upon commercial transaction; (2) providing warranty or safety information with respect to a product purchased or used by the recipient; (3) providing information with respect to an ongoing commercial relationship; (4) providing information directly related to an employment relationship or benefit plan; or (5) delivering goods or services to which the recipient is entitled under the terms of an agreed-upon transaction. The Act requires the Federal Trade Commission ("FTC") by January 1, 2005 to issue regulations on how to determine the primary purpose of a message.

Requirements for Commercial E-Mail

At the heart of the Act are a series of requirements for the transmission of commercial e-mail messages. These requirements generally apply to the "sender" of the e-mail message, which is the entity that initiates or procures the e-mail and whose product, service, or website is advertised in the message. With respect to all commercial e-mail messages, the Act:

- prohibits the use of false or misleading transmission information;
- prohibits the use of deceptive subject headings;
- requires that the message clearly and conspicuously include a return e-mail address or other Internet-based mechanism by which the recipient may opt-out of future commercial e-mail messages for up to 30 days after transmission of the message;
- requires that all opt-outs be honored within ten business days, and prohibits the sale, lease, or transfer of e-mail addresses for which there has been an opt-out;
- requires that the message clearly and conspicuously include (1) identification that the message is a solicitation (except where the recipient has given prior affirmative consent for the commercial e-mail); (2) notice of the opportunity to opt-out; and (3) a valid physical postal address of the sender;
- prohibits sexually-oriented material except according to specified rules; and
- identifies prohibited "aggravated" violations for which treble damages are available, including (1) address harvesting and the use of dictionary attacks to identify recipient addresses; (2) the automated creation of multiple transmission accounts; and (3) the retransmission of commercial e-mail through unauthorized accounts.

The Act authorizes enforcement of these provisions by the FTC (or other appropriate federal agencies) and state agencies and also provides a private cause of action for Internet service providers – though not for individual recipients of commercial e-mail messages. Available remedies include injunctive relief and damages of up to \$250 per violation (or treble damages for willful violations), with a maximum award of \$2 million. In actions taken by state AGs and Internet service providers, courts are permitted to consider as part of assessing the level of damages whether defendants have implemented and followed commercially reasonable compliance procedures.

Criminal Prohibition on Fraudulent Activity Related to E-Mail

The Act also criminalizes certain acts related to the transmission of commercial e-mail messages. Conduct punishable by up to five years imprisonment, fines, and forfeiture of related goods includes:

- materially falsifying transmission information in “multiple” commercial e-mail messages;
- relaying or retransmitting multiple commercial e-mail messages with the intent to deceive with respect to the point of origin of those messages;
- transmitting multiple commercial e-mail messages from a computer without authorization;
- falsely registering for five or more e-mail accounts or two or more domain names, and then intentionally sending multiple commercial e-mail messages from those accounts or domain names;
- falsely representing oneself to be the registrant or successor to five or more Internet protocol addresses, and then intentionally sending multiple commercial e-mail messages from those addresses.

Preemption & Do-Not-E-Mail Registry

The Act preempts all state laws that expressly regulate commercial e-mail messages, except to the extent that the state laws regulate falsity or deception. State laws are preempted even if they are more stringent than the Act; thus, California’s new anti-spam law is largely preempted.

The Act requires the FTC by July 1, 2004 to submit a report to Congress with respect to a plan for a nationwide do-not-e-mail registry, and allows the Commission to establish and implement the plan beginning on October 1, 2004. The law does not, however, require the FTC to implement a do-not-e-mail registry.

Agency Regulations and Reports

The FTC is empowered to promulgate regulations implementing and clarifying most of the Act. The FTC is also required to submit to Congress reports on (1) rewarding those who supply information about violators; (2) subject-line labeling for commercial e-mail; and (3) the effectiveness of the Act, particularly with respect to technological advances, pornography, and international commercial e-mail. The Federal Communications Commission is given authority to promulgate rules regarding commercial e-mail sent over wireless devices.

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This information is not intended as legal advice, which may often turn on specific facts. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

If you have any questions concerning the material discussed in this client alert, please call the following members of our privacy practice group:

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