

Client Alert

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for clients
and friends
of the firm

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Federal Anti-Spam Law Has Arrived

A federal anti-Spam law is here — 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.

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 agreed to that version on December 8. After clearing final Congressional hurdles, the President signed the law on December 16.

Here is what the new law requires:

- The CAN-SPAM Act (S. 877) sets national standards for sending unsolicited commercial e-mail, bans false or misleading unsolicited commercial e-mail, creates civil and criminal penalties for violators, and authorizes the FTC to implement a "Do-Not-Spam" registry, similar to the "Do-Not-Call" registry created to prevent unsolicited telemarketing telephone calls.
- 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.
- All unsolicited commercial electronic mail must contain a valid physical postal address of the sender in the text of the electronic message.

- 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 requires the Federal Trade Commission to report on the feasibility of a Do-Not-Spam registry within six months of enactment. However, FTC Chairman Timothy Muris says technological solutions, such as filters, hold more promise in curbing spam than law enforcement, and reiterates that a no-spam registry is infeasible.

The CAN-SPAM Act is perhaps known best among privacy professionals for its preemptive effect on thirty-seven existing state anti-spam laws. 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. Now that the CAN-SPAM Act has become law, proponents hope that such restrictive anti-spam legislation will no longer have any effect. The Act clearly preempts California's opt-in regime, but preemption on the whole may not be as complete as many observers believed. The interplay between state and federal law remains to be seen.

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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