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Bulletins

Japanese New Anti-Spam Law

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Japanese New Anti-Spam Law

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The spam problem in Japan has evolved rapidly over the past few years. As late as 2004, the vast majority of spam was sent to mobile phones rather than PCs. This is no longer true: Japan has been largely successful in its efforts to reduce mobile spam; however, spam sent to PCs has exploded and now constitutes the vast majority of spam in Japan. In 2006, close to 90% of spam in Japan was sent to PCs (it was less than 30% in 2004).^[1] Of the spam sent to PCs, more than 90% was advertisements for matchmaking (dating) sites, 2% was for adult sites and the remaining messages were for all other content.^[2]

In response to the changing nature of spam in Japan, regulations to combat it have accordingly evolved. A large increase in spam sent to mobile phones gave rise to industry self-regulation in 2001 by mobile operators and, in 2002, two national laws were enacted to combat spam – the Law Concerning the Proper Transmission of Specified Electronic Mail (the “Anti-Spam Law”) and the Law for the Partial Amendment to the Law Concerning Specified Commercial Transactions (the “Revised Transactions Law”). The Japanese government first amended the Anti-Spam Law in 2005 (the “2005 Anti-Spam Law”). Most recently, on June 6, 2008, the government amended the Anti-Spam Law a second time (the “New Anti-Spam Law”) in hopes of curtailing its continuing spam problem. The New Anti-Spam Law will go into effect once the government issues an implementing order with regulations supplementing the law, which it must do by December 6, 2008. The Ministry of Internal Affairs and Communication (“MIC”), which is in charge of regulating the telecommunications and broadcasting industry, enforces the New Anti-Spam Law.

The New Anti-Spam Law applies to all commercial email sent to or from Japan by for-profit groups or individuals engaged in business (“Senders”).^[3] Accordingly, the rules described in this Alert are applicable to any Sender who sends commercial email to recipients in Japan, regardless of where the Senders are located.

In the 2008 amendments, Japan has made several substantial changes to the 2005 Anti-Spam Law:

1. Previously, the law provided for substantial categories of commercial email that were exempt from its rules. These exemptions no longer exist.
2. Before the amendments, the law established an “opt-out” regime, much like the U.S.’s CAN-SPAM Act. Japan has decided that this framework is insufficient to curtail unwanted spam and has switched to an “opt-in” regime where recipients must affirmatively agree to receive commercial email before Senders can send it.
3. Fines for violating the law or relevant regulations have been substantially increased.

Below we outline the basic requirements of the New Anti-Spam Law and point out some of the main differences between the law and the 2005 Anti-Spam Law. We also discuss how businesses can change their practices to comply with the new law.

Permitted Recipients of Commercial Email (Opt-In)

Under the New Anti-Spam Law, a Sender may only distribute commercial email if the recipient falls into one of the following categories: ^[4]

- Individuals who have notified the Sender in advance that they request or agree to receive commercial email;
- Individuals who have provided the Sender with their own email addresses;
- Individuals who have a preexisting business relationship with the Sender; and
- Individuals (limited to those engaged in for-profit activities) or groups that publicly announce their own email addresses.

Because all of these categories require affirmative acts by the recipient before a Sender is permitted to transmit commercial email, Japan has essentially adopted a modified opt-in system for commercial email regulation.

The New Anti-Spam Law does not describe how individuals must notify Senders of their email addresses for the opt-in to be valid. Nor does it indicate what constitutes a “business relationship” or how an individual or group “publicly announces their own email address” for opt-in purposes. The government’s forthcoming implementing order will clarify these issues.

Additional Requirements

In addition to requiring opt-in consent; there are four further requirements under the New Anti-Spam Law that Senders must fulfill:

- Senders must keep records which prove that the recipients requested the emails;
- Senders must honor opt-out requests received from individuals;
- Senders must include certain information in the commercial email sent; and
- Senders are prohibited from sending email using programs that generate email addresses and from falsifying information about themselves.

Record-Keeping Requirements

Senders who send commercial email must keep records that prove that the recipients agreed to receive commercial emails in advance.^[5] The implementing order will specify exactly what information the Sender must preserve to fulfill this requirement.

Honoring Opt-Outs

Senders are prohibited from sending commercial email to recipients from whom Senders have received subsequent opt-out requests. There is no “grace period” for complying with such a request.

Labeling Requirements

Commercial email must contain the Sender’s name and title, as well as an email address that recipients can use to send opt-out notifications.^[6] These items must be clearly indicated so they are visible on the recipient’s screen.^[7] Although these requirements are less strict than those imposed by the 2005 Anti-Spam Law, the Japanese government may impose additional labeling requirements when it issues the implementing order.^[8]

Computer Generated Email Addresses and False Sender Information

Senders may not send email to email addresses that have been generated using a program that automatically combines symbols, letters and numbers to create email addresses.^[9] They may not send blank emails, which attempt to obtain active addresses, or disguised emails, such as those apparently from friends of the recipient. Senders must also not disguise or falsify the email address used to send commercial email or the symbols, letters or numbers that identify the electronic communication device or facility used to send the email.

Penalties for Violation

If a Sender violates its obligations under the New Anti-Spam Law, the Minister of MIC can order the Sender to take measures to bring itself into compliance.^[10] The Sender may also be subject to a fine of up to ¥1,000,000 or imprisonment for up to a year if it violates such an order.^[11] A Sender may also be subject to these penalties if commercial email using false Sender information is sent in violation of Article 5.^[12]

The Minister of MIC may also require Senders to submit reports regarding the Sender’s transmission of

commercial email, and may inspect the Sender's premises, books and other documents.^[13] A Sender may be subject to a penalty of up to ¥1,000,000 if they refuse to submit such reports or to cooperate with an inspection.^[14]

In addition, under the New Anti-Spam Law, Senders may face additional penalties if their agents violate the provisions of the law. A Sender whose agent violates an administrative order from MIC to comply with the law is subject to a fine of up to ¥30,000,000.^[15] If a Sender's agent refuses to cooperate with a MIC investigation, the Sender is subject to a fine of up to ¥1,000,000.^[16]

Lastly, the New Anti-Spam Law authorizes MIC to share information with foreign governments.^[17] Accordingly, non-Japanese Senders may face scrutiny from their home regulators in regard to commercial email they send to Japan.

Preparing for the New Law

Many of the details of the New Anti-Spam Law's requirements will not be clear until the Japanese government issues its implementing order. Nevertheless, Senders must stop sending commercial email to recipients that do not fall into one of the opt-in categories as soon as the new law takes effect.

The first step that Senders should take is to assess the current recipients of their commercial email and determine whether each of the categories of recipients falls within one of the exceptions.

Senders may wish to send an email to its current recipients who do not fall into any of the opt-in groups to opt-in by replying and agreeing to receive commercial email in the future. Senders should do so quickly because they may not be able to send such emails once the law takes effect.

Another step that Senders can take is to create an opt-in mechanism on their websites to attract new recipients for commercial email. For example, if the site has a page where the user enters personal information such as an email address, the site can also present the user with a check-box next to text that says "I agree to receive commercial email from the Sender" which the user can check off. A Sender who received a user's email address through this mechanism would then be able to send the user commercial email.

Lastly, Senders should adopt a system of keeping accurate records of requests by recipients to receive commercial email. As noted above, Senders will have an affirmative duty to keep such records once the New Anti-Spam Law becomes effective.

Footnotes

^[1] "Japan's Countermeasures Against Spam," Hiroyo Hiramatsu, Deputy Director of Telecommunications Consumer Policy Division, Telecommunications Bureau of the Ministry of Internal Affairs and Communication (MIC), Japan, April 10, 2007, page 1, citing survey by Nippon Information Communications Association.

^[2] Id.

^[3] The New Anti-Spam Law, Article 2.2.

^[4] The New Anti-Spam Law, Article 3.1.

^[5] The New Anti-Spam Law, Article 3.2.

^[6] The New Anti-Spam Law, Article 4.

^[7] Id.

^[8] Id.

^[9] The New Anti-Spam Law, Article 5.

^[10] The New Anti-Spam Law, Article 7.

^[11] The New Anti-Spam Law, Article 34. Violators of an administrative order concerning record keeping requirements are only subject to a ¥1,000,000 fine, not imprisonment.

^[12] Id.

^[13] The New Anti-Spam Law, Article 28.

^[14] The New Anti-Spam Law, Article 35.

^[15] The New Anti-Spam Law, Article 37.

^[16] Id.

^[17] The New Anti-Spam Law, Article 30.

