

A wide orange banner at the top of the page contains a grid of small icons, including envelopes and binary code, and a globe on the right side.

CAN-SPAM Act of 2003: Important Information Regarding New Rule Provisions from the Federal Trade Commission

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The information in this document is not intended as legal advice. Rather, it is intended to serve as a primer for our clients on the recent CAN-SPAM Act rulemaking. Many of the questions raised by the statute will require careful analysis by your legal counsel. This document was prepared in conjunction with the E-mail Sender and Provider Coalition (ESPC).

In 2003, Congress passed the CAN-SPAM Act which took effect on January 1, 2004. The law imposed limitations on sending unsolicited commercial e-mail. When the law was passed, several issues were left on the table for "additional rulemaking" by the Federal Trade Commission (FTC). Many of these rule clarifications were addressed over the initial 24 months after the bill was signed. Congress and the FTC have had several other regulations under consideration, which they finalized on the week of May 12, 2008.

The new rule provisions are a follow-up to a Notice of Proposed Rulemaking (NPRM) and Advance Notice of Proposed Rulemaking (ANPR) on these and other CAN-SPAM topics that the FTC published on May 12, 2005 and March 11, 2004, respectively. A full copy of the new regulations can be found at: <http://www.ftc.gov/os/2008/05/R411008frn.pdf>

The four new rules will take effect in 45 days (from date of publication in the Federal Register). As of now, that date has not been set.

1. Opt-out

You cannot complicate the opt-out process or mechanism. A recipient cannot be required to pay a fee, provide information other than their e-mail address and opt-out preferences, or take any steps other than sending a reply e-mail message or visiting a single Internet Web page to opt out of receiving future

e-mail from a sender. To be clear, requiring a log-in or asking for any other information to opt-out is not permitted under this rule.

2. Valid Postal Address

Businesses may publish a P.O. Box or private mailbox in a commercial e-mail message to comply with the valid physical postal address requirement provided that either address is “accurately” registered with the USPS or with a commercial mail-receiving agency established pursuant to USPS regulations.

3. Definition of the “Sender”

The definition of “sender” was modified to allow multiple marketers within one e-mail to designate a single sender for purposes of CAN-SPAM compliance. The benefit from this rule is that a single opt-out link and single valid physical postal address can be displayed in a multi-advertiser e-mail. The sole sender appearing in the “from” line becomes the designated sender of the e-mail, and is responsible on behalf of all other advertisers in the message for complying with key provisions of the Act.

The message must also comply with the following CAN-SPAM requirements:

- Cannot contain false or misleading transmission information
- Cannot contain a deceptive subject heading
- Must clearly and conspicuously include a functioning return e-mail address or other Internet-based mechanism, that a recipient may use to opt-out from future commercial messages of that sole sender appearing in the “from” line
- Must provide clear and conspicuous identification of the message as an advertisement or solicitation, clear and conspicuous notice of the opportunity to opt out, and a valid physical postal address
- Must comply with the SEXUALLY EXPLICIT labeling rule, if applicable

If the designated sender in the “from” line fails in any of these obligations, then all advertisers in the e-mail by definition will be deemed “senders,” rendering each advertiser liable for the non-compliance of the e-mail message.

It is important to note that the entity listed in the “from” line must satisfy the definition of “sender,” meaning that its own product, service or Web site is advertised or promoted in the e-mail message as well. The FTC has proposed a “reasonable consumer expectation” test to determine whether an advertisement or product promotion appears in an e-mail message so as to satisfy this rule.

4. Definition of “Person”

This rule clarifies that the definition of a “person” is not limited to a natural person, and includes individuals, groups, unincorporated associations, limited or general partnerships, corporations or other business entities.

This rule is consistent with the Telemarketing Sales Rule. The FTC confirmed that both for-profit and non-profit businesses that send commercial messages are within the scope of the CAN-SPAM Act requirements. Based on the Act’s definition of “initiate,” any such entity (person) can be deemed an initiator or sender of a commercial e-mail message.

Commentary accompanying the final rule also addresses a number of topics that are not the subject of any new rule provisions.

1. CAN-SPAM’s definition of “transactional or relationship message”
2. The FTC’s decision not to alter the length of time a “sender” of commercial e-mail has to honor an opt-out request from 10 days to 3 days
3. The FTC’s determination not to designate additional “aggravated violations” under the Act
4. The FTC’s views on how CAN-SPAM applies to forward-to-a-friend e-mail marketing campaigns, in which someone either receives a commercial e-mail message and forwards the e-mail to another person, or uses a Web-based mechanism to forward a link to or copy of a Web page to another person; if the seller offers something of value in exchange for forwarding a commercial message, the seller must comply with the Act’s requirements, such as honoring opt-out requests

As a reminder, the five rules below were considered and decided upon in previous rulemaking processes:

1. Labeling Commercial E-mail: This change was rejected; only sexually explicit e-mail requires a “SEXUALLY EXPLICIT:” tag at the beginning of the subject line.
2. Do-Not-E-mail Registry: This change was rejected.
3. Tip “Rewards”: This rule would pay a bounty for turning in spammers. This change was rejected.
4. Primary Purpose: The rule clearly defines commercial e-mail versus transactional e-mail.
5. Wireless Messaging: The rule prohibits commercial e-mail messages to wireless devices unless you have explicit permission in addition to a general opt-in.



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For more information on this or other deliverability-related subjects, contact Rick Buck, director of privacy and ISP relations CIPP, at 781-372-3317 or rbuck@e-dialog.com.

About e-Dialog

With more than 10 years of e-mail marketing experience and many experts on our staff, e-Dialog has been providing software-as-a-service and strategic services to world-class marketers in retail, entertainment, travel, media, business-to-business, and more. We understand what it takes for our clients to be successful, which is why for the third consecutive year Jupiter Research ranks e-Dialog highest overall among e-mail marketing providers and service-oriented ESPs. Furthermore, e-Dialog has been named a leader in the Forrester Wave: E-mail Marketing Service Providers Q4 2007, recognizing the strength of our platform and an able services team. e-Dialog is a wholly owned subsidiary of GSI Commerce, Inc. (Nasdaq: GSIC).