

# **ARNOLD & PORTER UPDATE**

## **Your Use of Email May Be Restricted by the New CAN-SPAM Act**

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Every business that uses email to communicate with customers and potential customers must become familiar with the new federal anti-spam law. While intended to stop email abuses, the statute regulates many legitimate uses of email, and unwary businesses could find themselves subject to harsh sanctions for even technical violations.

For example, a business sends out 10,000 emails discussing its products or services. Each email clearly identifies itself as an advertisement, the products or services offered are legitimate, the business's name is clearly stated, and there is even a return email address that the recipient can use to opt out of future emails. The email, however, does not include a valid physical postal address for the business. The business could be subject to fines of up to \$6 million.

The new law also provides criminal penalties and forfeitures for certain conduct and makes businesses potentially liable for the conduct of third parties promoting their goods or services.

### **OVERVIEW**

On December 16, 2003, President Bush signed into law the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, P.L. 108-187 (the "CAN-SPAM Act"). Among its major provisions:

- Commercial emails are subject to content regulation:
  - the subject header must not be misleading,
  - a functioning return email address must be provided,
  - a valid physical postal address for the sender must be provided, and
  - the email must conspicuously identify itself as an advertisement, such as by using the tag "ADV" in the subject line.
- Anyone sending commercial email must maintain a list of recipients who have requested not to receive future commercial emails and must honor that list.

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- A nationwide Do-Not-Email Registry may be created.
- Wireless telephone subscribers are to have the ability to avoid receiving unwanted commercial text messages.
- Most state regulation of commercial email is preempted.
- Misleading headers, address harvesting, dictionary attacks and sexually oriented emails are subject to specific restrictions.
- A business may be liable for any violations of these restrictions by third parties selling or marketing its products or services.

Enforcement of the CAN-SPAM Act is split among the Federal Trade Commission (FTC), other federal agencies, state attorneys general and Internet service providers. There is no private right of action for the ultimate recipients of spam email, but a system is to be devised to pay substantial bounties to persons who provide information about violations. Civil penalties can range from \$250 per email up to \$2 million per action (subject to trebling), and criminal penalties are also provided for certain violations.

## COMMERCIAL EMAIL CONTENT RESTRICTIONS

The CAN-SPAM Act imposes content restrictions on emails whose primary purpose is to promote commercial products or services. The restrictions do not extend to certain narrowly defined transactional or relationship emails, such as those that confirm a previously agreed to commercial transaction, provide warranty or product recall information, furnish account balances, or deliver product upgrades. Among the restrictions on commercial emails:

**Subject Headings Not Deceptive.** Subject headers must not be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.

**Return Email Address Provided.** A functioning return email address (or other Internet-based mechanism) must be provided for the recipient to submit requests not to receive future emails from the sender. There must also be clear and conspicuous notice of the opportunity not to receive further commercial emails from the sender.

**Valid Postal Address Provided.** A valid physical postal address for the sender must be provided.

**Notification That the Email Is an Advertisement.** The email must identify itself clearly and conspicuously as an advertisement, unless the recipient has given prior affirmative consent to receipt of the email. The FTC is to recommend to Congress by June 2005 whether the tag “ADV” or another comparable identifier should specifically be required for the subject line.

## **NO EMAIL LIST**

If the recipient of a commercial email asks not to receive additional emails from the sender, then the sender must honor that request, beginning 10 business days after the request. In addition the sender may not disclose the email address to any third party without consent.

## **DO-NOT-EMAIL REGISTRY**

The FTC is to create a plan for establishing a nationwide Do-Not-Email Registry no later than June 2004 and may implement the Do-Not-Email Registry as early as September 2004. The Do-Not-Email Registry presumably would function like the Do-Not-Call Registry – unsolicited commercial email could not be sent to any email address listed on the registry – but the CAN-SPAM Act leaves it to the FTC to decide whether to create a Do-Not-Email Registry and to work out the details of how it will work.

## **TEXT MESSAGES**

The Federal Communications Commission is to issue rules by September 2004 to protect wireless telephone users from unwanted text messages. The rules are to prohibit the sending of commercial text messages, unless the subscriber has provided express prior authorization. The rules are also to allow subscribers to indicate a desire not to receive future text messages from the initiator.

## **PREEMPTION OF STATE LAWS**

The CAN-SPAM Act supersedes any state law that expressly regulates the use of email to send commercial messages, except to the extent that any such law prohibits falsity or deception in any part of a commercial email. Thus, most state anti-spam laws should be preempted.

## **OTHER RESTRICTIONS**

Commercial emails may not be sent to email addresses obtained through address harvesting (obtaining email addresses by automated means from an Internet website or proprietary online service that states that addresses will not be transferred to any other party for the purpose of initiating email messages) and dictionary attacks (obtaining email addresses through an automated means that combines names, letters or numbers into numerous permutations).

Commercial emails that include sexually oriented material must include in the subject heading a notice to be prescribed by the FTC, such as the tag “ADLT.” The sexually oriented material also must not be initially viewable by the recipient merely by opening of the email.

## **LIABILITY FOR THIRD-PARTY CONDUCT**

In some circumstances, a business may be held liable for certain violations of the CAN-SPAM Act by third parties that are promoting the business’s goods or services.

## **ENFORCEMENT AND PENALTIES**

The FTC has authority to enforce the CAN-SPAM Act, except with respect to businesses in certain federally regulated industries. Thus, for example, the Securities and Exchange Commission is to enforce the CAN-SPAM Act with respect to brokers, dealers, investment advisors and investment companies. The Federal Communications Commission, the Department of Transportation, the Department of Agriculture, insurance regulators and banking regulators have similar authority with respect to the businesses that they regulate. A state attorney general or other state official also may enforce the CAN-SPAM Act through an action in federal district court.

No private right of action is created for the recipients of spam email, although the FTC is to propose procedures to grant rewards of not less than 20% of the civil penalties to the first person that identifies violations of the CAN-SPAM Act and supplies information that leads to the successful collection of a civil penalty. In addition, a provider of Internet access service adversely affected by certain violations of the CAN-SPAM Act may bring a civil action in federal district court to enjoin further violations and recover damages and attorney fees.

Civil penalties include fines of up to \$250 per email up to \$2 million. Damages may be trebled for willful or knowing violations or for specified aggravated violations. Damages may be reduced if the defendant established and implemented, with due care, commercially reasonable practices and procedures to prevent such violations.

Criminal penalties, including prison sentences of up to 5 years and forfeitures of computer equipment, are provided for certain violations, such as falsifying header information or sending commercial emails from multiple email accounts registered under a false identity.

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We hope that you find this brief summary helpful. This is only a general summary of some of the provisions of the CAN-SPAM Act and should not be construed as providing legal advice. If you would like more information, please feel free to contact Richard Firestone at 202.942.5820, Scott Feira at 202.942.5769, or your Arnold & Porter attorney.