



The Association of Business Media Companies

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Key Requirements and Prohibitions of the New Federal Spam Law

The federal spam law that will take effect on January 1, 2004, should make compliance by American Business Media members a far easier task than complying with the variety of state laws it replaces. The law does not ban all commercial e-mail messages. Businesses may lawfully use e-mail to advertise and solicit new customers, whether or not there is prior consent to receive e-mails or an established business relationship. It is essentially an “opt out” law that also prohibits fraudulent or deceptive conduct associated with e-mails whose “primary purpose” is to advertise or solicit new customers, referred to as “commercial e-mail.”

The law imposes new obligations on businesses and e-mail marketers that use commercial e-mail. “Transactional and relationship e-mails” to confirm purchase or delivery; provide recall, safety, upgrade, or account information about a product or service purchased by the recipient; or notify recipients of changes to their subscriptions or accounts are not considered to be commercial e-mail and are therefore exempt from most provisions of the law.

Compliance with the new law requires senders of commercial e-mail to take the following steps:

1. Ensure that header information on all e-mail accurately identifies the sender and includes the sender’s e-mail address. This is the only provision of the new law that applies to both commercial and transactional e-mail.
2. Include the sender’s postal address.
3. Notify recipients that they can opt out of future commercial e-mail from the sender, and include a return e-mail address or other Internet-based reply mechanism enabling recipients to refuse future e-mail. Businesses can fulfill this requirement with a list or menu permitting recipients to select the types of e-mail messages they want to receive.
4. Clearly and conspicuously label commercial e-mail messages as advertising material.
5. Use only accurate identification information when registering for e-mail addresses and domain names.
6. Take steps to ensure that no further e-mails are sent to a recipient who has previously opted out by declining e-mail from the sender (and, for e-mails sent by third parties, “sender” is defined as the person or company who originates or transmits the e-mail *and* whose product or service is advertised).

In an effort to prevent fraudulent and deceptive conduct in connection with commercial e-mail messages, the act explicitly prohibits certain activities commonly associated with unsolicited spam. Businesses and e-mail marketers must not:

1. Transmit commercial or transactional e-mail with false header information, or otherwise obscure or mislead recipients about the identity of the sender or an e-mail's contents.
2. Sell or transfer to a third party an e-mail address belonging to a recipient who has previously declined e-mail from the sender (so any list that is rented out or sold must be scrubbed of opt-out names).
3. Use computer programs or software to generate e-mail addresses.
4. Send commercial e-mail to recipients whose e-mail addresses were obtained from a website that promised its visitors their e-mail addresses would not be transferred to a third party.
5. Use a computer to send commercial e-mail without authorization from the computer's owner.
6. Falsely claim to be the registrant of an IP address and subsequently transmit commercial e-mail from that address.

Businesses can be liable for profiting from the promotion of their business or products through e-mails with false or misleading header information. Businesses should make an effort to monitor and prevent such promotion of their businesses and products by third parties, and disclose the transmission of any such e-mail to the Federal Trade Commission.

Although individual recipients may not sue for damages or to enforce provisions of the anti-spam bill, the Federal Trade Commission, individual state governments, and Internet service providers may initiate civil or criminal enforcement of the act. Penalties for violating the new law include fines and imprisonment, disgorgement of any profit, and forfeiture of computer equipment.

The act neither establishes a national Do-Not-E-Mail Registry nor requires the subject lines of commercial e-mail messages to include the label "ADV." Instead, the Federal Trade Commission is to study and report upon issues associated with the implementation of both proposals. After October 1, 2004, the Federal Trade Commission may implement a Do-Not-E-Mail Registry without further Congressional action.

The federal law preempts state spam laws except to the extent that they address false or deceptive e-mails.

This summary of the new spam law is believed to be accurate, but it does not describe every feature of the 54-page bill that Congress passed. If you need more detail or have questions, please contact your attorney, or American Business Media Postal Counsel, David Straus, at (202) 585-6921.