

**A NEW FEDERAL LAW REGULATING COMMERCIAL E-MAIL:
THE CAN-SPAM ACT WILL AFFECT ALL BUSINESSES**

On December 16, 2003, President Bush signed into law the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the “Act”), creating the first U.S. federal law regulating commercial electronic mail messages¹ (referred to herein as “commercial e-mail”). While the Act will affect all businesses that engage in any advertising/marketing of products or services via e-mail, it is much less onerous than several existing state anti-spam laws. Effective January 1, 2004, the Act largely overrides state laws and thus provides a national uniform regulatory approach. Among other things, the Act (1) requires commercial e-mails to be identified as an advertisement or solicitation, include a valid postal address, and provide a mechanism that will enable recipients to opt out of receiving future e-mails; (2) prohibits e-mail practices that are fraudulent or deceptive in nature; and (3) requires the FCC to promulgate specific rules regulating mobile service commercial e-mails. Primary enforcement responsibility for the Act rests with the Federal Trade Commission (“FTC”). The Act imposes heavy fines and prison terms for certain violations.

I. Summary of the Act**A. Prohibitions in General**

1. Identifier, Opt-Out, and Physical Address. The Act prohibits the initiation² of a commercial e-mail, unless the e-mail includes:

(1) An identifier. A commercial e-mail must include a clear and conspicuous identification that the e-mail is an advertisement or solicitation (unless the recipient has given prior affirmative

¹ “Commercial electronic mail message” means “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose).” Act § 2(A). Referencing a commercial entity or including a link to a commercial Web site in an e-mail does not, by itself, cause such message to be treated as a commercial e-mail if the *primary purpose* of the message is other than commercial advertisement or promotion of a commercial service or product. See Act § 2(D).

² “Initiate,” when used with respect to a commercial e-mail, “means to originate or transmit such message or to procure the origination or transmission of such message, but shall not include actions that constitute routine conveyance of such message.” A message may be initiated by more than one person. Act § 3(9).

consent³ to receive such e-mail).

(2) An opt-out. all commercial e-mail must include a clear and conspicuous functioning return e-mail address or similar Internet-based opt-out mechanism that the recipient may use to request not to receive future commercial e-mails from the sender⁴ at the e-mail address where the message was received. The opt-out mechanism must be operational for at least thirty (30) days after the transmission of the original e-mail. The Act also states that the sender may comply with the opt-out requirement by providing a list from which the recipient may choose the specific types of commercial e-mail that he or she does or does not wish to receive, so long as the list includes an option under which the recipient may choose not to receive any commercial e-mail from the sender.

Further, once a recipient makes an opt-out request, it is unlawful for the sender (or any entity acting on behalf of the sender) to initiate further commercial e-mail transmissions to the recipient that are inconsistent with the preferences expressed by the recipient more than ten (10) business days following such a request. The Act also dictates that once a recipient elects to opt-out, it is unlawful for the sender, or any other person who knows that the recipient has made such a request, to transfer or release a recipient's e-mail address, with certain exceptions. Subsequent affirmative consent given by the recipient will suffice to negate the recipient's prior opt-out request.

(3) A physical address. The commercial e-mail must contain a notice of the sender's valid physical postal address.

2. **Fraudulent/Deceptive Practices and Sexual Material.** The Act bans certain commercial e-mail practices that are fraudulent, false, or misleading in nature, including: (1) using false or misleading header information or subject lines;⁵

³ "Affirmative consent" means "the recipient [of the commercial e-mail] expressly consented to receive the message, either in response to a clear and conspicuous request for such consent or at the recipient's own initiative; and...if the message is from a party other than the party to which the recipient communicated such consent, the recipient was given clear and conspicuous notice at the time the consent was communicated that the recipient's electronic mail address could be transferred to such other party for the purpose of initiating commercial electronic mail messages." Act § 3(1).

⁴ With regard to commercial e-mails, a "sender" means a person who initiates such a message and whose product or service is promoted by the e-mail. However, if a company "operates through separate lines of business or divisions and holds itself out to the recipient throughout the message as that particular line of business or division rather than as the entity of which such line of business or division is a part, then the line of business or the division shall be treated as the sender of such [e-mail]." Act § 3(16).

⁵ "Header information" means "the source, destination, and routing information attached to an [e-mail], including the originating domain name and originating [e-mail] address, and any other information that appears in the line identifying, or purporting to identify, a person initiating the message." Act § 3(8).

and (2) harvesting e-mail addresses from Web sites and sending commercial e-mails to them.⁶ The Act also prohibits “transactional or relationship messages” (*i.e.*, messages contacting customers about their accounts, requested products or services, or product upgrades) that contain false or misleading header information or subject lines -- note that “transactional or relationship messages” are excluded from the definition of “commercial electronic mail messages.” In addition, the Act generally requires warning labels to be placed on commercial e-mails containing sexually oriented material.

3. **Promotion**. Generally, the Act prohibits a person from promoting, or allowing others to promote, the person’s business activities in a commercial e-mail that provides false or misleading information.

4. **Mobile Phones**. The Act requires the Federal Communications Commission (“FCC”), in consultation with the FTC, to promulgate rules within 270 days that, among other issues, will (1) enable mobile subscribers to avoid receiving mobile commercial e-mails unless the subscriber provides express prior authorization (or “opt-in” consent) to the sender, but grants the “Commission”⁷ discretion to consider the existing relationship between mobile service providers and their subscribers in determining whether such providers should be subject to the opt-in rule; and (2) allow recipients of mobile commercial e-mail to indicate electronically a desire not to receive future mobile commercial e-mail from the sender.

B. **Liability**. The Act imposes statutory damages, which can be up to \$250 per e-mail violation. In extreme circumstances, violators could potentially be forced to pay multi-million dollar fines. The Act also provides for criminal penalties, including prison terms of up to five (5) years, depending on the nature and extent of the violation. For example, those sending fraudulent e-mails, or sexually oriented e-mails without proper labels, could face prison terms.

C. **Enforcement/Private Right of Action**. Generally, the FTC will enforce the Act as if a violation of the Act were an unfair and deceptive practice in violation of the FTC Act.⁸ The Act also authorizes the FTC to study the feasibility of a do-

⁶ “Harvesting” generally refers to the use of computer programs to search public areas on the Internet in order to compile, capture, or otherwise “harvest” lists of e-mail addresses from Web pages, newsgroups, chat rooms, and other online destinations.

⁷ Given the context of this section, we believe “Commission” here refers to the FCC. However, note that the Act defines “Commission” as the FTC.

⁸ See 15 U.S.C. 57a(a)(1)(B). Compliance with the Act will also be enforced by other federal agencies.

not-e-mail registry -- a report on this matter must be submitted to Congress by June 2004. Additionally, although the Act allows other federal agencies, state attorneys general, and Internet service providers to take violators to court, the Act does not allow a private right of action by individuals.

- D. State Spam Laws.** As mentioned, the Act largely supersedes state spam laws. The Act provides, however, that state spam laws will survive to the extent that they prohibit falsity or deception in any portion of a commercial e-mail (or information attached thereto).

- II. Implications on Business Practices.** The Act essentially applies to all U.S. companies that use e-mail. Given the potential liabilities under the Act, companies must ensure that they have the policies and procedures in place that will allow them to comply with the Act (and applicable foreign spam laws, as discussed below).

Companies should refrain from engaging in any type of fraudulent or deceptive tactics with regard to sending e-mails. As required by the Act, a commercial e-mail should include a proper advertising identifier (as applicable), an accurate postal address of the sender, and a proper consent mechanism. Companies should establish mechanisms, for example, that will allow them to obtain the appropriate level of user consent (noting that the Act, with regard to mobile commercial e-mail, and certain foreign laws require opt-in consent) before sending commercial e-mails to users. At the same time, companies must ensure that they have the means to properly identify and remove from their marketing lists users who opt out, for example, via an unsubscribe mechanism provided in the commercial e-mail.

In addition, companies should (1) ensure that anyone sending e-mails on the companies' behalf is not engaging in any type of fraudulent or deceptive e-mail practices; (2) properly train their employees and service providers and review their privacy policies to ensure that their actual marketing practices comply with the notice requirements provided in such privacy policies; and (3) continue to follow developments regarding the FTC do-not-e-mail registry and the FCC rules governing mobile commercial e-mail.

- III. Foreign Spam Legislation.** Foreign spam laws could also have an impact on U.S. companies that send e-mail to users abroad. In the EU, for example, an EU Directive imposes restrictions on sending unsolicited communications to individuals via e-mail (including SMS -- Short Message Service), fax, and automatic calling machines. Under the EU Directive, companies must obtain prior explicit (*i.e.*, opt-in) consent *before* they can solicit business or advertise in this way. Note that this is in contrast to the Act's opt-out requirement regarding (non-mobile) commercial e-mail, which puts the onus on the recipients of commercial e-mail to opt out. The EU Directive provides an exception to obtaining opt-in consent in the context of *existing customer relationships*, as long as similar products or services to those already purchased by a customer are the subject of the marketing communication. EU Member States were required to bring the EU Directive into force by October 2003.

If you have any questions regarding compliance with these or other e-mail regulations, please contact Demetrios Eleftheriou (202-303-1134), David Don (202-303-1133) or McLean Sieverding (202-303-1163) in our Washington, D.C. office (202-303-1000).

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, New York 10019. Our telephone number is 212-728-8000 and our facsimile number is 212-728-8111. Our website is located at www.willkie.com.

December 24, 2003

Copyright © 2003 by Willkie Farr & Gallagher LLP.

All Rights Reserved. This memorandum may not be reproduced or disseminated in any form without the express permission of Willkie Farr & Gallagher LLP. This memorandum is provided for news and information purposes only and does not constitute legal advice or an invitation to an attorney-client relationship. While every effort has been made to ensure the accuracy of the information contained herein, Willkie Farr & Gallagher LLP does not guarantee such accuracy and cannot be held liable for any errors in or any reliance upon this information