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UPDATE: FTC Issues Final Rule For Determining "Primary Purpose" Of An E-mail Message Under The CAN SPAM Act

THE CAN SPAM ACT - A SENSE OF PRIMARY PURPOSE

On December 16, 2004, the FTC issued its "Final Rule: Defining What Constitutes a 'Commercial Electronic Mail Message'" (the "Final Rule")¹ under the CAN SPAM Act of 2003 (the "Act").² The Final Rule establishes specific criteria to be used to determine the primary purpose of an email message for purposes of regulation under the Act. Initially scheduled to become effective February 18, 2005, the effective date of the Final Rule has been delayed until March 28, 2005.³

The Act defines two types of electronic messages based on the primary purpose of the message: "Commercial Electronic Mail Messages" ("CEMs") and "Transactional or Relationship Messages" ("TRMs"). The primary purpose of a CEM is the commercial advertisement or promotion of a commercial product or service (including content on an Internet Web site operated for a commercial purpose).⁴ TRMs are messages with the primary purpose to: (i) complete or facilitate an ongoing commercial transaction; (ii) provide recall or warranty information regarding a product or service purchased by the recipient; (iii) provide notice of changes or periodic statements regarding a subscription, membership, account or similar ongoing commercial relationship; (iv) deliver information regarding an employee benefit plan in which the recipient is currently involved; or (v) deliver goods or services, like product updates or upgrades.⁵ Most of the operative provisions of the Act apply to CEMs, so a determination of the primary purpose of the electronic message directly affects the extent to which the message is regulated.

THE FTC'S FINAL RULE - MAKING SENSE OF A PRIMARY PURPOSE

Congress required the FTC, not later than 12 months after the effective date of the CAN SPAM Act, to issue regulations defining the relevant criteria to be applied in determining the primary purpose of an electronic mail message. Among other things, the Final Rule creates four different categories of email messages for purposes of applying specific criteria to determine the primary purpose of the message.

Commercial Advertisement or Promotion Content Only
The first category is electronic messages that

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contain only commercial advertisement or promotion. The Final Rule provides that if the message consists exclusively of commercial advertisement or promotion of commercial goods and services, then the primary purpose of the message is deemed to be commercial. Accordingly, the message would be a CEM subject to the full extent of regulation under the Act.

Transactional or Relationship Content Only

Similar to a message containing only commercial advertisement or promotion, the second category includes messages that consist solely of transactional or relationship content. Under the Final Rule, the primary purpose of these messages is deemed to be transactional or relationship and the message would be a TRM subject to limited regulation under the Act.

Commercial and Transactional Content

The third category of electronic messages addressed in the Final Rule is comprised of messages that consist in part of commercial advertisement or promotion of goods and services, and in part of transactional and relationship content. The primary purpose of the message is commercial and the message is a CEM, if either:

- ◆ A recipient reasonably interpreting the subject line of the electronic message would likely conclude the message contains the commercial advertisement or promotion of a commercial product or service; or
- ◆ The electronic mail message's transactional or relationship content does not appear, in whole or in substantial part, at the beginning of the body of the message.

Commercial and "Other" Content

The fourth and final category under the Final Rule contains messages that consist in some part of

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a commercial advertisement or promotion of a commercial product or service, and other content that is not transactional or relationship. For these types of messages, the primary purpose is commercial and the message is a CEM if either:

- ♦ A recipient reasonably interpreting the subject line of the electronic message would likely conclude the message contains the commercial advertisement or promotion of a commercial product or service; or
- ♦ A recipient reasonably interpreting the body of the message would likely conclude that the primary purpose of the message is the commercial advertisement or promotion of a commercial product or service. Factors relevant to this interpretation include: placement of the promotional content, in whole or in part, at the beginning of the body of the message; the proportion of the message dedicated to promotional content; and how color, graphics, type size, and style are used to highlight the promotional content.

CONCLUSION

Whether the Final Rule provides any real clarity for senders of electronic mail messages remains to be seen. The “subject line criteria” puts greater emphasis on what senders put in the subject line of message. This criteria, however, should not present any greater challenge to senders because the Act already prohibits use of a subject line that would be likely to mislead a recipient. In addition, as the FTC notes in comments to the Final Rule, “The subject line stands out as a separate part of a message that serves as a preview of the body of the message. As such, it is appropriate to tailor the criteria to accommodate this basic feature of email communication.”

The “placement criteria,” appears to provide specific direction for senders of email messages containing commercial and promotional content with transactional and relationship content. The Act is fairly specific as to what constitutes transactional or relationship content. Senders should identify this content and make sure that it appears at the beginning of the body of the message. For example, if a message transmits a customer’s account balance, the balance and related information should be presented at the beginning of the body of the message, with the commercial content presented lower in the message.

The most significant challenge under the Final Rule will likely be application of the “message body interpretation criteria.” In the end, with regard to this criteria, the FTC may simply be saying use common sense. The list of factors identified in the Final Rule by the FTC as relevant to the recipient’s interpretation of the message, such as: placement of the commercial or promotional content at the beginning of the message, the proportion of the message ded-

icated to the commercial or promotional content, and color graphics, type and style that are used to highlight the commercial or promotional content, suggest elements that as a practical matter tend to create an overall impression. As a result, efforts to disguise a commercial email message will fail if the overall impression of the message is one that conveys a commercial or promotional impression.

Regardless of the issues it raises, the Final Rule does provide senders of email message with some needed guidance. Senders of electronic business newsletters and similar publications, who were previously faced with the challenge of deciding whether the inclusion of any commercial advertising or promotional content would result in the message being considered a CEM and subject to full regulation under the Act, should have comfort that under the Final Rule they at least have some guidelines on how to structure their online publications to avoid the full regulatory effect of the CAN SPAM Act. For example, if we were to include advertisements as part of the content of the electronically delivered version of this client alert, we would present the advertisement in a manner (considering the position of the ad within the body of the message, and the font, color, style and size of the ad) that would not overshadow or make a greater impression on the recipient than the substantive update or recent legal matter discussed and analyzed.

Endnotes

- 1 70 Fed. Reg. 3110 (2005) (to be codified at 16 C.F.R. pt. 316).
- 2 The CAN SPAM Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699 [codified at 15 U.S.C §§7701, et seq.]
- 3 The effective date of the Final Rule was moved back to March 28, 2005 when the Office of Management and Budget determined that the Final Rule was a “major rule,” which cannot take effect until 60 days after publication in the Federal Register.
- 4 15 U.S.C at §7702(2).
- 5 Id. at §7702(17).

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Brannon Anthony, Brian Casey, Pat Hatfield and Jon Neiditz are leaders of Lord, Bissell & Brook’s e-commerce practice, which helps clients manage the risks and maximize the benefits of e-records. The authors have spent many years developing solution sets in the areas of e-signatures, e-record retention, privacy, security and inter-operability. Recent Client Alerts can be found at http://www.lordbissell.com/practice_news.cfm?paID=76.

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