

Trade & Professional Association Bulletin

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THE EFFECT OF THE CAN SPAM ACT ON ASSOCIATIONS

President Bush signed the “Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003” (the “CAN SPAM” Act) into law on December 16, 2003. CAN SPAM became effective January 1, 2004 and preempts all state and local laws, with the exception of those which prohibit false and deceptive e-mails. While associations will no longer have to concern themselves with each state’s laws on e-mail solicitation, the new federal law does have implications for associations that communicate with their members via e-mail.

CAN SPAM applies to all “commercial” e-mail, regardless of whether or not the e-mail is solicited. Commercial e-mails must have accurate header information, including the source, destination and routing information. This requires commercial e-mails to include an accurate originating domain name and e-mail address specifically in the “from” line. Commercial e-mails also must not contain misleading subject lines and include a valid physical postal address for the sender. Absent “affirmative consent” from a recipient, commercial e-mails must clearly indicate their purpose as advertisement or solicitation. This can be indicated in either the subject line or the text of the message.

Which e-mails are “commercial”?

CAN SPAM defines commercial e-mails as those having the “primary purpose” of advertising or promoting a commercial product or service, including content on an Internet site. Promotions for association events or educational publications would be considered commercial e-mails under a broad interpretation of the Act.

Are associations exempted from the Act?

The Act currently makes no exception for not-for-profit organizations nor for e-mail communications sent by them in furtherance of their exempt purposes.

What must I do to comply with CAN SPAM and still send commercial e-mails?

A commercial e-mail must accurately include source, destination and routing information, include a physical postal address, not mislead the recipient in its subject line and, for associations that do not want to burden themselves with obtaining “affirmative consent” from recipients, include an indication in the text or subject line that the commercial message is an advertisement or solicitation.

How do I obtain “affirmative consent” to avoid including “advertisement” in the message?

CAN SPAM defines affirmative consent as an express indication from the recipient of consent to receive commercial messages. Such consent may be obtained via response from an e-mail request by the association for such consent or an indication on a dues statement that the individual expressly consents to receive commercial e-mails from the association.

Does a member’s “affirmative consent” apply to commercial e-mails from affiliated organizations and local chapters?

A member’s affirmative consent applies to affiliated organizations and local chapters if, at the time consent was obtained, it was clear to the member that he or she was consenting to receive commercial e-mails from such other parties. A request for consent could include an indication that the member is consenting to receive commercial e-mails from the association, its affiliates and sponsors.

Our association already obtained written consent to receive e-mails on the same form we used to obtain consent to receive commercial faxes. Do I have to do anything more?

Yes. Regardless of consent, commercial e-mails must provide accurate header information and allow for recipients to either opt out by replying to the message or include a link to a valid Internet-based mechanism that allows recipients to opt out. Associations could include a link to a web page with a menu that lists all types of e-mail the association sends and allow users to select which types of e-mail the recipient no longer chooses to receive. Such an opt-out process would have to include an option for the recipient to “select all” in opting out.

What do I do after a recipient opts out of receiving commercial e-mails?

Opt-out requests must be processed within ten days. Once a recipient has opted out, associations must not release that person’s e-mail address to anyone for any purpose, including to organizations that will not be sending commercial e-mails and most likely to the association’s own affiliates. Once a member opts out of receiving commercial e-mails, his e-mail address must not be included in a membership list provided to other organizations or in a membership directory published by the association.

What about e-mail communications that are not commercial?

CAN SPAM’s regulations for commercial e-mails do not apply to e-mails that are sent for “transactional or relationship” purposes. E-mails relating to dues statements, dues collection, or membership status and account information are not commercial e-mails under CAN SPAM. E-mails that contain both a transactional and a commercial purpose, such as a dues statement with an announcement for an annual conference or a sponsor’s advertisement, are arguably not commercial where the “primary purpose” of the e-mail is the dues statement.

Transactional or relationship e-mails still must contain accurate header information, including the source, destination and routing number. Transactional and relationship e-mails do not need an indication that they are an advertisement, a valid physical postal address, or an opt-out mechanism.

What about purely informational e-mails?

Informational e-mails such as legislative and news updates are not covered by CAN SPAM and do not require an opt-out mechanism.

What if I violate CAN SPAM?

The Federal Trade Commission (“FTC”) will be the primary enforcer of CAN SPAM. State attorneys general may also bring actions in the federal courts to enjoin further action by violators. While private individuals may not bring suit against an association for violating CAN SPAM, individuals may report violators to the FTC.

What now?

CAN SPAM contains many directives to the FTC to promulgate further regulations interpreting the scope of CAN SPAM. There is a possibility that the FTC will exempt e-mails sent by nonprofit organizations in furtherance of their exempt purpose (such as promotions for upcoming conferences) from the definition of commercial e-mails. CAN SPAM also directs the FTC to determine whether the required indication that a commercial e-mail is an advertisement must be given by including “ADV” in the subject line.

Should you have any questions regarding this bulletin, please contact Michael E. Reed (312/609-7640) or any other Vedder Price attorney with whom you have worked.

VEDDER, PRICE, KAUFMAN & KAMMHOLZ, P.C.

About Vedder Price

Vedder, Price, Kaufman & Kammholz, P.C. is a national, full-service law firm with approximately 200 attorneys in Chicago, New York and Livingston, New Jersey.

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The Trade and Professional Association Group

Vedder, Price, Kaufman & Kammholz, P.C. has assembled a team of attorneys with knowledge and experience in the particular and various areas of law that impact today's trade and professional associations. Whether your association is local, national or international, whether it has its own executive staff or is administered by an outside management firm, Vedder Price is uniquely qualified and experienced in the issues which confront you, including:

- Antitrust matters;
- Tax issues;
- Insurance coverage;
- Standard setting, certification and accreditation;

- Publication activities;
- Intellectual property protection;
- Meeting and convention concerns;
- Employee benefits matters;
- Personnel considerations; and
- Membership issues.

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