

LESSONS LEARNED IN  
INTERACTIVE  
ADVERTISING: E-MAIL  
ADVERTISING

by

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(Ed.'s Note: This is the first in a four-part series on interactive advertising. Future issues will cover fax advertising, telephone advertising, and text message ads.)

GOVERNMENT RESPONDS TO DRAMATIC INCREASE IN UCE

In late 2003, the federal government responded to the dramatic increase in unsolicited commercial e-mail (UCE) by passing the CAN-SPAM Act.<sup>1</sup> While the Act was intended to slow the constant barrage of spam—most sent by offshore scam artists—many believe that it has failed to meet this lofty goal. Instead, the Act is viewed as putting pressure on legitimate companies that send commercial (marketing) e-mail messages.

Under the Act, a company that sends commercial e-mail messages is faced with two significant requirements. First, the company must provide consumers with the ability to opt out of receiving future commercial messages.<sup>2</sup> Second, if a company has not received affirmative consent from the consumer prior to sending the commercial e-mail, the company must provide "clear and conspicuous" notice that the message is an advertisement or solicitation.<sup>3</sup> (In cases where a consumer has affirmatively consented to receive a commercial message, the sender does not need to include such notice.) A company that sends commercial e-mail messages also must include in the e-mail message its valid physical postal address; use accurate and non-misleading header, sender, origination, and transmission information; and not disguise the computer that is used to initiate the message.<sup>4</sup>

Over the few years since the passage of the Act, several questions have arisen. In particular, companies have struggled to understand how messages that contain both advertising and non-advertising content will be treated under the Act. They have also grappled with the application of the Act to "tell-a-friend" services.

DETERMINING "PRIMARY PURPOSE" OF E-MAIL MESSAGES

Because the Act places higher burdens on companies that send commercial as opposed to transactional or relationship e-mails, a primary question for businesses has become whether or not their e-mail messages can be classified as transactional or relationship in nature, allowing the companies to avoid the Act's opt-out and advertising-label requirements.

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industry events and conferences.

As contemplated under the Act, transactional and relationship messages are those with a primary purpose of furthering a transaction, or which relate to the relationship the consumer already has with the company. Such a message might facilitate or confirm a commercial transaction the recipient has already entered into with the sender, or might provide product safety or warranty information for a product or service that the recipient has used or purchased. Transactional messages also may pertain to a subscription, membership, account, loan, or other kind of ongoing business relationship containing information about the service features, the recipient's standing, or account balance details. Alternatively, transactional e-mails may provide information about an employment relationship or benefit plan. Finally, transactional messages might themselves deliver products or services, including product updates or upgrades.<sup>5</sup>

In many cases, a message may contain both transactional and advertising content. In these circumstances, the Act directs us to look at the message's "primary purpose." Determining a message's primary purpose is far from clear, however, especially if the amount of advertising is great, or if the advertising content is prominent. The FTC has considered how best to define primary purpose.<sup>6</sup> One possibility is to use a "net impression" test, (i.e., to examine the placement of disclosures within the marketing material, the proximity of the disclosures to the relevant claims, the prominence of the disclosures, and whether other parts of the marketing material divert attention from the disclosure). Another approach is to define the primary purpose of an e-mail as commercial if the advertisement or promotion is "more than incidental" to the e-mail. Because these tests are not always easy to apply, companies should be cautious when sending e-mail messages that appear to be advertising or marketing in nature.

#### SEND-A-FRIEND SYSTEMS

An increasingly popular practice by many companies is to place on their websites a "send-a-friend" or "tell-a-friend" feature. Using the feature, a website visitor can request that a friend receive an e-mail, sent through website's servers (as opposed to the visitors own e-mail servers). Of great importance under the Act is who is the "sender" of the message, as that term is defined under the Act. Is it the user or the company? If the company, then the Act's requirements for sending an unsolicited commercial e-mail message would apply, namely that the e-mail address of the friend must be scrubbed against the company's suppression lists, and opt-out provisions must be followed.

#### *Determining the Sender of a Tell-a-Friend Message*

The FTC has provided specific guidance on how to determine who is the

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sender of an e-mail message in instances such as a tell-a-friend program. First, the FTC looks to the Act's definition of an e-mail sender. Under the Act, a sender, "when used with respect to a commercial electronic message, means a person who initiates such a message and whose product, service or Internet web site is advertised or promoted by the message."<sup>7</sup> To initiate a message, noted the FTC, means to either originate the message, or to procure its origination. To procure the origination of a message, in turn, means to either intentionally (1) pay or provide other consideration or to (2) induce another to send the message.<sup>8</sup> In a tell-a-friend situation then, it is possible that even though the web visitor requests that the message be sent, the company will be viewed as the sender.

To the FTC, instances where a web visitor is provided with an incentive to use a tell-a-friend service—such as money, coupons, discounts, awards, or additional sweepstakes entries—clearly constitute instances where the company would be the "sender" of the forward-a-friend message.<sup>9</sup> Indeed, in March 2006, the FTC brought a case against Jumpstart because it offered an incentive to web visitors to use a tell-a-friend feature, yet failed to follow the Act's requirements for senders of unsolicited commercial messages. In the Jumpstart tell-a-friend program, consumers were promised "free" movie tickets if they "told" five friends about Jumpstart's Free Flix Tix program. The FTC found that Jumpstart had violated CAN-SPAM by:

- (1) having in the e-mail "from" field the original consumer's e-mail address, rather than a Jumpstart e-mail address, and only indicating at the bottom in small type that "this invitation was sent to you on behalf of FreeFlixTix;"
- (2) having a personal subject line ("Heya," or "Happy Valentine's Day!");
- (3) not indicating that the e-mail was advertising;
- (4) saying "click here to manage your message preferences" rather than having clear directions on how to opt out; and
- (5) not respecting opt-out requests within 10 days.

Jumpstart agreed to settle and pay civil penalties of \$900,000.

With respect to "inducement" to send a tell-a-friend message, the FTC has provided less direction, but has noted that the dictionary definition of "induce" is broader than the payment or provision of consideration, and does not require the provision of something of value.<sup>10</sup> The FTC concluded in comments to its proposed rule that in order for intentional inducement of a

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commercial message to occur, "the sender must affirmatively act or make an explicit statement that is designed to urge another to forward the message."<sup>11</sup>

*Being The Sender: Providing  
And Respecting Opt-Outs*

If the company is the sender of a commercial message, under the Act it must include its name and address in the message, label the message as advertising, and scrub against its suppression list prior to sending out the message. The company must also provide consumers with the ability to opt out of receiving future commercial e-mail communications. This option must be provided with every commercial e-mail message companies send. These opt-out mechanisms must be valid for at least 30 days, and opt-out requests must be processed within 10 days of receipt. Companies also should ensure that they have the procedures in place to respect those opt-out requests.

The FTC has actively enforced the opt-out requirements of the Act. For example, in a case filed May 11, 2006 before the Northern District of California, the FTC alleged that Kodak sent e-mail messages to more than two million recipients without including in the messages an opt-out mechanism, without telling recipients that they had the right to opt out of receiving future e-mail messages, and without including a valid physical postal address. The messages were sent to promote Kodak's [www.ofoto.com](http://www.ofoto.com) and [www.kodakgallery.com](http://www.kodakgallery.com) services. As part of the settlement, Kodak disgorged 100 percent of the gross proceeds from the e-mail campaign—\$26,331. On the same day, the FTC settled similar charges with ICE.com, an online jewelry retailer, for ICE's alleged failure to respect opt-out requests. According to the FTC, ICE continued to send e-mail advertisements more than 10 business days after receiving opt-out requests. As part of its settlement, ICE agreed to pay \$6,500 in civil penalties.

Managing consent and opt-out can be difficult for companies with multiple divisions or with many independent franchisees. The Act drafters anticipated that coordination difficulties might be faced by such entities, and in the Act specifically provided that different lines of business or divisions within the same company could send e-mails to consumers even if the consumer had opted out of receiving messages from another division.<sup>12</sup> This is permissible, however, only if the two divisions have held themselves out to be separate. Companies also must be very clear about which division sent the message, and must track customer replies to multiple divisions. Companies may avoid this administrative burden by providing a variety of opt-out choices, such as allowing consumers the ability to elect to receive e-mails from one or more of the company's divisions, or from none at all.

Managing consent and opt-out is similarly difficult if the message is perceived by a consumer as coming from multiple senders. For example, free

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ISP services may send e-mails containing third-party advertisements. Or, companies that have opt-in based e-newsletters may include third party ads in their messages. Depending on the nature of the message, consumers who opt out of these e-mails may believe that they are opting out of receiving marketing e-mail messages from all entities whose products are promoted in the original message. Some have argued that the entity that pays for transmission should bear the responsibility of being the sender for purposes of the Act. For example, they argue, if Newspaper Company sends out an e-mail with an ad for Major Retailer, Newspaper Company should be the sender, not Major Retailer.

The FTC has proposed that in instances where two (or more) companies' products are promoted in an e-mail message, the sender will be determined by looking first at the Act's definition, namely: the one who initiates the message and whose products are advertised.<sup>13</sup> If both entities fall within this definition, then just one is considered the sender only if it also does one (and the other entity does none) of the following:

- (1) controls the content;
- (2) determines the e-mail addresses; or
- (3) is identified in the "from" line.

Thus, in the Newspaper Company example, if Newspaper Company's products are advertised, if it initiates the message, and if it determines the e-mail addresses to which the message will be sent, then Major Retailer will not be considered the advertiser (as long as it does not control the content, does not select the e-mail address, and is not identified in the "from" line).<sup>14</sup> If only Newspaper Company is the sender, then only Newspaper Company need provide an opt out, and only Newspaper Company need scrub its e-mail suppression list.

### CONCLUSION

Companies that send marketing messages or that offer "tell-a-friend" features on their websites should be cognizant of, and should follow, the requirements of the CAN-SPAM Act. In 2006, many cases were brought for violations of the Act, including some in which civil penalties reached almost \$1 million. Given consumer frustrations with spam e-mail, it is quite likely that in 2007 will see continued enforcement activity on the CAN-SPAM front.

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CAN-SPAM Act of 2003:

[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_cong\\_public\\_laws&docid=f:publ187.108.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_public_laws&docid=f:publ187.108.pdf) (15 USC § 1 7701 et seq.)

Definitions and Implementation Under the CAN-SPAM Act; Final Rule, January 19, 2005. (70 Fed. Reg. 3110).

Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act; Proposed Rule

<http://www.ftc.gov/os/2005/05/05canspamregformfrn.pdf>, May 12, 2005. (70 Fed. Reg. 25426).

See also: US v. Jumpstart Technologies, LLC, C-06-2079 (ND Cal.), consent decree entered March 22, 2006.

FTC Facts for Business - The CAN-SPAM Act: Requirements for Commercial E-mailers,

<http://www.ftc.gov/bcp/online/pubs/buspubs/canspam.pdf>, April 2004.

**Footnotes**

1. 15 U.S.C. § 7701 et. seq.
2. 15 U.S.C. § 7704(a)(3).
3. 15 U.S.C. § 7704(5)(i).
4. 15 U.S.C. § 7704(a)(1).
5. 15 U.S.C. § 7702 (15)(A).
6. 70 Fed. Reg. 3115 (January 19, 2005).
7. 70 Fed. Reg. 25441, citing 15 U.S.C. § 7702(16)(A).
8. Id., citing 15 U.S.C. § 7702(12).
9. Id.
10. Id.
11. Id.
12. 15 U.S.C. § 7702(16).
13. 15 U.S.C. § 7702(16)(B).

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