

Memorandum

From: Stephen P. Rothman
Date: January 2004
Re: Federal SPAM law – “CAN-SPAM”

1. Federal SPAM Law Enacted; Pre-empts State Law.

A federal law regarding spam (the virtual kind, not the kind your mother used to serve for lunch) took effect January 1, 2004. The federal law is known as the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, or the “CAN-SPAM” Act and was numbered S.877. The law has had little effect on the curbing true spam – bulk emails advertising diet pills, consumer products, Viagra, etc., many of which come from elusive foreign sources that have no respect for law and are difficult to track down. But it does pose some requirements of which legitimate business enterprises in the United States, or sending email to U.S. recipients, should be aware. It also supersedes any state law that expressly regulates commercial email, except to the extent that the state law prohibits false or deceptive messages.

2. Opt-Out Mechanism Required.

The CAN-SPAM law prohibits sending a commercial email that does not contain a functioning return email address or Internet-based mechanism, clearly and conspicuously displayed, by which the recipient can opt out of future messages from the sender. The

required opt-out mechanism has to stay in operation for at least 30 days after the transmission of the message. Starting 10 days after an opt-out request is received by the sender of a commercial email from the recipient of the commercial email, it becomes unlawful for the sender to send another message to the person who opted out. It is permissible for the opt-out process to present the recipient with a menu of choices through which the recipient can elect to receive some kinds of messages but not others, as long as one of the available choices is to receive no email from the sender.

3. Labeling as Advertisement Required.

In addition to the opt-out notice, the federal law requires commercial email messages to contain a clear and conspicuous notice that the message is an advertisement or solicitation. But this notice does not need to be in the subject line, and does not have to be in any specific form (unlike a former California law, which had required the first characters in the subject line of an email advertisement to be “ADV:”). The federal law also requires commercial email messages to contain a valid physical postal address of the sender.

4. State Law Pre-Empted; Limited Private Lawsuit Enforcement.

One of the reasons for the federal law was that many states were adopting their own laws, and there was concern that direct marketers and other businesses would be subject to an array of differing and inconsistent regulatory schemes. California had adopted a law that was also scheduled to take effect on January 1, 2004, SB 186 (which added §17529 and subsequent sections to the California Business and Professions Code). Because the adoption of the CAN-SPAM law, the California law has been mostly superseded. There are several differences between the federal law and the California law that would have taken effect on January 1, 2004. First, the California law would have permitted any individual who received an unsolicited commercial email advertisement to sue the sender for \$1,000 per email, plus attorneys’ fees. The California law hence made it likely that there would be some class action lawsuits against spammers. The federal law, by contrast, is enforced mostly by federal and state government agencies, primarily the Federal Trade Commission and state attorneys general. Internet service providers are also given a right to sue offenders, but those are the only private lawsuits specifically authorized under the federal law. No suits by individual recipients of unlawful messages are contemplated.

5. Opt-Out Rather Than Opt-In.

A second difference between CAN-SPAM and California's SB 186 is that is that the California law would have prohibited unsolicited commercial email advertisements outright, unless the recipient had consented to receive them or had a pre-existing relationship with the sender. The federal law doesn't prohibit an initial unsolicited commercial email advertisement, but only requires a provision by which the recipient can opt out of receiving future email advertisements. In both these regards, then, the federal law is much more moderate, and more palatable to the direct marketing industry, than the California law would have been.

6. Narrow Exemption for Transactional or Relationship Messages.

A third notable difference between CAN-SPAM and the California law that was scheduled to take effect January 1, 2004 is the nature of the exemption for ongoing relationships. The California law would have exempted a message if the recipient had a pre-existing or current business relationship with the advertiser. This was defined to mean that the recipient had made an inquiry and provided his or her email address to the advertiser, or had made an application to the advertiser, or a purchase of products or services offered by the advertiser. Under the California law, therefore, if a consumer had bought a product in the past from an Internet-based retailer, that retailer would have been allowed to send unsolicited email to that consumer about other products, although such an email would have been prohibited in the absence of the prior relationship. The California law would have required an opt-out mechanism where an email was sent in reliance on this pre-existing relationship exemption.

The federal law also exempts what it defines as transactional or relationship messages, but these are much more narrowly defined than the California exemption for a pre-existing relationship. The federal exemption applies, for example, to completing a transaction previously agreed to; providing warranty, product recall or safety information to someone who has already purchased your product; or providing notices to subscribers to some ongoing service, or account balance information. But in the example given above, where an e-tailer that has sold a consumer a product previously, wants to send an email advertising a different product to the same consumer - the federal exemption would not cover this. That does not mean that the federal law would prohibit sending an email about a new product or service to a

customer that had previously purchased other products or services from the sender. It just means that the email would have to contain an opt-out mechanism and otherwise comply with the federal law.

6. Law Can Apply to a Single Email.

It is important for businesses to keep in mind that, like the California law, the federal CAN-SPAM law can apply to a single email, not only to bulk emails sent to multiple recipients. This is a trap for the unwary, as most of us do not regard an individually tailored email as “spam.”

7. Some State Law Provisions Survive CAN-SPAM.

Although the federal law supersedes state law that expressly regulates commercial email, there is a carve-out for state law prohibiting falsity or deception in any portion of a commercial electronic mail message or information attached thereto. Under this exception, a couple of provisions of the California law appear to survive. Sections 17529.5(b) and (c) of the California Business & Professions Code, added by SB 186, prohibit falsified or misrepresented header information, and misleading subject lines, respectively. Since these portions of the California law prohibit falsity or deception in a portion of a commercial email message or attached information, they should still be valid despite the new federal law. The California law provision that would have allowed any recipient of an unsolicited commercial email message to sue for \$1,000 in liquidated damages, plus attorneys’ fees, however, appears to be pre-empted by the federal law. A recipient of an email with false header or subject information, therefore, would need to prove how he or she was actually damaged by receiving that message, rather than getting the automatic \$1,000. Getting messages with such misleading components is no doubt annoying, but for an individual to show actual damages of any significance from having received a message with a misleading header or misleading subject line would be difficult. If a message recipient could prevail in such a case, he or she should also be able to recover attorneys’ fees from the sender, pursuant to the California law. The federal law also states that it does not supersede state trespass, contract or tort law, or state laws related to fraud or computer crime.

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8. Other CAN-SPAM Prohibitions.

The federal law also contains various other prohibitions, including those against harvesting email addresses from the Internet, falsifying sender information and using misleading subject lines.