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Hi, Robin. Here is your e-newsletter for July 26, 2011.

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**Businesses: How to Comply with the CAN-SPAM Act**



## The Law Applies to a Wide Variety of Communications

If your business uses e-mail to communicate with customers, clients or prospects, you must comply with a federal law called the *CAN-SPAM Act*. This law sets the rules for commercial e-mail, establishes requirements for messages, gives recipients the right to have messages stop, and contains penalties for violations.

Many people are not aware that the *CAN-SPAM Act* doesn't apply only to bulk e-mail messages. It covers all commercial e-mail messages. The law defines such a communication as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service." This includes messages that link to or promote content on commercial Web sites. (*Note:* Different rules apply to e-mails with sexually explicit content.)

There is no exception in the law for business-to-business e-mail messages. The Federal Trade Commission (FTC) states that all e-mail must comply with the law, including for example, a message to former customers announcing a new product line.

The agency has just released compliance guidelines (see right-hand box).

### Frequently Asked CAN-SPAM Questions

Here are answers from the FTC to some questions businesses have asked about complying with the *CAN-SPAM Act*.

**Question:** *How do I know if the CAN-SPAM*

### Seven Guidelines To Stay in Compliance

The penalties for violating the *CAN-SPAM Act* are steep. Each separate noncompliant e-mail is subject to penalties of up to \$16,000. To help businesses follow the law to the letter, the FTC has provided these guidelines:



**Guideline #1 - Don't use false or misleading header**

**information.** Your "From," "To," "Reply-To," and routing information – including the originating domain name and e-mail address – must be accurate. It must identify the person or business who initiated the message.

**Act covers e-mail that my business sends out?**

**Answer:** The "primary purpose" of the message is what matters. To determine the primary purpose, remember that an e-mail can contain three different types of information:

- *Commercial content* – which advertises or promotes a commercial product or service, including content on a Web site operated for a commercial purpose.
- *Transactional or relationship content* – which facilitates an already agreed-upon transaction or updates a customer about an ongoing transaction.
- *Other content* – which is neither commercial nor transactional or relationship.

If the message contains only commercial content, its primary purpose is commercial and it must comply with the requirements of CAM-SPAM. If it contains only transactional or relationship content, its primary purpose is transactional or relationship. In that case, it may not contain false or misleading routing information, but is otherwise exempt from most provisions of the CAN-SPAM Act.

**Question: How do I know if I'm sending a transactional or relationship message?**

**Answer:** The primary purpose of an e-mail message is transactional or relationship if it consists only of content that meets one of these tests:

- It facilitates or confirms a commercial transaction to which the recipient already has agreed.
- It gives warranty, recall, safety, or security information about a product or service.
- It gives information about a change in terms or features or account balance information regarding a membership, subscription, account, loan or other ongoing commercial relationship.
- It provides information about an employment relationship or employee benefits.
- It delivers goods or services as part of a transaction to which the recipient already has agreed.

**Question: What if the message combines**

**Guideline #2 - Don't use deceptive subject lines.** The subject line must accurately reflect the content of the message.

**Guideline #3 - Identify the message as an ad.** The law gives you a lot of leeway in how to do this, but you must disclose clearly and conspicuously that your message is an advertisement.

**Guideline #4 - Inform recipients where you're located.** Your message must include your valid physical postal address. This can be your current street address, a post office box that you've registered with the U.S. Postal Service, or a private mailbox that you've registered with a commercial mail receiving agency established under Postal Service regulations.

**Guideline #5 - Tell recipients how to opt out of receiving future e-mail from you.** Your message must include a clear and conspicuous explanation of how a recipient can opt out of getting messages in the future. Write the notice in a way that's easy for an ordinary person to recognize, read, and understand. Creative use of type size, color, and location can improve clarity. Provide a return e-mail address or another easy Internet-based way to allow people to communicate their choice to you. You may create a menu to allow a recipient to opt out of certain types of messages, but you must include the option to stop all commercial messages from you. Make sure your spam filter doesn't block these opt-out requests.

**Guideline #6 - Honor opt-out requests promptly.** The opt-out mechanism you offer must be able to process opt-out requests for at least 30 days after you send your message. You must honor a recipient's opt-out request within 10 business days. As a condition for honoring an opt-out request, you can't:

- Charge a fee;
- Require the recipient to give you any personally identifying information beyond an e-mail address; or
- Make the recipient take steps other than to send a reply e-mail or visit a single page on an Internet Web site.

Once people tell you they don't want to

**commercial content and transactional or relationship content?**

**Answer:** It's not unusual for businesses to send e-mail messages mixing commercial content and transactional or relationship content. When an e-mail contains both content types, the primary purpose of the message is the deciding factor. How to make that determination? The primary purpose of a message is commercial if a recipient reasonably interpreting the subject line likely concludes that the message contains an advertisement or promotion for a commercial product or service. This is also true if the message's transactional or relationship content does not appear mainly at the beginning. In other words, when a message contains both commercial and transactional or relationship content, look at the message. If the subject line leads the recipient to think it's a commercial message, it's a commercial message for CAN-SPAM purposes. Similarly, if the bulk of the transactional or relationship part of the message doesn't appear at the beginning, it's a commercial message under the *CAN-SPAM Act*.

Here's an example:

**Example:  
MESSAGE A**

**TO:** Jane Smith

**FROM:** XYZ Distributing

**RE:** Your Account Statement

We shipped your order of 25,000 deluxe widgets to your Springfield warehouse on June 1st. We hope you received them in good working order. Please call our Customer Service Office at (877) 555-5555 if any widgets were damaged in transit. Per our contract, we must receive your payment of \$1,000 by July 30th. If not, we will impose a 10 percent surcharge for late payment. If you have any questions, please contact our Accounts Receivable Department.

Visit our Web site for our exciting new line of mini-widgets!

**MESSAGE A** is most likely a *transactional or relationship message* subject only to CAN-SPAM's requirement of truthful routing information. One important factor is that information about the customer's account is at the beginning of the message. The brief commercial portion of the message about mini-widgets is at the end.

**Example:  
MESSAGE B**

receive more messages, you can't sell or transfer their e-mail addresses, even in the form of a mailing list. The only exception is that you may transfer the addresses to a company you hire to help you comply with the CAN-SPAM Act.

**Guideline #7 - Monitor what others are doing on your behalf.** The law makes clear that even if you hire another company to handle your e-mail marketing, you can't contract away your legal responsibility to comply with the law. Both the company whose product is promoted in the message and the company actually sending the message may be held legally responsible.



Statue outside the FTC building in Washington, D.C., titled "Man Controlling Trade."

**CAN-SPAM is short for "Controlling the Assault of Non-Solicited Pornography and Marketing Act." It was passed in 2003 after Congress found: "The convenience and efficiency of electronic mail are threatened by the extremely rapid growth in the volume of unsolicited commercial electronic mail."**

**TO:** Jane Smith

**FROM:** 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 Web site for our exciting new line of mini-widgets!

Sizzling Summer Special: Order by July 30th and all waterproof commercial-grade super-widgets are 20 percent 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, August 1st.

**MESSAGE B** is most likely a **commercial message** subject to all CAN-SPAM requirements. Although the subject line is "Your Account Statement" – generally a sign of a transactional or relationship message – the information at the beginning of the message is commercial in nature and the brief transactional or relationship portion of the message is at the end.

**Question:** *What if the message combines elements of both a commercial message and a message with content defined as "other"?*

**Answer:** In that case, the primary purpose of the message is commercial and the provisions of the *CAN-SPAM Act* apply if:

- A recipient reasonably interpreting the subject line likely concludes that the message advertises or promotes a commercial product or service; and
- A recipient reasonably interpreting the body of the message likely concludes that the primary purpose is to advertise or promote a product or service.

Factors relevant to that interpretation include:

- The location of the commercial content (for example, is it at the beginning of the message?).
- How much of the message is dedicated to commercial content.
- How color, graphics, type size, style, etc., are used to highlight the commercial content.

**Question:** *What if the e-mail includes information from more than one company? Who is the "sender" responsible for CAN-SPAM compliance?*

**Answer:** If an e-mail advertises or promotes the goods, services, or Web sites of more than one marketer, there's a method for determining who's responsible for the duties the *CAN-SPAM Act* imposes on "senders" of commercial e-mail. Marketers that have goods, services, or Web sites advertised or promoted in a message can designate one of the marketers as the "sender" for purposes of CAN-SPAM compliance as long as the designated sender:

- Meets the CAN-SPAM definition of "sender," meaning that they initiate a commercial message advertising or promoting their own goods, services, or Web site.
- Is specifically identified in the "from" line of the message.
- Complies with the "initiator" provisions of the law. For example, the e-mail does not contain deceptive transmission information or a deceptive subject heading. And the e-mail includes a valid postal address, a working opt-out link, and proper identification of the message's commercial or sexually explicit nature.

If the designated sender doesn't comply with the responsibilities the law gives to

initiators, all marketers in the message may be held liable as senders.

**Question: My company sends e-mail with a link so that recipients can forward the message to others. Who is responsible for CAN-SPAM compliance for these "Forward to a Friend" messages?**

**Answer:** Whether a seller or forwarder is a "sender" or "initiator" depends on the facts. So deciding if the *CAN-SPAM Act* applies to a commercial "forward-to-a-friend" message often depends on whether the seller has offered to pay the forwarder or give the forwarder some benefit. For example, if the seller offers money, coupons, discounts, awards, additional entries in a sweepstakes, or other benefits in exchange for forwarding a message, the seller may be responsible for compliance. Or if a seller pays or gives a benefit to someone in exchange for generating traffic to a Web site or for any form of referral, the seller is likely to have compliance obligations under the *CAN-SPAM Act*.

**Question: What are the penalties for violating the CAN-SPAM Act?**

**Answer:** Each separate e-mail in violation of the law is subject to penalties of up to \$16,000, and more than one person may be held responsible for violations. For example, both the company whose product is promoted in the message and the company that originated the message may be legally responsible. E-mail that makes misleading claims about products or services can also be subject to laws governing deceptive advertising. The *CAN-SPAM Act* has certain aggravated violations that may give rise to additional fines. The law provides for criminal penalties – including imprisonment – for:

- Accessing someone else's computer to send spam without permission.
- Using false information to register for multiple e-mail accounts or domain names.
- Relaying or retransmitting multiple spam messages through a computer to mislead others about the origin of the message.
- Harvesting e-mail addresses or generating them through a dictionary attack (the practice of sending e-mail to addresses made up of random letters and numbers in the hope of reaching valid ones).
- Taking advantage of open relays or open proxies without permission.

If you have questions about CAN-SPAM at your organization, consult with your attorney or technology professional.

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