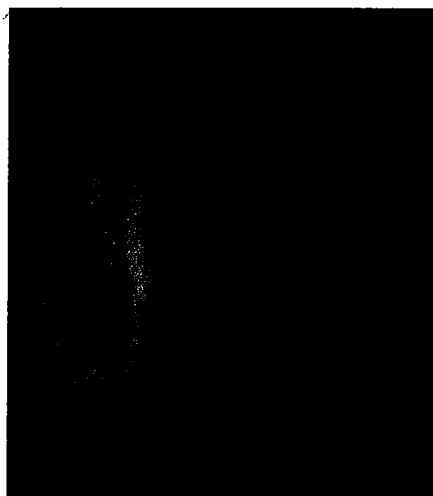
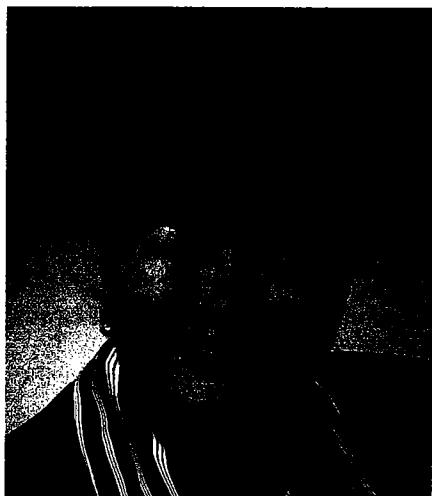


# The CAN-SPAM Act and the FTC's Request for Comments

By Carolyn S. Melvin and Vanessa A. Nelson



**Carolyn S. Melvin** is Of Counsel with Dreher Langer & Tomkies L.L.P., a Columbus, Ohio law firm concentrating in the area of banking and financial services. Ms. Melvin has extensive experience in banking, financial services, and federal and state regulatory, transactional, product development and compliance matters.

Ms. Melvin received her B.A. degree from Dickinson College and her J.D. from the Moritz College of Law at the Ohio State University.

Ms. Melvin is an active member of the Consumer Financial Services Subcommittee of the Business Law Section of the American Bar Association and the Banking, Commercial, and Bankruptcy Law Committee of the Ohio State Bar Association.

**Vanessa A. Nelson** is an associate with Dreher Langer & Tomkies L.L.P., in Columbus, Ohio concentrating in the area of banking and financial services, and is the editor of the firm's *Marketing and Privacy Digest*. She received her A.B. from Princeton University and her J.D. from Case Western Reserve University School of Law.

## I. Introduction The CAN-SPAM Act

The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act of 2003)<sup>1</sup> went into effect on January 1, 2004.

The CAN-SPAM Act provides a number of protections for users of commercial electronic mail including a prohibition against false or mislead-

ing header information, an opt-out mechanism, a number of disclosure requirements, and strong criminal provisions. This article summarizes certain key CAN-SPAM provisions.

## II. Application of the CAN-SPAM Act

The majority of the provisions of the CAN-SPAM Act apply to commercial electronic mail messages. The term "commercial electronic mail message" does not include a "transactional or relationship message." However, the

prohibition against materially false or materially misleading header information applies to transactional and relationship messages as well as commercial electronic mail messages. The CAN-SPAM Act defines five categories of transactional or relationship messages, which include messages sent to: (1) facilitate, complete, or confirm a commercial transaction; (2) provide warranty, product recall, or safety or security information with respect to a product or service used or purchased by the recipient; (3) provide notification concerning a change in account terms or status, or account balance information, or other types of account statement information with respect to an ongoing commercial relationship; (4) provide information related to employment or a related benefit plan; or (5) deliver goods or services under the terms of a transaction that the recipient has previously entered into with the sender.<sup>2</sup>

## III. Opt-Out Provisions

The CAN-SPAM Act requires that e-mailers allow recipients to opt out of receiving further commercial electronic mail and allows senders ten business days to process opt-out requests. The CAN-SPAM Act makes it unlawful for the sender or any person acting on behalf of the sender with actual or implied knowledge of an opt-out request to initiate a commercial electronic mail message to the recipient more than ten days after the request.<sup>3</sup>

1. Pub. L. 108-187 (Dec. 16, 2003).

2. See CAN-SPAM Act §§ 3(17), 5(a).

3. See *id.* § 5(a).

#### IV. Disclosure Requirements

The CAN-SPAM Act creates a number of disclosure requirements and makes it unlawful for a sender to initiate the transmission of a commercial electronic mail message unless the message provides: (1) clear and conspicuous identification that the message is an advertisement or solicitation; (2) clear and conspicuous notice of the ability to opt out of receiving further commercial electronic mail messages from the sender; and (3) a valid physical postal address of the sender.<sup>4</sup>

In addition, the CAN-SPAM Act requires that any sender initiating the transmission of any commercial electronic mail message that includes sexually oriented material must include in the subject heading for the message, and in the portion of the message that is initially viewable to the recipient, the marks or notices prescribed by the Federal Trade Commission (FTC).<sup>5</sup> The FTC published a Notice of Proposed Rulemaking and Request for Public Comment on January 29, 2004, seeking comment on the appropriate mark or notices to be used to designate sexually oriented material. The final rule was published on April 13, 2004, with an effective date of May 19, 2004.<sup>6</sup>

#### V. Penalties Under the CAN-SPAM Act

Penalties for violations of the CAN-SPAM Act include fines, imprisonment, or both depending upon the nature of the offense. Aggravated violations described in section 5(b) of the CAN-SPAM Act include: (1) obtaining electronic mail addresses through improper means including "harvesting" and "dictionary attacks"; (2) using automated means to register for multiple electronic mail accounts or on-line user accounts to transmit to a protected computer an unlawful

commercial electronic mail message; and (3) knowingly relaying or retransmitting an unlawful commercial electronic mail message from a protected computer or computer network accessed without authorization. The CAN-SPAM Act's provisions relating to enforcement by the states and by providers of Internet access services allow for increased statutory damages if a court finds that a defendant has engaged in one of the practices specified in section 5(b) while violating section 5(a) of the CAN-SPAM Act. This increased statutory damages calculation also applies when a court finds that the violations were committed "willfully and knowingly."<sup>7</sup>

#### VI. FTC's Request for Comments

On March 11, 2004, the FTC published an Advance Notice of Proposed Rulemaking and Request for Public Comment seeking comment on several issues related to the CAN-SPAM Act, including mandatory rulemaking, discretionary rule-making, and reports to Congress.<sup>8</sup> The FTC also seeks comment on certain issues related to compliance with the Act. Below is a summary of the key points of the Request for Public Comment.

#### VII. Mandatory "Primary Purpose" Rulemaking

The CAN-SPAM Act directs the FTC to issue regulations no later than twelve months after enactment (*i.e.*, by December 16, 2004) "defining the relevant criteria to facilitate the determination of the 'primary' purpose of an electronic mail message."<sup>9</sup> The term "primary purpose" is incorporated in the definition of "commercial electronic mail message" (*i.e.*, "any electronic mail message the *primary purpose* of which is the

commercial advertisement or promotion of a commercial product or service").<sup>10</sup>

Since the CAN-SPAM Act generally applies to "commercial electronic mail messages," identifying the "primary purpose" of an electronic mail will be critical in determining whether the Act applies to that electronic mail. There is some uncertainty now as to whether the CAN-SPAM Act applies to messages that only incidentally promote products and services, such as "client alerts" from law firms, and other messages that are generally for informational purposes, but which could be interpreted as encouraging the use of the firms' services. Thus, it may be in the interest of law firms and others to submit comments recommending that the FTC adopt a narrow definition of primary purpose.

#### VIII. Discretionary Rulemaking

The CAN-SPAM Act also provides discretionary authority for the FTC to issue regulations:

- modifying the definition of "transactional or relationship message" to the extent necessary to accommodate changes in technology or practices and accomplish the Act's purposes;
- modifying the ten business-day period for honoring opt-out requests;
- specifying additional activities or practices as aggravated violations; and
- implementing the provisions of the Act.<sup>11</sup>

#### IX. Reports to Congress

The CAN-SPAM Act also requires the FTC to provide reports to Congress regarding the advisability of:

7. See *id.* §§ 5(b), 7(f), 7(g).

8. Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, 69 Fed. Reg. 11,775 (Mar. 11, 2004) (to be codified at 16 CFR pt. 316).

9. See CAN-SPAM Act §§ 3(2)(C), 13. See *infra* Pt. XI.

10. CAN-SPAM Act § 3(2)(A) (emphasis added). See *infra* Pt. XI.

11. See *id.* §§ 3(17)(B), 5(c), 5(c)(2), 13(a).

4. See CAN-SPAM Act § 5(a).

5. *Id.* § 5(d).

6. 16 CFR § 316.1.

- establishing a nationwide “Do Not E-Mail” Registry;
- establishing a system for rewarding those who supply information about CAN-SPAM violations;
- setting forth a plan for requiring commercial e-mail to be identifiable from its subject line; and
- providing ways to improve the effectiveness of the CAN-SPAM Act.<sup>12</sup>

**X. Other Issues**

The FTC also invited comment on whether:

- post office boxes or commercial mail drops satisfy the “valid physical postal address of the sender” requirement;
- the Act’s treatment of “from” line information is sufficiently clear;

- the Act requires the “from” line to identify a sender by name; and
- rules should be adopted clarifying: (1) obligations of initiators and recipients who forward messages in “forward-to-a-friend” scenarios; (2) the obligations of multiple senders of a single e-mail; and (3) what constitutes a valid physical postal address.<sup>13</sup>

Comments addressing the nationwide Do Not E-Mail Registry were required to be submitted by March 31, 2004. Comments addressing any other aspect of the CAN-SPAM Act were required to be submitted by April 12, 2004.

**XI. Proposed “Primary Purpose” Rule**

On August 13, 2004, the FTC published a Notice of Proposed Rulemaking and Request for Public Comment seeking comment by September 13, 2004 on its proposed criteria for determining the

“primary purpose” of an electronic mail message as required by the mandatory rulemaking.<sup>14</sup> Based on the comments received in response to the March 11, 2004 Advanced Notice of Proposed Rulemaking discussed herein, as well as its law enforcement experience, the FTC proposed three sets of criteria based on the single fundamental principle that determining “the primary purpose” of an e-mail message must focus on what the message’s recipient would reasonably interpret the primary purpose to be.<sup>15</sup> The Notice does not address the discretionary rulemaking issues raised in the March 11, 2004 Advanced Notice of Proposed Rulemaking, which are to be addressed in a separate Notice.<sup>16</sup>

12. See CAN-SPAM Act §§ 9(a), 10, 11(1), 11(2).

13. See *id.* §§ 5(a)(1), 5(a)(5)(A)(iii).

14. Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, Notice of Proposed Rulemaking and Request for Public Comment, 69 Fed. Reg. 50,091 (Aug. 13, 2004) (to be codified at 16 CFR pt. 316).

15. *Id.* at 50,093, 50,094.

16. *Id.* at 50,093.