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CAN-SPAM: THE "MEAT" OF EMAIL MARKETING LEGISLATION

Are you using email to market your business? Most businesses continually work to build quality email marketing lists with contact information for past, present, and prospective customers. Many businesses, however, are not aware that federal law sets rules for commercial email, establishes requirements for commercial messages, gives recipients the right to stop emails from being sent to them, and spells out tough penalties for violations. Everyone who engages in email marketing is required to comply with the federal CAN-SPAM Act - Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 - and a lack of awareness of what the law requires is not a viable defense for violations.

Despite its name, the CAN-SPAM Act does not apply just to bulk email. It covers all commercial email messages, which the law defines as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service," including email that promotes content on commercial web sites. Each separate email in violation of the law is subject to penalties of up to \$16,000 for both the company whose product is promoted in the message and the company that originated the message. Whether you have established an in-house email marketing program or are using a third-party marketer, this article will provide helpful tips to ensure your business remains compliant.

What Types of Email are Covered By CAN-SPAM?

CAN-SPAM recognizes three different types of email content: **1)** commercial content; **2)** transactional or relationship content; or **3)** other content. The "primary purpose" of the message is key to determining which of the content categories applies:

- 1. Commercial Content.** An email contains "commercial content" if it advertises or promotes a commercial product or service, including content on a web site operated for a commercial purpose or promoting links to content on advertising-driven web sites. These commercial emails must comply with the requirements of CAN-SPAM.
- 2. Transactional or Relationship Content.** An email contains "transactional or relationship content" if it facilitates an already agreed-upon transaction or updates a customer about an ongoing transaction. These emails may not contain false or misleading routing information, but are otherwise exempt from most provisions of the CAN-SPAM Act. Transactional or relationship emails include content that:
 - a. Facilitates or confirms a commercial transaction to which the recipient already has agreed;
 - b. Gives warranty, recall, safety, or security information about a product or service;
 - c. Gives information about a change in terms or features or account balance information regarding a membership, subscription, account, loan, or other ongoing commercial relationship;
 - d. Provides information about an employment relationship or employee benefits; or
 - e. Delivers goods or services as part of a transaction to which the recipient already has agreed.

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3. Other Content. An email contains "other content" if its content is neither "commercial" nor "transactional or relationship." This type of email is not impacted by CAN-SPAM.

If an email contains both commercial content and transactional or relationship content, the "primary purpose" of the message is the deciding factor. The primary purpose of the message is commercial if: 1) a recipient reasonably interpreting the subject line would likely conclude that the message contains an advertisement or promotion for a commercial product or service; or 2) the message's transactional or relationship content does not appear mainly at the beginning of the message.

Tips to Remain CAN-SPAM Compliant

Before sending out future marketing emails, review the following tips to help you remain in compliance with the CAN-SPAM Act.

- 1. Who Are You?** You must accurately identify the person who sends (initiates) the email message. You cannot pretend to be another web site or company just to get a user to open your email. The "From" address and the "Reply-To" address must be accurate and must be your company.
- 2. Promote Only Your Web Site.** You must have authority to promote web sites included in your email, and it must be the domain that you say it is. You cannot deceive people by listing one web site and then directing people to a different site once they click on the link. The rule of thumb should be to direct readers to your own web site only.
- 3. The Subject Line Must Not Be Deceptive.** The subject line must accurately reflect the content of the message - it cannot be "misleading." This should be simple - all you need to do is be truthful.
- 4. Identify the Message As An Advertisement.** You must disclose clearly and conspicuously that your message is an "advertisement." While you may believe the email conveys this message based on its content, you still must state that the email is an "advertisement" at least once in the body of the email. The disclosure can be included at the end of the email, but the message should be explicit.
- 5. Tell Recipients Where You Are Physically Located.** Your message must include your valid physical postal address - either your current street address, a post office box you have registered with the U.S. Postal Service, or a private mailbox registered with a commercial mail receiving agency established

under Postal Service regulations. This ensures that you are not a spammer and also allows customers a way of sending a verified communication to you to remove themselves from your mailing list.

- 6. Tell Recipients How to "Opt Out" of Receiving Future Email From You.** The law prohibits you from sending a marketing email without letting the recipient know how to stop you from sending future emails to them. Your email must include a clear and conspicuous "opt out" provision, typically included at the bottom of the email. This notice should be simple so that an ordinary person can easily understand how to exercise the right to opt out. You can create a menu to allow a recipient to opt out of certain types of messages but not others, but you must include the option to stop all commercial messages from you - also known as "universal unsubscribe."
- 7. Honor Opt-Out Requests Within 10 Days.** Any opt-out mechanism offered must be valid for 30 days after the message is sent. Companies should ensure that their own "spam" filter does not block these opt-out requests. You have 10 business days to honor a recipient's opt-out request. You are not permitted to charge a fee for removal from an email list. The recipient cannot be required to give you any personally identifying information beyond an email address or be required to take any step other than sending a reply email or visiting a single page on an Internet web site, as a condition for honoring an opt-out request. Once a recipient has unsubscribed, you cannot send him or her any more messages, and you are prohibited from selling or transferring the email address - even in the form of a mailing list. The only exception is that you may transfer the address to a third party you have hired to help you comply with the CAN-SPAM Act.
- 8. Know What a Third-Party Marketing Firm Is Doing.** Make sure you monitor what any marketing firm or affiliate is doing on your behalf. The law makes clear that you cannot contract away your legal responsibility to comply with CAN-SPAM. Both the company whose product is promoted in the message and the company that actually sends the message may be held legally responsible.

Complying with CAN-SPAM may seem daunting, but by following the above rules your email marketing efforts should run smoothly. For businesses embarking on more sophisticated marketing endeavors, including joint marketing opportunities with affiliated businesses or utilizing international mailing lists, additional considerations will be required.