

EMAIL SOLICITATIONS: Are You Complying with the CAN-SPAM Act?

The use of email in your business and to generate new business is pervasive and in recognition of this, the federal government has enacted legislation to protect consumers from unwanted solicitations. Unsolicited commercial email (“UCE” or “spam”) has proliferated as have text messaging, instant messaging (“spim”) and voice over internet protocol communications (“spit”).

The purpose of this Alert is to help you identify and comply with important requirements set forth in the CAN-SPAM Act (the acronym commonly used for this legislation, whose full title is “Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003”). This legislation outlaws the use of the following: (i) a false email address to mask the true source of email; (ii) the use of certain false, misleading or deceptive information; (iii) “dictionary attacks” that generate email by combining common names, letters and numbers; and (iv) electronic harvests of email addresses. Additionally the CAN-SPAM Act requires the inclusion of “opt-out” information in commercial emails along with the removal of email addresses from recipient lists for those who have opted out.

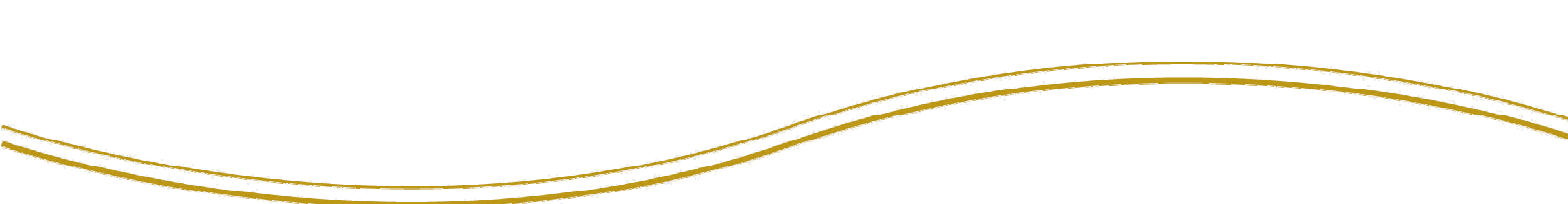
The CAN-SPAM Act applies to all messages whose primary purpose is promotional, and is not limited to unsolicited messages. There is no exception for emails to recipients with whom the sender has a pre-existing business relationship. However, there is an exception for emails relating to an existing commercial transaction (e.g. confirmation of purchase or shipping).

No false or misleading transmission may be sent and the subject line of an email must accurately describe its content. So if the subject line says “From an old friend” and the sender never met the recipient, then that would violate the law.

Additionally, there must be an opt-out mechanism that works for 30 days after the email is sent, does not require the recipient to do more than reply or visit a single page to opt-out, and does not require any payment or information other than the recipient’s email address. The opt-out page may give a menu of options as long as one is an opt-out from all commercial email. Opt-out requests must be honored within 10 days after they are received, do not expire and do not subject the person opting out to the sharing of his/her email address with others, except to comply with the opt-out request.

Though this has not been the subject of any court ruling, the CAN-SPAM Act also likely applies to messages sent to users’ in-boxes for social networks such as Facebook, MySpace and Twitter.





Facebook has won default judgments against those who send spam messages posted to users' walls and tweets and wall postings could fall within the Act's broad definition of an email address which includes "a destination, commonly expressed as a string of characters, consisting of a unique user name or mailbox", and "a reference to an Internet domain...whether or not displayed, to which an electronic mail message can be sent or delivered". Tweets and postings are received at the recipient's unique URL which includes these elements. While the FTC has stated it will not police social media for compliance with CAN-SPAM, the sites themselves will continue to enforce the law in their communities as spam can make them unattractive to current and prospective users. Additionally, social media sites have their own terms of use which typically contain strong anti-spam provisions.

In view of the regulation of these business communications, it behooves every business using emails for their business to be sure it is CAN-SPAM compliant.

This *Internet Law Alert* was written by **Jeanne M. Hamburg**, a Member of Norris McLaughlin & Marcus, its Intellectual Property Group and the Chair of its Internet Law Group. She practices all aspects of trademark and copyright law, handling both transactions and litigation. In 2009 and 2010, she was recognized as a New York Super Lawyer® in Intellectual Property and Intellectual Property Litigation; only five percent of New York attorneys are awarded this honor. For more information concerning the CAN-SPAM Act and/or any Internet Law topics, please do not hesitate to contact Jeanne at jhamburg@nmmlaw.com or (212) 808-0700.

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