

Client Alert

A report
for clients
and friends
of the firm

November 2003

Federal Anti-Spam Law On Its Way

A federal anti-Spam law is on its way — finally. Whether the new law does anything to control the barrage of junk mail arriving via e-mail every day remains to be seen. But, for sure, the new law imposes new requirements on commercial e-mail senders. The law is clearing final Congressional hurdles and the President is expected to sign it soon.

On November 22, 2003, following a House-Senate conference on the bill, the House passed an amended version of the CAN-SPAM Act ("Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003"). The Senate passed another, slightly modified, version on November 25, and the House is expected to agree to that version in early December.

Here is what the new law will require:

- All unsolicited commercial electronic mail must contain clear and conspicuous identification that the message is an advertisement or a solicitation.
- All unsolicited commercial e-mail messages must contain a clear "opt-out" mechanism through which recipients can decline to receive further messages from the sender.
- Senders of nonconforming unsolicited mass e-mail could face civil fines of up to \$250 *per electronic message*. The bill makes it a crime, punishable by up to five years in prison, to send fraudulent unsolicited commercial e-mail messages.
- Both the Federal Trade Commission and state attorneys general are vested with the power to enforce these provisions of the bill. The bill also requires the Federal Trade Commission to report on the feasibility of a "Do-Not-Spam" registry within six months of enactment, similar to the "Do-Not-Call" registry created to prevent unsolicited telemarketing telephone calls.

- Perhaps most significantly, the bill clearly pre-empts any state laws that expressly regulate commercial e-mail. Currently, thirty-five states have enacted some form of regulation of commercial e-mail.

A few states have imposed much tighter restrictions on commercial e-mail than that provided in the CAN-SPAM Act. For example, California recently enacted a controversial law that completely bans unsolicited commercial e-mail by imposing an "opt-in" regime, whereby senders of commercial e-mail may only deliver messages with the consumer's express consent. If the CAN-SPAM Act becomes law, such restrictive anti-spam legislation would no longer have any effect.

For further information on this new law and how to comply, contact Chris Wolf in Proskauer's Washington Office at cwolf@proskauer.com or 202-416-6818.

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Proskauer's Computer Security Practice Group counsels clients on their obligations in the event of a computer security breach and the steps that may be taken to avoid or limit legal liability from potential computer intrusions. The following individuals serve as the contact persons who would welcome any questions you might have:

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