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FCC Issues Rules on Commercial E-Mail to Wireless Devices

On August 12, the Federal Communications Commission ("FCC") released a Report and Order with new rules for sending commercial e-mail messages to wireless devices pursuant to the CAN-SPAM Act of 2003. Although that act primarily addresses traditional commercial e-mail sent to computers and is subject to ongoing Federal Trade Commission ("FTC") rulemaking, Congress directed the FCC to promulgate regulations on "mobile service commercial messages" in an effort to forestall the wireless spam problem that has become widespread in other countries. The new FCC rules prohibit initiating commercial e-mail to any address referencing an Internet domain name associated with wireless subscriber messaging services absent "express prior authorization," and will likely affect any entity that sends commercial e-mail.

The Scope of the Rules

The type of e-mail covered by the new rules is limited, but the compliance impact is vast. The FCC's rules apply to "mobile service commercial messages" ("MSCMs"), which will be defined generally as commercial messages sent to e-mail addresses using Internet domain names assigned by wireless (e.g., cellular and PCS) carriers. The new rules do not cover phone-to-phone commercial text messages, but the FCC reiterated that such messages are regulated (somewhat strictly) by the Telephone and Consumer Protection Act of 1991.

Prohibition on Initiating MSCMs Absent Express Prior Authorization

The rules forbid initiating an MSCM without express prior authorization from the subscriber. This strict opt-in system is designed to minimize the cost that wireless subscribers pay to receive messages, and it contrasts with the general CAN-SPAM regime that allows commercial e-mail messages to be sent absent prior opt-out by the recipient. Senders must therefore identify those e-mail addresses associated with wireless devices in order to comply with the new FCC rules. To that end, the FCC will work with wireless carriers to create an all-inclusive and publicly-available list of relevant domain names that will be subject to the opt-in rule.

Express Prior Authorization

Commercial e-mail may be sent to domain names assigned by wireless carriers for mobile service messaging pursuant only to express prior authorization, which may not be obtained by a "negative option" or "opt-out," but must instead include an affirmative act by the subscriber. There are specific rules governing the means by which a sender may obtain such consent. A sender who wishes to rely on an authorization obtained before the effective date of the rules must be able to show that it complies with the new requirements.

Subsequent Opt Out

Express prior authorization will apply indefinitely, subject only to a subsequent opt-out request by the subscriber. Under the rules, every authorized MSCM must include certain information allowing a recipient to opt out of receiving future MSCMs from the sender.

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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 any of the following members of our privacy practice group:

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