



The New Spamscape

The Federal Trade Commission proposals might continue to change the rules on spam.

By Alan L. Friel

IN THE LAST YEAR, the Federal Trade Commission (FTC) announced two proposed rulings clarifying aspects of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM). The Act imposed federal regulation of unsolicited commercial e-mail, but stopped short of altogether outlawing spamming. For more details on the Act's scope and the first year of FTC activity, see the May/June 2005 *Marketing Management* article, "The Spam Spat."

Crucial Modifications

Although the FTC declined to adopt some of the changes it considered, the current proposal (even if never made a final rulemaking) still could substantially affect unsolicited commercial e-mail; in the rulemaking, the FTC explains how it interprets certain parts of the Act even without any regulatory changes. There are four key elements that merit discussion, in light of the proposed rulemaking.

New opt-out requirements. Citing privacy concerns, and responding to comments that many senders easily can update their opt-out lists (often automatically), the FTC proposed shortening to three business days the grace period for honoring opt-out requests. (Previously, Congress set the limit at 10 business days.) In view of this stricter deadline, many businesses probably would benefit from obtaining the consent of potential clients through opt-in promotions. The FTC also proposed prohibiting opt-out mechanisms from requiring consumers to pay a fee, provide information other than e-mail address and opt-out preferences, or perform tasks aside from replying to the e-mail or visiting one Web page. Thus, relatively common practices—such as requiring consumers to log into an account to adjust subscription preferences—essentially would need to be simplified to one-click opt-outs.

The definition of "sender" in multi-advertiser e-mails. Being considered the sender of a commercial e-

mail triggers certain duties: most notably, providing for and processing opt-out requests, maintaining and checking against a "scrub list," and including a physical address in each message. However, the definition of "sender" is arguably vague when applied to e-mails that reference multiple advertisers, such as co-promotions and e-mails sent by online marketing firms. Therefore, the FTC proposed modifying the definition in these situations. The new definition would allow designation of a single sender in multi-advertiser e-mails, but the requirements are rather strict.

An e-mail would have one advertiser designated as its only sender when that advertiser (1) initiated the commercial e-mail, and (2) was the only party who controlled the message's content, determined its distribution list, or appeared in its "from" line. Although the advertiser need perform only one of

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the tasks in part 2, no other advertiser may perform any of them—or all will be deemed senders.

Forward-to-a-friend e-mails. The FTC also took the somewhat controversial position that with respect to viral e-mails and e-cards, the Act's affiliate liability—and even the broad definition of "sender"—likely covers these activities. According to the FTC conclusions, the Act provides that when an advertiser gives consideration to or "induces" a recipient to forward an e-mail to a friend, that e-mail can be said to promote the inducing party's products, services, or Web site—and the advertiser becomes a sender of that forwarded e-mail.

Under the FTC's interpretation, consideration may take the form of rewards, coupons, discounts, points, or status: Inducement includes even a persuasive "tell a friend" encouragement. The FTC defines inducement (from *Webster's Dictionary*) as "to lead on to; or influence; to prevail on; to move by persuasion or influence." However, simply providing a link to a Web site, with "click here to forward" (and no other encouragement or consideration), would not amount to inducement.

Accordingly, an e-mail that an advertiser or Web site enables to be sent to a user—if it can be said to include promotion of products, services, or a Web site—must be presented passively as a user tool, and the user/sender may not be encouraged to forward it or receive anything of value for doing so. Alternatively, the tool must be designed to comply with the opt-out and other Act requirements. (This includes ensuring that the recipient is not on the advertiser's opt-out list.)

The inclusion of post office boxes as a "valid physical postal address." Under the Act, each commercial e-mail's sender must provide an address. The proposed rule deals with previous confusion over what types of addresses suffice. It would allow senders to use (1) their current street addresses, (2) a U.S. Postal Service-registered post office box, or (3) a private mailbox registered with a commercial mail-receiving agency operating under U.S. Postal Service regulations.

Vital Preservations

The FTC decided not to alter several key aspects of the Act's implementation. Three decisions were most important.

Infected e-mails. E-mails that contain viruses, bombs, covert downloads, and other unsavory surprises will not receive special treatment (e.g., be considered an "aggravated violation"). In fact, the FTC noted that messages containing only a virus—no accompanying text—may not meet the "commercial" or "transactional" definition, and hence may be left unregulated. The only instance when the Act would reach viruses is when a spammer uses a virus to route a commercial or transactional e-mail through someone else's computer, disguising its origin. However, other current and proposed state/federal laws address this type of activity.

The definition of a "transactional or relationship message." One way of ensuring compliance with the Act is by tailoring outgoing e-mails to fit into the categories of exempt transactional messages: (1) mes-

sages that further an agreed-to commercial transaction, (2) messages relating to warranties or recalls for a purchased product, (3) e-mailed account statements, notifications of changed terms, or subscription information, (4) messages related to employment or benefits, and (5) messages to deliver products, product upgrades, and product updates.

Although commercial e-mail must satisfy all of the Act's different requirements, a transactional or relationship message is subject to only the prohibition of false or misleading information. When a message contains both commercial and transactional components, one must determine its primary purpose, according to various criteria. Perhaps the most important criteria apply to electronic newsletters, to which customers affirmatively subscribed. Unless these messages are exclusively commercial, they will be considered transactional, thus largely exempt. In its most recent proposed rulemaking on the issue, the FTC declined to expand or contract the complicated categories of transactional or relationship messages. It based this decision on technology not changing sufficiently to justify redefining the categories.

Identification of commercial e-mails as advertising. Earlier, Congress directed the FTC to determine whether the Act's requirement—that commercial e-mail senders clearly and conspicuously identify their messages as advertisements—applied to the subject line instead of the body text. After concluding in its report that such labeling "likely would not have any measurable impact" on spamming, the FTC recommended that Congress not require it. Many advertisers undoubtedly greeted the decision with sighs of relief.

Continual Evolution

Although the FTC doesn't possess a timeline for finalizing the proposed rule, several of the aforementioned issues represent its new interpretation of existing provisions, and therefore should be treated as the law of the land. It remains to be seen whether the FTC will adopt the proposed changes, reject them, or engage interested parties in more rounds of comments and deliberations. But there is no question that keeping up with e-mail marketing's constantly shifting landscape is a tall order. ■

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