

**2008 CAN-SPAM FINAL RULES**

**Summary**

Four new Rules will take effect in 45 days (from date of publication in the Federal Register), concluding a multi-year process that was opened by FTC staff in May of 2005.

**New Rules Overview**

**1. Liability may attach to any “person,” including non-natural persons (see [16 C.F.R. §316.2\(h\)](#))**

This new Rule clarifies that the definition of “person” is the same as that in the Telemarketing Sales Rule, 16 CFR 310.2. It is to be “broadly construed,” is not limited to a natural person, and includes individuals, groups, unincorporated associations, limited or general partnerships, corporations, or other business entities. The Commission confirms that nonprofits that send commercial messages are explicitly within the scope of the CAN-SPAM Act requirements. Based on the Act’s definition of “initiate,” any such entity can be deemed an initiator or sender of a commercial email message.

**2. Designated sender option (see [16 C.F.R. §316.2\(m\)](#))**

This new Rule provides a framework whereby multiple advertisers that appear in the same commercial email message, each of which normally would satisfy the Act’s definition of “sender,” may designate a single sender among them as the sole sender of the message. To benefit from this rule of simplification, justifying a single opt-out link and single valid physical postal address to be displayed in a multi-advertiser email, the advertisers must designate only one such advertiser to be referenced in the *from* line of the email. The sole sender appearing in the *from* line becomes the designated sender of the email, and is responsible on behalf of all such advertisers for complying with key provisions of the Act, including five specific responsibilities:

- The message cannot contain false or misleading transmission information;
- The message cannot contain a deceptive subject heading;
- The message shall clearly and conspicuously include a functioning return email address or other internet-based mechanism, that a recipient may use to opt-out from future commercial messages *of that sole sender appearing in the “from” line*;
- The message shall provide clear and conspicuous identification of the message as an advertisement or solicitation, clear and conspicuous notice of the opportunity to opt out, and a valid physical postal address; and
- The message must comply with the SEXUALLY EXPLICIT labeling rule, if applicable.

If the designated sender in the “from” line fails in any of these obligations, then all advertisers in the email by definition will be deemed “senders,” and each advertiser will remain severally (individually) liable as senders for the non-compliance of the email message.

Remember: the entity listed in the from line must satisfy the definition of “sender,” meaning that its *own* product, service or internet website is advertised or promoted by the email message as well. The Commission proposes a “reasonable consumer” perception test to determine whether an ad or product promotion appears in an email message so as to satisfy this Rule, but indicates that the meaning of “advertised and promoted” is clear and broadly understood. It further suggests that mere inclusion of a reference to a business name or a link to the website of a business in the message does not, by itself, mean that the reference is an advertisement or promotion.

**3. Valid postal address satisfied by accurately-registered P.O. or private mailbox ([see 16 C.F.R. §316.2\(p\)](#))**

The new Rule now allows businesses to publish a sender’s P.O. box or private mailbox in a commercial email message to comply with the valid physical postal address requirement. Note that either must be “accurately” registered with the USPS or with a commercial mail receiving agency established pursuant to USPS regulations. The Commission noted, for example, that if such an address were not accurately identified on the applicable postal form used for registering it, or if the registrant failed to comply with any applicable requirements (e.g., that two forms of valid id be furnished when registering the P.O. Box,) such address would not meet the definition of “valid” physical postal address.

**4. Cannot complicate the opt-out mechanism ( [see 16 C.F.R. §316.4](#))**

This new Rule clarifies that the consumer opt-out required under CAN-SPAM may not be conditioned on the payment of any fee. In addition, the opt-out mechanism must only rely on the consumer’s input of an email address and associated opt-out preferences for that email address, and no more (e.g. any other PII). Further, the opt-out mechanism must rely on either a reply electronic message or visit to a *single* Internet webpage.

Note that this Rule rejects several proposed frameworks for effectuating opt-outs. The Commission indicates that multiple steps to verify the identity of the recipient, logons or other account confirmations are unnecessarily burdensome and do not prevent purported risks of computer security or identity theft.

**Other Commission Guidance**

1. **10 day rule maintained** – to avoid substantial burden on small entity legitimate email marketers.
2. **List owners** – must independently qualify as “senders” in order to offer a compliant opt-out mechanism of their own in lieu of other advertisers (or be the sole opt-out under the “designated sender” rule).
3. **No safe harbor for “affiliate” messages:** any downstream payment may qualify as “inducement” to have affiliates “initiate” the message. . .

By agreeing in advance to pay an affiliate for sales to persons who come to a marketer’s website as a result of an affiliate’s referral, a seller creates an inducement for the affiliate to transmit commercial email messages to the public. Affiliates will be mere initiators unless they independently qualify as senders.

4. Categories of potentially “commercial” messages requiring “primary purpose” analysis:
  - a. **Legally mandated notices** require case-by-case analysis, although most will likely be transactional
  - b. **Debt collection emails** will mostly be transactional, because the primary purpose is not advertising or promotion – PLUS third party agents (collection agents) are allowed to message to consumers on behalf of any principal that has a previously existing business relationship, provided they don’t promote their own product or service at the same time.
  - c. **Copyright infringement** and **market research** are probably not subject to the Act at all because there is no previously existing business relationship and the primary purpose is not commercial – at the fringe there might require a dual purpose analysis
  - d. **Free services** (e.g. *Evite*) may be covered as commercial messages even in the absence of an exchange of consideration – ad or promotion of a commercial product or service (even if free) counts as commercial – they are engaged in commerce.
  - e. Members of **online groups** (e.g. **listservs**) – no exemption, if the primary purpose is commercial, it is covered. Note that opt-in lists eliminate the problem. Plus, best practices seem to accord with the provision of an unsubscribe anyway – just add valid physical postal address.
  - f. **Negotiations and B2B** – no exemption for unsolicited messages that propose a commercial transaction or attempt to launch a negotiation, even if it is a pure B2B

(one employee to another employee) type message. Primary purpose rule applies, and affirmative consent to receive such message overcomes the issue.

- g. **Associations and members** – no de facto exemption, primary purpose rule applies – many will be transactional
- h. **Newsletters** may be goods and services and thus transactional, but if unsolicited, then primary purpose analysis applies.
- i. **Employment messages** – emails from employers to employees offering third-party discounts are transactional. Third party agents of employers can also send messages to employees (under agency theory) provided the message would be transactional if sent by the employer itself. Messages to prospective employees that also contain advertisements should be analyzed under the primary purpose rule.

## **5. Forward-to-a-Friend (FTF)**

- a. Mere provision of a **web-based FTF mechanism** in an email may be considered “routine conveyance,” whereby CAN-SPAM compliance obligations such as scrubbing an unsub list would not be required. But. . . **storing the email for future use will sacrifice routine conveyer status.**
- b. An individual that uses her own email client to forward a message to a friend is not subject to liability, nor is the originator of such a commercial email message, provided that it is merely forwarded through the email client by the consumer (**and that such action is neither procured nor induced** by the original initiator of the message)

Under either scenario, **an entity that originates an FTF commercial email message will be liable as an “initiator” if it “procures” the forwarding of that message** to a new consumer by their friend.

**What does it mean to “procure” the forwarding of the message?** It definitely includes intentional payment/provision of consideration to induce someone to send on your behalf, e.g. offering something of value such as an act, forbearance, or return promise, offering anything of minimal (de minimis) value, offering money, coupons, discounts, awards additional entries in a sweepstakes, etc.

Procurement also includes “**inducing**” the sending of an email without providing consideration directly to the forwarder of an email message. The Commission’s two “inducement” examples seem to focus on scenarios where consideration is indirectly incentivizing the forwarding of a message, without tying payment to the actual forwarder for email campaigns, per se:

Example 1: Seller offers to pay or provide consideration to someone in exchange for generating traffic to a website or for any form of referrals – and that offer results in the forwarding of the seller’s email message.

Example 2: Where the seller does offer to pay an affiliate for generating web traffic, but does not directly offer to pay any sub-affiliate in exchange for generating web traffic or other referrals, the seller will nevertheless be inducing the sending of any emails by the sub-affiliate that advertise the seller’s product, service, or website.

We are told by the Commission that inducements *need not* take the form of any “explicit statement” or “affirmative act,” specifically urging someone to send an email, no matter how forceful the language used. This is a retreat from the position taken previously in the FTC’s prior guidance in the NPRM. Now, we are told that “inducement” requires **something more than a seller’s use of language exhorting consumers to forward a message.**