

The following are SVM Corporate Marketing, LLC (“SVM”) comments in response to the FTC’s (the “Commission”) proposed rules regarding the CAN-SPAM Act (the “Act”):

A. Determining whether the “primary purpose” of an email message is commercial

COMMENTS

PRIMARY PURPOSE: SVM believes that the “primary purpose” of an email should not be considered in determining whether the email is a “commercial electronic message” and is therefore, subject to the Act. Rather, SVM believes that the Act should focus on the “transactional or relationship message” aspect of the email to determine whether the email is subject to the Act. If an email message is sent pursuant to a transaction or relationship with the recipient, the fact that the message may also carry a commercial message is irrelevant. The Act should be inapplicable to transactional or relationship messages.

SENDER: However, if the Commission does consider the “primary purpose” of the email in determining whether the email is a “commercial message” and therefore subject to the Act, SVM believes that the identity of the “sender” should be an essential element in making this determination.

A “sender” is defined in the Act as “a person who initiates a commercial electronic mail message and whose product, service or Internet website is advertised or promoted by the message.” This definition of the “sender” is overly broad. The definition of the “sender” should be limited to the “immediate sender,” one level before each recipient, thereby making each party responsible for its own acts. One who “initiates” an email should not be held liable for the acts of parties beyond its control. Please refer to paragraph 2E for a detailed discussion on the definition of the “sender.”

(1) Modifying what is a “transactional or relationship message”

The following definitions should be elaborated:

- a. Email messages that “facilitate, complete, or confirm” a commercial transaction or relationship that the recipient has previously agreed to enter into with the sender. The definition should include the term “relationship” in addition to a transaction, since an email can be sent in response to an ongoing relationship in comparison to a one-time transaction.

- b. Email messages that “provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled.” This definition should be modified to acknowledge that a message is a “transactional or relationship message”, regardless of whether it is sent directly by the employer or with the consent of the employer or on behalf of the employer by a third-party or “by a service in which the employer of the recipient has enrolled on behalf of the recipient.”
- c. Email messages that “deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.” This definition should be modified to specifically include “product or service updates or upgrades.” Further, the definition should be modified to reflect the sender’s ability to send the email to the recipient. Therefore, the definition should state “deliver goods or services, including product or service updates or upgrades, which the sender is entitled to send under the terms of a transaction or relationship that the recipient has previously agreed to enter into with the sender.”

(2) Some transactional or relationship messages may also advertise or promote a commercial product or service. In such a case, is “the primary purpose” of the messages relevant, and if so, what criteria should be applied to determine the “primary purpose” of such a message?

COMMENTS

The “primary purpose” of transactional or relationship messages that also advertise or promote a commercial product or service is not relevant. If an email message can be classified as a “transactional or relationship message,” the primary purpose of the message is irrelevant because the message is not unsolicited and has been sent in connection with a transaction or relationship with the recipient. For example, in the traditional “snail mail” system, when monthly credit card statements are mailed to account-holders, a flier is often attached to the return envelope with offers for free gifts. Even though the account-holder might have signed up with the post office under the “mail preference service” and with the direct marketing association to avoid receiving junk mail, the post office cannot control such mail and the party offering the gifts would not be held liable. Similarly, in the case of email messages, as long as the message is a “transactional or relationship message” it should not be subjected to the Act, regardless of whether the email message also advertises or promotes a commercial product or service.

C. Modifying the 10-day business-day time period for processing opt-out request

Is 10 business days an appropriate deadline for acting on an opt-out request by deleting the requester’s email address from the sender’s email directory or list? And if not, which of the following would be a more appropriate time limit?

COMMENTS

Yes, 10 business days is an appropriate deadline for acting on an opt-out request by deleting the requester’s email address from the sender’s email directory or list. However, the rules should specify who is liable for receipt of notice to opt-out and clearly define the liability of each of the parties namely: the initiator, the immediate sender and any other parties involved in sending the message.

In the online marketing business, there are several levels of hierarchy, and a party whose product is being advertised need not necessarily be the deliverer of the email. Often a third-party vendor is hired to administer online delivery of commercial messages. This same vendor is generally responsible for responding to and effectuating opt-out requests. Therefore, it is essential that the liability of the parties be clearly defined. The initiator of the email should not held liable for failing to opt-out the ultimate recipient with the ten business days if the initiator does not have notice of the recipient’s request. The rules should impose liability only on those parties that knowingly or willfully fail to opt-out the recipient after having received the opt-out request.

Opt-out liability should be restricted to a sender on notice of the recipient’s request to opt-out. For example, a recipient may opt-out of a particular company’s mailing list. However, if an email message contains a third-party advertisement and is sent as part of a larger brochure of advertisements, the third-party should not be held liable for sending the message to the recipient, though the recipient had requested to opt-out of the third-party’s individual mailing list. It is virtually impossible for the sender of an email message to know whether the recipient had requested to opt-out of the third-party’s mailing list. Imposing liability on the sender not on notice or the third-party who cannot control to whom the sender sends these brochures or bundles of advertisements would be highly unfair. The rules should specify that liability for failing to opt-out is limited to parties on notice.

E. Issuing Regulations to Implement Various Aspect of the CAN-SPAM – Defining who is the “sender” of a commercial email message.

Section 3(16) of the Act defines when a person is a “sender” of commercial email. The definition appears to contemplate that more than one person can be a “sender” of commercial email, for example, an email containing ads for four different companies.

COMMENTS

The Act defines a “sender” as a “person who initiates a commercial electronic message and whose product, service or Internet website is advertised or promoted by the service”. As stated earlier, the definition of the “sender” is overly broad, as it will result in holding persons who have no control over sending of an email liable for a violation of the Act.

The definition should be modified to include only the “immediate sender” of the email and not the “initiator” regardless of whether the initiator’s products are being advertised.

Once the initiator sends an email to a recipient, the initiator does not retain control over the email and the recipient may forward it to any number of people, including parties that the initiator does not have a transaction or relationship with. In such a case, the initiator should not be liable for the actions of the recipient, who in turn is the “immediate sender” and should be liable for its own acts. Under the current definition of the sender, the “initiator” would remain unfairly liable and continue to be liable throughout the life of the email.

Thus, the definition imposes an unnecessary and unlimited burden on the “initiator”. As stated in the comments to Question A, the definition of “sender” should be modified and be limited to the “immediate sender,” one level before each recipient, thereby making each party responsible for its own acts and not imposing liability on the “initiator” for the acts of other parties beyond the initiator’s control.

E2. Issuing Regulations to Implement Various Aspects of CAN-SPAM – “Forward-to-a friend” scenarios.

The Act defines “initiate” to mean originate or transmit, or procure the origination or transmission of a message. In turn, the term “procure” means to pay, provide consideration, or induce a person to initiate a message on one’s behalf.

COMMENTS

The Commission should clarify the meaning of “forward-to-a-friend”. SVM believes that the “forward-to-a-friend” scenario should be restricted to instances when the email message is being forwarded in exchange for a promise or offer of monetary consideration or other tangible benefit to any person who forwards the email. For example, when a company induces email recipients to forward the email message in exchange for monetary benefits, thereby committing an overt act of inducement, the company should be held liable for violating the Act. However, when the sender does not commit an overt act of inducement, “forward-to-a friend” should not fall within the Act.

Moreover, there are several exceptions to “forward-to-a-friend” scenarios, which should be highlighted by the Commission. For example, email messages sent by the initiator and forwarded by an “immediate sender” to a recipient who has a personal or commercial relationship with the “immediate sender” should not fall within “forward-to-a-friend” scenario.

Similarly, in the employment context, the Commission should specify that emails received by the employer and forwarded to the employees, does not fall within the “forward-to-a-friend” scenario. For example, employers should not be sanctioned for forwarding information concerning corporate benefits, corporate discount plans, continuing education seminars, etc., to their employees, regardless of whether the “initiator” of such emails had a transaction or relationship with the individual employees or not and regardless of whether the employee had signed-up his work email address with the “Do Not Email” Registry. Such emails should be specifically exempted from the Act to avoid any confusion. It is essential for the smooth functioning of the businesses that the employers continue to have the right to forward emails to their employees.

SVM would appreciate if the Commission would consider SVM’s comments in formulating the proposed rules to implement the Act.