

WHAT THE CAN-SPAM ACT NOW COVERS

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CAN-SPAM Act

- Stands for: Controlling the Assault of Non-Solicited Pornography and Marketing
- Enacted in 2003
- Covers electronic commercial messages (e-communication)

Scope of CAN-SPAM Act

- Traditionally was thought to only cover e-mail communications
- In the *Facebook v. MaxBounty* case, the court held that the CAN-SPAM Act applies to electronic communications other than e-mail communications

Scope of CAN-SPAM Act cont'd

- CAN-SPAM Act has been held to communications between user's within Facebook
- This decision may signal the broader application of the CAN-SPAM Act entities deemed to be Internet Access Services -

“Internet access service”

“a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers.

Such term does not include telecommunications services.”

47 USC § 231(e)(4)

Electronic Communications

- “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service”
(15 U.S.C. 7702(2)(A))
- Covers both business-business and business-consumer email

Requirements of CAN-SPAM

- Header information of e-communication may not be false or misleading
 - Header Information covers, FROM, TO, REPLY-TO, and routing information (i.e., domain name and email address)
- Subject lines may not be deceptive

Requirements of CAN-SPAM cont'd

- The message must be identified as an ad (if it is primarily commercial in nature)
- Must disclose your mailing address
- Must tell recipients how to opt out of receiving future communications
- Any request to opt out must be honored promptly

Electronic Communication Cont'd

- Three types of content in electronic communication:
 - Commercial Content –advertises or otherwise promotes a commercial product or service
 - Transactional Content –relates to a prior transaction or relationship
 - Other content – content that is neither commercial nor transactional

[\[http://business.ftc.gov/documents/bus61-can-spam-act-compliance-guide-business\]](http://business.ftc.gov/documents/bus61-can-spam-act-compliance-guide-business)

Example 1

TO: Jane Smith

FR: OneCo

RE: Shipping Confirmation

Order #12345 : (order will arrive in 1 shipment)

Description: LED Monitor

Shipping Method: Two-Day Shipping

Shipping Preference: I want my items faster. Ship them as they become available.

Subtotal of Items: \$404.54

Shipping & Handling: \$0.00 -----

Total for this Order: \$404.54

Visit our website for our exciting new line of new computer accessories!

Example 1 - Answer

- Transactional message
- Probably only subject to CAN-SPAM's requirement of truthful routing information
- Factors:
 - Customer's account is at the beginning of the message
 - Brief commercial portion of the message is at the end

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Example 2

TO: Jane Smith

FR: XYZ Distributing

RE: Your Account Statement

We offer a wide variety of widgets in the most popular designer colors and styles – all at low, low discount prices. Visit our website for our exciting new line of mini-widgets!

Sizzling Summer Special: Order by June 30th and all waterproof commercial-grade super-widgets are 20% off. Show us a bid from one of our competitors and we'll match it. XYZ Distributing will not be undersold.

Your order has been filled and will be delivered on Friday, June 1st.

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Example 2 - Answer

- Commercial message
- Subject to all CAN-SPAM's requirements.
- Factors:
 - Subject line is “Your Account Statement” but...most of the information in the message is commercial in nature
 - Brief transactional content at the end of message

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Who is Liable?

- Multiple parties may be liable for violations
- Sender - party that sent the electronic communication (including those who forward the electronic communication)
- Initiator – initial sender or entity that hired the sender to send the message, e.g., company on whose behalf the message was created and sent

Penalties

- If Internet Access Service (e.g., Facebook) brings lawsuit, up to \$100 per e-mail sent
- If State Attorney General brings lawsuit, up to \$250 per e-mail sent
- Other penalties include:
 - Injunction
 - Cease and desist orders
 - Attorney's fees
 - Aggravated Damages

Risk Mitigation

- Make sure to comply with terms of service of platforms, e.g., Facebook, Twitter, MySpace, LinkedIn, when sending electronic communications
- If you are the sender, confirm that all electronic communication satisfies the requirements of the CAN-SPAM Act
- If you are the initiator, confirm that the individuals or companies that handle your social media marketing are complying with the CAN-SPAM Act.

Risk Mitigation cont'd

- With the widespread use of smart phones and tablets, senders and initiators should also ensure that any commercial messages comply with the wireless CAN-SPAM rules set by the Federal Communication Commission; see <http://www.fcc.gov/guides/spam-unwanted-text-messages-and-email>
- Senders and initiator should understand all laws and rules applicable to the commercial communications they are sending

Legal Disclaimer

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