OPT-OUT AND COMPLYING WITH THE CAN-SPAM ACT

Disclaimer. This summary is intended solely for informational purposes and is not intended to constitute legal advice or to create an attorney-client relationship between Foley & Lardner and any recipient or reader of this summary. If you have questions about complying with the CAN-SPAM Act you should contact your legal counsel.

1. Introduction. The CAN-SPAM Act of 2003 establishes requirements for companies that send commercial emails. The law covers email whose primary purpose is advertising or promoting a commercial product or service. This includes content on a Website. A “transactional or relationship message” — an email that facilitates an agreed-upon transaction or updates a customer in an existing business relationship — may not contain false or misleading routing information, but otherwise is exempt from most provisions of the Act. Violations of the Act can result in civil fines and criminal liability. The Act applies to consumer and business recipients and makes no exceptions for business-to-business emails.

2. Commercial Emails vs. Transactional or Relationship Emails. The requirements of the CAN-SPAM Act differ based on whether the email is (1) a “commercial” email or (2) a “transactional or relationship email.” An email is “commercial” if the primary purpose of the email is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose). A “transactional or relationship” email facilitates a commercial transaction (e.g., purchase of products or services) that the recipient has previously entered into, or to provide information relating to a product or service already purchased by the recipient from the sender, such as warranty or recall information or account balances. Most requirements and prohibitions of the Act apply only to commercial messages, but the Act does prohibit both commercial and transactional / relationship messages from containing false or misleading routing information (e.g., the source, destination, originating email address, “from” line, etc.).

3. Prior Consent / Opt-In Not Required. Opt-Out Mechanisms and Procedures. Prior express consent or opt-in consent is not required in order to send commercial emails. Commercial emails may not, however, be sent to recipients who have opted-out or unsubscribed from receiving commercial emails from the sender.

A. Opt-Out Rather than Opt-In. While some jurisdictions outside of the United States (e.g. the European Union and Canada) require opt-in in order to send marketing or commercial emails, the US has been an opt-out jurisdiction since the passage of CAN-SPAM. This means marketing emails can be sent to recipients unless and until they have opted out of receiving marketing emails from the sender.

Section 7704(a)(3) of the Act requires that marketing messages contain an opt-out or unsubscribe mechanism:

(3) Inclusion of return address or comparable mechanism in commercial electronic mail

(A) In general, it is unlawful for any person to initiate the transmission to a protected computer of a commercial electronic mail message that does not contain a functioning return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed, that—

(i) a recipient may use to submit, in a manner specified in the message, a reply electronic mail message or other form of Internet-based communication requesting not to receive future commercial electronic mail messages from that sender at the electronic mail address where the message was received; and
(ii) remains capable of receiving such messages or communications for no less than 30 days after the transmission of the original message.

Section 7704(a)(4) of the Act states the opt out requirements:

(4) Prohibition of transmission of commercial electronic mail after objection

(A) IN GENERAL If a recipient makes a request using a mechanism provided pursuant to paragraph (3) not to receive some or any commercial electronic mail messages from such sender, then it is unlawful:

(i) for the sender to initiate the transmission to the recipient, more than 10 business days after the receipt of such request, of a commercial electronic mail message that falls within the scope of the request;

(ii) for any person acting on behalf of the sender to initiate the transmission to the recipient, more than 10 business days after the receipt of such request, of a commercial electronic mail message with actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that such message falls within the scope of the request;

15 USC § 7704(a)(3)

(iii) for any person acting on behalf of the sender to assist in initiating the transmission to the recipient, through the provision or selection of addresses to which the message will be sent, of a commercial electronic mail message with actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that such message would violate clause (i) or (ii); or

(iv) for the sender, or any other person who knows that the recipient, has made such a request, to sell, lease, exchange, or otherwise transfer or release the electronic mail address of the recipient (including through any transaction or other transfer involving mailing lists bearing the electronic mail address of the recipient) for any purpose other than compliance with this Act or other provision of law.

Thus, the Act does not contain any requirements or reference to opting-in to receive marketing email messages. As the Federal Trade Commission has stated in public guidance,

Here’s a rundown of CAN-SPAM’s main requirements:

1. **Don’t use false or misleading header information.** Your “From,” “To,” “Reply-To,” and routing information – including the originating domain name and email address – must be accurate and identify the person or business who initiated the message.

2. **Don’t use deceptive subject lines.** The subject line must accurately reflect the content of the message.

3. **Identify the message as an ad.** The law gives you a lot of leeway in how to do this, but you must disclose clearly and conspicuously that your message is an advertisement.

4. **Tell recipients where you’re located.** Your message must include your valid physical postal address. This can be your current street address, a post office box you’ve registered with the U.S. Postal Service, or a private mailbox you’ve registered with a commercial mail receiving agency established under Postal Service regulations.
5. Tell recipients how to opt out of receiving future email from you. Your message must include a clear and conspicuous explanation of how the recipient can opt out of getting email from you in the future. Craft the notice in a way that’s easy for an ordinary person to recognize, read, and understand. Creative use of type size, color, and location can improve clarity. Give a return email address or another easy Internet-based way to allow people to communicate their choice to you. You may create a menu to allow a recipient [https://www.ftc.gov/tips-advice/business-center/guidance/can-spam-act-compliance-guide-business](https://www.ftc.gov/tips-advice/business-center/guidance/can-spam-act-compliance-guide-business) people to communicate their choice to you. You may create a menu to allow a recipient to opt out of certain types of messages, but you must include the option to stop all commercial messages from you. Make sure your spam filter doesn’t block these opt-out requests.

6. Honor opt-out requests promptly. Any opt-out mechanism you offer must be able to process opt-out requests for at least 30 days after you send your message. You must honor a recipient’s opt-out request within 10 business days. You can’t charge a fee, require the recipient to give you any personally identifying information beyond an email address, or make the recipient take any step other than sending a reply email or visiting a single page on an Internet website as a condition for honoring an opt-out request. Once people have told you they don’t want to receive more messages from you, you can’t sell or transfer their email addresses, even in the form of a mailing list. The only exception is that you may transfer the addresses to a company you’ve hired to help you comply with the CAN-SPAM Act.

7. Monitor what others are doing on your behalf. The law makes clear that even if you hire another company to handle your email marketing, you can’t contract away your legal responsibility to comply with the law. Both the company whose product is promoted in the message and the company that actually sends the message may be held legally responsible.

As required by the Act, the FTC recently reviewed the law and accepted public comments in order to determine whether the law was still appropriate as written. On February 12, 2019, the FTC confirmed:

B. Requirements. The Act does not require that recipients affirmatively consent or opt-in to receiving commercial emails. Rather, each email must contain a clear and conspicuous notice the recipient can opt-out of receiving more commercial email from the sender.

C. Commercial emails must contain a return email address or another Internet-based response mechanism that allows the recipient to indicate it does not want future email messages to that email address. It is permissible to create a "menu" of choices to allow a recipient to opt-out of certain types of messages, but the email must include the option to end any and all commercial messages from the sender.

D. The return email address / opt-out mechanism must be able to process opt-out requests for at least thirty (30) days after the commercial email is sent. When a sender receives an opt-out request, the sender must honor and stop sending email to the requestor’s email address no later than ten (10) business days after receipt of the request. A sender cannot help another entity send email to that address, or have another entity send email on the sender’s behalf to that address. It is also a violation of the Act to sell or transfer the email addresses of people who choose not to receive commercial email, even in the form of a mailing list, unless the sender transfers the addresses so another entity can comply with the law.

E. The sender cannot require a recipient to pay a fee, provide information other than the person’s email address and opt-out preferences, or take steps other than sending a reply email or visiting a single Web page, as a condition of receiving or honoring opt-out requests.
4. Identification of Commercial Email as an Advertisement. Commercial emails must be clearly and conspicuously identified as an advertisement or solicitation. The email should state at the beginning of the message (there does not have to be ADV or similar identification in the subject line) that it is an advertisement from the sender, and generally describe the products or services being advertised. If the recipient previously provided consent to receive commercial emails from the sender (e.g., through an opt-in process), then the email does not have to be conspicuously identified as an advertisement.

5. Message Routing / Header Information Cannot Contain False or Misleading Information. The "From," "To," and routing information on a commercial email – including the originating domain name and email address – must be accurate and identify the person who initiated the email. As noted above, this applies to commercial as well as transactional / relationship emails.

6. Subject Lines May Not Be Deceptive. The subject line should be clear, truthful and accurate, and cannot be misleading to the recipient about the content or subject matter of the message.

7. Identification of Postal Address. A commercial email must include the sender’s valid physical postal address, which can be a post office box or private mailbox.

8. Multiple Senders / Advertisers. In the event two or more advertisers desire to send an email including content on behalf of each advertiser (e.g., a joint-marketing arrangement), the advertisers must designate one of them as the sender that must honor opt-out requests and satisfy the other statutory obligations. Then sender must be the only person identified in the “from” line of the email and must comply with all requirements under the Act. Even though there is one sender, all other advertisers are still responsible for compliance under the Act. Accordingly, each advertiser should carefully review and assess the compliance of the joint email, investigate the reputation of the sender, and take appropriate steps to ensure the sender’s compliance with the Act, including the all opt-out requests.

9. No Sexually-Explicit Material. The email should not include sexually-explicit material. The Act provides additional requirements for labeling, disclaimers and presentation of emails with sexually-explicit content.

10. No Harvesting or Automatic Email Generation. Senders should not use automated means to gather or “harvest” email addresses from third party web sites with terms that or randomly generating possible email addresses.
GENERAL APPLICABILITY AND REQUIREMENTS OF THE CALIFORNIA CONSUMER PRIVACY ACT

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November 5, 2019

Disclaimer. This summary of the California Consumer Privacy Act (CCPA) is intended solely for informational purposes and is not intended to constitute legal advice or to create an attorney-client relationship between Foley & Lardner and any recipient or reader of this summary. This is not intended to be an exhaustive summary of all requirements of the CCPA. If you have questions about complying with the CCPA, you should contact your legal counsel.

1. Introduction. The CCPA intended to protect the data privacy rights of citizens living in California. The law forces companies to provide more information to consumers about what’s being done with their data and gives them more control over the sharing of their data.

2. Applicability. The CCPA covers any business—a for-profit legal entity—that collects and sells consumer “personal information”, with a few exemptions discussed below. The law sets a floor in terms of revenue and the number of consumer records being processed for the CCPA to kick in. A company has to meet one of the following for the CCPA to apply:

   Have $25 million or more in annual revenue; or
   Annually buy, receive, sell or share personal information of 50,000 or more California consumers, households or devices; or
   Earn more than half of its annual revenue selling consumers’ personal data.

The following types of businesses are exempt:
Health providers and insurers already under HIPAA
Banks and financial companies covered by Gramm-Leach-Bliley
Credit reporting agencies (Equifax, TransUnion, etc.) that are under the Fair Credit Reporting Act

3. Consumers’ Rights. The new rights under the CCPA are similar to many contained in the EU’s General Data Protection Regulation. The CCPA gives California residents the right to request that a business:
   Disclose the categories and specific pieces of personal information it has collected.
   Disclose the categories of sources from which the personal information is collected.
   Disclose the business or commercial purpose for collecting or selling the personal information.
   Disclose the categories of third parties with which the business shares the personal information.
   Delete any personal information about the consumer that the business has collected from a consumer, subject to certain exceptions.
   Not “sell” (broadly defined) the consumer’s personal information if the consumer opts-out (the “do not sell” opt-out).
4. Privacy Policies / Disclosures. The CCPA has added several new substantive elements to the required disclosures that must be included in a privacy notice or policy. In addition to the information that must be included under the existing California laws or provided pursuant to California’s "Shine the Light" law, online privacy policies must include:

A description of consumers' rights under the CCPA.
A description of the categories of personal information collected by the business in the preceding 12 months.
The commercial and business purposes for which the personal information is collected.
The categories of personal information sold or disclosed for a business purpose in the preceding 12 months.
The categories of third parties with which personal information is shared.
If the Company sells personal information, a link to a "Do Not Sell My Personal Information" web-based opt-out tool.
A description of any financial incentives for providing data or not exercising rights (e.g., if the company offers a 15% discount to individuals who provide their email address for marketing purposes, this incentive must be disclosed in the privacy policy).
FREQUENTLY ASKED QUESTIONS REGARDING THE CALIFORNIA CONSUMER PRIVACY ACT

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November 7, 2019

Disclaimer. These FAQs regarding the California Consumer Privacy Act (CCPA) are intended solely for informational purposes and is not intended to constitute legal advice or to create an attorney-client relationship between Foley & Lardner and any recipient or reader of this summary. This is not intended to be an exhaustive summary of all requirements of the CCPA. If you have questions about complying with the CCPA, you should contact your legal counsel.

1. Who does the CCPA apply to?
The CCPA applies to any business—a for-profit legal entity—that collects and sells consumer “personal information”, with a few exemptions discussed below. The law sets a floor in terms of revenue and the number of consumer records being processed for the CCPA to kick in. A company has to meet one of the following for the CCPA to apply:

- Have $25 million or more in annual revenue; or
- Annually buy, receive, sell or share personal information of 50,000 or more California consumers, households or devices; or
- Earn more than half of its annual revenue selling consumers’ personal data.

The following types of businesses are exempt:

- Health providers and insurers already under HIPAA
- Banks and financial companies covered by Gramm-Leach-Bliley
- Credit reporting agencies (Equifax, TransUnion, etc.) that are under the Fair Credit Reporting Act

2. What if we are not located and have no facilities in California?
If you collect personal information from residents of the State of California while they are in California you are likely doing business in California. Thus the law would apply to you if your company satisfies any of the applicability triggers discussed above.

3. What qualifies as “personal information” under the CCPA?
The CCPA defines personal information broadly to include information that can identify, relate to, describe, be associated with, or be reasonably capable of being associated with a particular consumer or household. The CCPA’s private right of action provision relating to data breaches incorporates a narrower definition of personal information (discussed below).

The law identifies a non-exhaustive list of categories of personal information, including:

- Identifiers including real name, alias, postal address, unique personal identifier, online identifier, internet protocol (IP) address, email address, account name, social security number, driver’s license number, passport number, or other similar identifiers;
- Characteristics of protected classifications under California or federal law;
- Commercial information, including records of personal property, products, or services purchased, obtained, or considered, or other purchasing or consuming histories or tendencies;
Biometric information;
Internet or other electronic network activity information, including, but not limited to, browsing history, search history, and information regarding a consumer’s interaction with an internet website, application, or advertisement;
Geolocation data;
Audio, electronic, visual, thermal, olfactory, or similar information;
Professional or employment-related information; and
Education information, defined as information that is not publicly available personally identifiable information as defined in the Family Educational Rights and Privacy Act (FERPA).

The definition also pulls in inferences from personal information used to create a profile about a consumer that would reflect the person’s preferences, characteristics, psychological trends, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes. Thus, for example, businesses that leverage artificial intelligence (AI) to help determine consumer preferences or identify preferred job candidates must look more carefully at what personal information they may maintain about their consumers (including employees) for purposes of CCPA.

Personal information does not include de-identified or aggregate consumer information.

4. What rights do consumers have under the CCPA?
The new rights under the CCPA are similar to many contained in the EU’s General Data Protection Regulation. The CCPA gives California residents the right to request that a business:
Disclose the categories and specific pieces of personal information it has collected.
Disclose the categories of sources from which the personal information is collected.
Disclose the business or commercial purpose for collecting or selling the personal information.
Disclose the categories of third parties with which the business shares the personal information.
Delete any personal information about the consumer that the business has collected from a consumer, subject to certain exceptions.
Not “sell” (broadly defined) the consumer’s personal information if the consumer opts-out (the “do not sell” opt-out).

5. Do we need to revise our privacy policies; and if so, what should it cover?
Probably; if the law applies to you. The CCPA has added several new substantive elements to the required disclosures that must be included in a privacy notice or policy. In addition to the information that must be included under the existing California laws or provided pursuant to California’s “Shine the Light” law, online privacy policies must include:
A description of consumers’ rights under the CCPA.
A description of the categories of personal information collected by the business in the preceding 12 months.
The commercial and business purposes for which the personal information is collected.
The categories of third parties with which personal information is shared.
If the Company sell personal information, a link to a “Do Not Sell My Personal Information” web-based opt-out tool.
A description of any financial incentives for providing data or not exercising rights (e.g., if the company offers a 15% discount to individuals who provide their email address for marketing purposes, this incentive must be disclosed in the privacy policy).

6. For the “do not sell” opt-out, what constitutes the “sale” of personal information?
A “sale” of Personal Information under the CCPA is defined broadly to include the “selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means” the Personal Information of a Consumer to another business or third party “for monetary or other valuable consideration.”

This broad definition suggests that if Personal Information is provided as part of a larger business relationship, a “sale” may have occurred even if no amounts are paid directly for the data itself. In addition, a website may be “selling” Personal Information by passing such information to third-party ad networks through cookies.

7. What would NOT be considered a “sale” of personal information?
The law provides a non-exhaustive list of examples which would not be considered a sale of personal information:

A Consumer uses or directs the Business to intentionally disclose Personal Information to a third party. An “intentional” interaction occurs when the Consumer intends to interact with the third party via one or more deliberate actions. Hovering over a piece of content or closing it does not qualify as a “deliberate action”.

A Business shares a Consumer identifier to alert a third party of a Consumer’s opt-out decision.

Personal Information is shared with a third party to perform a “business purpose” (explained below); the Business has provided notice of this sharing and the opt-out right (as described below); and the third party does not further collect, sell or use the Personal Information except as necessary to perform the business purpose.

The Personal Information is an asset that is part of a merger, acquisition, bankruptcy or other transaction in which the third party assumes control of all or part of the Business, provided the Business complies with the CCPA disclosure requirements relating to the disclosure of information collected or sold (discussed below). If the acquirer plans to alter how it will use or share the Personal Information in a manner materially inconsistent with the promises made at the time of collection, it must provide prior notice of the new practices to the Consumer and include a “prominent and robust” notice so the Consumer can opt out. Note that the CCPA also warns Businesses that material, retroactive privacy policy changes must not violate California’s Unfair Competition Law — a statement apparently designed to address Businesses that want to make significant changes to a privacy policy in light of an impending deal.
EXEMPLARY OF PRIVACY POLICIES OF OUR PARTNER WEBSITES

Our partner websites are mostly lead generation websites that drive traffic to a page, get the visitor to fill out a form, then sell that contact information to vendors.

We work with over 12,000 websites. We have provided three examples of privacy policies, and we have also furnished a list of several other URL examples if you need to investigate further.

You will receive the “source” URL and opt-in date with every contact record.

Here are a few examples of websites and the privacy policies of those websites.

Example 1: timelypayday.com
As a condition of registration, registrants agree that timelypayday.net may share their Personally Identifiable Information (PII) with the Network Sites and unaffiliated third parties. If you do not agree that timelypayday.net may share your PII with such entities, you may not register on timelypayday.net, and if you are already registered, you must immediately terminate your account, by following the instructions in “Opting-Out of Further Communications.”

Example 2: www.carinsurancequote.net
We may disclose personally identifiable information:
To third parties when you (i) engage in certain activities on this Site that are sponsored by them, such as purchasing products or services offered by a third party, electing to receive information or communications from a third party, or electing to participate in contests, sweepstakes, games or other programs sponsored in whole or in part by a third party, and/or (ii) respond to promotional materials from us and you authorize a third party to use your personally identifiable information to, for example, send you additional promotional materials, provide you a product or service, or enter you into a sweepstakes. When we disclose your personally identifiable information to these third parties, your personally identifiable information will become permanently subject to the information use and sharing practices of the third party, and the third party will not be restricted by this Privacy Policy with respect to its use and further sharing of your personally identifiable information.

Example 3: http://originalcruisegiveaway.com/
How Personal Information is Used:
This Privacy Policy applies to consumers that have signed up on our website or our partners websites. We may sell the personal information that you supply to us and we may work with other third party businesses to bring selected retail opportunities to our members via direct mail, email and telemarketing. These businesses may include providers of direct marketing services and applications, including lookup and reference, data enhancement, suppression and validation and email marketing. Regardless of any State or Federal Do Not Call Registrations, you the customer expressly consent to be contacted via telephone in reference to this offer. You may opt-out of receiving future mailings; see the choice/opt-out section below we disclose your personally identifiable information to these third parties; your personally identifiable information will become permanently subject to the information use and sharing practices of the third party, and the third party will not be restricted by this Privacy Policy with respect to its use and further sharing of your personally identifiable information.

OTHER PARTNER URL EXAMPLES:

- sweepstakesmatch.com
- originalcruisegiveaway.com
- carinsurancequote.net
- checkmyscores.com