



WILMER, CUTLER & PICKERING

# Telecommunications Law Update

9 DECEMBER 2003

## CAN-SPAM Act-2003: New Rules for Sending Commercial E-Mail

On December 8, 2003, Congress passed legislation entitled the “CAN-SPAM Act-2003” which now awaits signature by the President. The Act is designed to reduce unsolicited commercial bulk e-mail, commonly known as “spam,” by imposing new restrictions on the sending of commercial e-mail that are enforceable through a range of civil and criminal penalties. For example, the Act makes it unlawful to send commercial e-mail that contains deceptive or misleading header information or subject headers. It also requires that all commercial e-mail messages contain a notice that the message is an advertisement or solicitation, an opt-out mechanism, and the sender’s physical postal address. In addition, the Act criminalizes certain practices used by senders of bulk commercial e-mail to disguise their identities, such as misleading routing information and false return address. The Act also gives the Federal Trade Commission authority to set up a “do-not-e-mail” registry similar to the “do-not-call” registry enacted by the FCC and FTC earlier this year. The Act will go into effect on **January 1, 2004**.

### **Are all e-mail messages subject to the restrictions of the Act?**

No. Most of the Act’s restrictions apply only to *commercial* e-mails. Commercial e-mails are messages *the primary purpose of which is* to advertise or promote a commercial product or service. However, the Act generally does not apply to *transactional or relationship* e-mails the primary purpose of which is either to facilitate a commercial transaction, provide information regarding a commercial product or service purchased by the recipient, notify the recipient of account or membership changes, provide information relating to an employment relationship, or to deliver good or services ordered by the recipient. The Act also gives the FTC the authority to *define “primary purpose” of the message and to modify the definition of “transactional or relationship” messages.*

### **Are commercial messages sent to wireless phones subject to the restrictions of the Act?**

No. The restrictions of the Act do not yet apply to commercial messages sent to wireless phones. However, the Act requires the FCC, in conjunc-

WILMER, CUTLER & PICKERING

WASHINGTON ♦ NEW YORK ♦ BALTIMORE ♦ NORTHERN VIRGINIA ♦ LONDON ♦ BRUSSELS ♦ BERLIN

*This letter is for general informational purposes only and does not represent our legal advice as to any particular set of facts, nor does this letter represent any undertaking to keep recipients advised as to all relevant legal developments.*

tion with the FTC, to promulgate rules within 270 days to govern the sending of such messages to wireless phones.

### **Can unsolicited commercial e-mail still be sent?**

Yes. The Act does not have an opt-in requirement that would require a sender to obtain consent from a recipient prior to transmitting commercial e-mail to that recipient. Instead, senders may lawfully transmit unsolicited commercial e-mail to recipients who have not opted-out, provided that the e-mail complies with the requirements outlined below.

### **What information must a sender include in an unsolicited commercial e-mail?**

The Act requires that a sender include the following information in an unsolicited commercial e-mail:

- a clear and conspicuous notice that the message is an advertisement or solicitation;
- a clear and conspicuous notice that the recipient may opt-out of receiving future commercial e-mails from the sender; and
- the sender's physical postal address.

### **What must the opt-out notice contain?**

The opt-out notice must contain a return e-mail address or Internet-based mechanism by which the recipient may transmit a request to opt-out of the receipt of future commercial e-mail messages from that sender. The notice may offer the recipient either the option to not receive any future e-mail or a list of options from which the recipient may choose the types of commercial e-mail that the recipient wishes to receive or not to receive in the future. In either case, the opt-out mechanism must function for at least 30 days after the transmission of the original commercial e-mail message.

### **What obligations does the Act impose upon a sender once a recipient makes an opt-out request?**

The Act prohibits the sender, or any person acting on behalf of the sender, from sending commercial e-mail messages to that recipient starting 10 business days after the recipient's request. It also prohibits the sender from selling or otherwise transferring the e-mail address of the recipient for any purpose other than compliance with the law.

### **Do the opt-out restrictions apply indefinitely?**

Not necessarily. The opt-out restrictions cease to apply if, subsequent to the opt-out request, the recipient gives affirmative consent to receive commercial e-mail from that sender.

### **What constitutes affirmative consent?**

Affirmative consent to the receipt of commercial e-mail must be express and may be given either in response to a request from the sender or at the recipient's own initiative. Additionally, a recipient may, by consenting to one sender, consent to other third party senders, if "the recipient was given clear and conspicuous notice" when it gave consent to the original sender "that the recipient's [e-mail] address could be transferred to such other [senders] for the purpose of initiating commercial [e-mail]."

### **May a sender continue to send e-mails to a particular recipient from whom it received consent prior to the effective date of the Act?**

Yes. The sender may continue to transmit commercial e-mail to that recipient, but the commercial e-mail must contain an opt-out notice and the sender's physical postal address.

### **If company A transmits a commercial e-mail that contains advertisements for company B as well as Company A's own advertisements,**

**must the ad include an opt-out notice solely for company A or for both companies A and B?**

Probably for both companies A and B. The Act requires any person who “initiates” the transmission of a commercial e-mail to include an opt-out notice, and the Act defines “initiate” to encompass persons who pay a third party to initiate a message on their behalf, as well as those persons who actually transmit the e-mail. Accordingly, by paying company A to send an ad on its behalf, company B is “initiating” the transmission of the commercial e-mail, thereby triggering its obligation, under the Act, to provide an opt-out notice.

**If company A sends the aforementioned e-mail, but is not aware that a recipient has opted-out of receiving e-mail from company B, will either company be liable?**

Company B would be liable but Company A may not be liable. The Act provides that, if a recipient opts-out of receiving certain commercial e-mail, it is unlawful for a sender *or anyone acting on behalf of the sender* to transmit such e-mail to that recipient in the future, however the person acting on behalf of the sender must have actual knowledge or knowledge fairly implied that the recipient has opted out. The Act defines a “sender” as someone who initiates the transmission of a commercial e-mail and has its product advertised in the subject e-mail. As described above, the term “initiates” includes a person’s act of paying another person to initiate a message on their behalf, as well as a person’s act of actually transmitting the e-mail. Accordingly, company B would be liable as the “sender” for the transmission of the e-mail, and company A could be liable for acting on behalf of the sender, company B, by sending the e-mail.

**What restrictions does the Act impose on disguising the origin of commercial e-mail?**

The Act imposes both criminal and civil liability on certain practices used by senders of commercial e-mail to disguise their identity. Specifically,

it is a federal crime to send commercial e-mail containing intentionally misleading information regarding the origin of the e-mail, such as misleading routing or return address information, or to register for multiple e-mail accounts using false registration information. The Act also imposes civil liability on senders who use phony routing information or false return address.

**What restrictions does the Act place on subject headings in commercial e-mail?**

The Act makes it unlawful for the sender to use subject headings that are likely to mislead the recipient as to the contents of the message.

**May a sender be held liable because the e-mail marketing company it hired used automatic “address harvesting” to obtain e-mail addresses?**

Possibly. If the sender had actual or implied knowledge that the e-mail addresses were obtained using an automated means from a website and that the website, at the time the address was obtained, had posted a notice stating that collecting e-mail addresses at the site for the purpose of initiating, or enabling others to initiate, electronic mail messages was prohibited.

**Does the Act establish a “do-not-e-mail” registry?**

No. Although the Act gives the FTC the authority to implement a “do-not-email” registry in the future, it does not mandate that it do so and the FTC has testified before Congress that it opposes the creation of such a registry.

**Does the Act preempt state spam laws?**

Yes. The Act preempts any state law that explicitly regulates the sending of commercial e-mail messages, except to the extent that such law prohibits falsity or deception in any portion of a commercial e-mail. This provision of the

Act protects companies from the difficulties of complying with a patchwork of varying state laws. Thus, the recently enacted California opt-in spam law is likely to be found largely preempted. The Act does *not* preempt state laws that are not specific to e-mail or that relate to general fraud or computer crime.

**Do individual consumers have a cause of action against senders who violate the Act?**

No. The legislation permits only the FTC and certain other federal agencies, state attorneys general, and Internet service providers to bring actions against senders who violate the Act.

**What are the penalties for violation of the Act?**

The Act provides that violation of any of the criminal provisions of the Act is punishable by

up to 5 years in prison and \$6 million in fines and damages. The Act also provides that violations of the civil provisions of the Act may be remedied by injunctive relief and/or statutory damages. The court has discretion to increase a damage award if it determines that the sender acted willfully and knowingly *or* if the sender's activity included an aggravating violation, such as the automatic harvesting of e-mail addresses. The court also may, in its discretion, award attorneys' fees.

If you have questions or would like further information, please contact:

**David Medine** +1 (202) 663-6220  
([david.medine@wilmer.com](mailto:david.medine@wilmer.com))

**J. Beckwith Burr** +1 (202) 663-6695  
([beckwith.burr@wilmer.com](mailto:beckwith.burr@wilmer.com))

This letter is for general informational purposes only and does not represent our legal advice as to any particular set of facts, nor does this letter represent any undertaking to keep recipients advised as to all relevant legal developments. For further information on these or other telecommunications matters, please contact one of the lawyers listed below:

Bradford Berry	<a href="mailto:Bradford.Berry@wilmer.com">Bradford.Berry@wilmer.com</a>
J. Beckwith Burr	<a href="mailto:Beckwith.Burr@wilmer.com">Beckwith.Burr@wilmer.com</a>
Patrick Carome	<a href="mailto:Patrick.Carome@wilmer.com">Patrick.Carome@wilmer.com</a>
Lynn Charytan	<a href="mailto:Lynn.Charytan@wilmer.com">Lynn.Charytan@wilmer.com</a>
John Flynn	<a href="mailto:John.Flynn@wilmer.com">John.Flynn@wilmer.com</a>
Jonathan Frankel	<a href="mailto:Jonathan.Frankel@wilmer.com">Jonathan.Frankel@wilmer.com</a>
John Harwood	<a href="mailto:John.Harwood@wilmer.com">John.Harwood@wilmer.com</a>
Samir Jain	<a href="mailto:Samir.Jain@wilmer.com">Samir.Jain@wilmer.com</a>

Janis Kestenbaum	<a href="mailto:Janis.Kestenbaum@wilmer.com">Janis.Kestenbaum@wilmer.com</a>
William Lake	<a href="mailto:William.Lake@wilmer.com">William.Lake@wilmer.com</a>
David Medine	<a href="mailto:David.Medine@wilmer.com">David.Medine@wilmer.com</a>
Jonathan Nuechterlein	<a href="mailto:Jonathan.Nuechterlein@wilmer.com">Jonathan.Nuechterlein@wilmer.com</a>
William Richardson	<a href="mailto:William.Richardson@wilmer.com">William.Richardson@wilmer.com</a>
Josh Roland	<a href="mailto:Josh.Roland@wilmer.com">Josh.Roland@wilmer.com</a>
Catherine Kane Ronis	<a href="mailto:Catherine.Ronis@wilmer.com">Catherine.Ronis@wilmer.com</a>