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SURPRISE! YOU MAY BE SENDING SPAM
NEW FEDERAL LAW COVERS ALL "COMMERCIAL EMAIL"

Contrary to popular belief, the federal CAN-SPAM Act (the "Act") goes well beyond regulating deceptive emails or unsolicited "spam" messages for drugs and pornography sites. The Act, which became effective January 1, 2004, covers *all* "commercial email," defined broadly as any email "*the primary purpose of which is the commercial advertisement or promotion of a commercial product or service.*"

Examples of seemingly innocent emails covered by the Act could include ordinary email text messages sent by legitimate businesses to established customers to promote new services or products, sales, etc.

To comply with the Act: A "commercial email" must include the following:

- A *clear and conspicuous* notice that the recipient can opt-out of future commercial emails from the sender;
- A *clear and conspicuous* internet-based mechanism for opting out, such as a reply email address or a link to the sender's website. The sender must honor opt-outs no later than 10 days after their receipt, and the opt-out mechanism must work for at least 30 days after the original message is sent;
- A *clear and conspicuous* identification that the email is an advertisement or solicitation (unless the recipient has given prior affirmative consent to receive the message); and
- The sender's valid physical postal address.

The trickiest item is identifying the email as an "advertisement or solicitation." The Act does not specify any particular method to do this. For now, one possible way to address all the requirements is to include the following legend *clearly and conspicuously* in any commercial email:

OPT-OUT INSTRUCTIONS FOR ADVERTISING

This is a commercial email or advertisement. You can opt out of receiving future commercial emails from [Company] by the following mechanism: [insert mechanism] [Company]'s address is [insert address].

Under the Act, the Federal Trade Commission is required to submit a plan within 18 months to require commercial email to be identified in the Subject line through the use of "ADV" or a comparable identifier, or report its reasons for recommending

against such plan. Also the FTC is to submit a plan and timetable within 6 months for a Do Not E-Mail registry.

Excluded from the Act are messages with a primary purpose other than advertisement or promotion of a commercial product or service. For example, the Act expressly states that a mere reference to a commercial email or a link to a commercial website does not, by itself, make an email a commercial email if the message is not otherwise promotional. Clearly, there is a lot of room for interpretation here, so the safe course for now is to comply with the Act when in doubt.

Other exclusions apply to certain "transactional or relationship" messages, defined as messages that:

- facilitate, complete or confirm a commercial transaction that the recipient has already agreed to;
- provide warranty information, product recall information or safety or security information with respect to a commercial product or service used or purchased by the recipient;
- deliver goods or services, including product updates or upgrades that the recipient is entitled to receive under the terms of a previously agreed transaction;
- provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or
- notify the recipient of a change in the terms or status of an on-going commercial relationship.

Penalties include fines up to \$250 per violation (i.e., per email message per recipient!), with a cap of \$2 million, which can be tripled in certain circumstances for "willful" violation. The FTC, state authorities, and internet service providers can all sue to enforce the law, but private citizens cannot. Additional civil and criminal penalties apply for transmitting fraudulent or misleading information, and special labeling requirements apply for sexually oriented email.

The Act preempts all state laws that directly regulate the transmission of commercial email, including the highly publicized and controversial California law requiring an "opt-in" for such email. The Act does not, however, preempt state trespass, contract or tort laws or other state laws to the extent that those laws relate to acts of fraud or computer crime.

More Information. If you have any questions or would like additional information, please contact **Barbara A. Young, Edward B. Chansky or Genna Davies** of our office at (203) 222-0885.

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