

Trade & Professional Association Bulletin

January 2005

FTC ISSUES FINAL RULE DEFINING WHICH ASSOCIATION E-MAILS ARE "COMMERCIAL" UNDER THE CAN-SPAM ACT

The "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003" (the "CAN-SPAM Act") became effective on January 1, 2004 and imposes federal requirements on all "commercial" e-mails, regardless of the sending entity and regardless of whether the e-mail was solicited. The CAN-SPAM Act makes no exceptions for not-for-profit corporations, and in its Final Rule effective March 28, 2005 the Federal Trade Commission (the "FTC") expressly declined to grant such an exemption for e-mails sent by a not-for-profit corporation to its members. Thus, trade and professional associations must be careful to comply with the CAN-SPAM Act and the FTC's Final Rule anytime their organization sends an e-mail.

In January 2004, Vedder Price issued a bulletin summarizing the effect of the CAN-SPAM Act on associations and its requirements, noting:

"Commercial" Messages must contain the following:

- Accurate header information, including the source, destination and routing information;
- Accurate originating domain name and e-mail address in the "from" line;
- A valid postal address for the sender;

- A subject line that is not misleading;
- Absent "affirmative consent" from the recipient, an indication in the text or subject line that the e-mail is an advertisement or solicitation; and
- Regardless of "affirmative consent" from the recipient, an opt-out mechanism—recipients should be allowed to opt out either by replying to the message or linking to a valid website that allows recipients to opt out.

"Transactional or Relationship" Messages must contain the following:

- Accurate header information, including the source, destination and routing information; and
- Accurate originating domain name and e-mail address in the "from" line.

"Informational" Messages are not covered by CAN-SPAM and need not meet any federal requirements.

Associations must first determine which e-mails are commercial, transactional or relationship, or informational. Under the CAN-SPAM Act, e-mails having the “primary purpose” of advertising or promoting a commercial product or service are “commercial” and must meet the above-listed requirements. The FTC’s Final Rule defines the relevant criteria for determining when the primary purpose of an e-mail is commercial by outlining four categories of e-mail messages:

- **Transactional or Relationship Content Only:** Transactional or relationship messages are only subject to the CAN-SPAM Act’s requirement that they contain accurate header information, an accurate originating domain and an accurate e-mail address in the “from” line of the message. Transactional or relationship messages have the primary purpose of: a) facilitating, completing or confirming an existing commercial transaction; b) providing warranty, recall, safety or security information regarding a commercial product or service already purchased by the recipient; c) providing notification regarding a subscription, membership, account or comparable ongoing commercial relationship; d) providing information related to an employment relationship or related benefit plan; or e) delivering goods or services pursuant to a previous commercial transaction.
 - Messages related to payment of membership dues, including membership status and/or account information, contain transactional or relationship content.
 - Messages related to confirming the recipient’s seminar or conference registration, purchase, subscription or account contain transactional or relationship content.
- **Commercial Content Only:** E-mail messages that contain only content that advertises or promotes a product or service (“commercial content”) are commercial e-mails subject to all requirements of the CAN-SPAM Act.
 - E-mails promoting a seminar or conference for which attendees pay an admission charge are commercial if the seminar or conference is the only substantial subject matter of the e-mail message.
- **Commercial Content and Transactional or Relationship Content:** E-mail messages in which the transactional or relationship content appears mainly in the beginning of the body of the message *and* in which the subject line does not reference a commercial product or service are transactional or relationship messages and are not subject to the CAN-SPAM Act’s requirements for commercial e-mails.
 - E-mail messages confirming conference attendance and/or an account balance could contain brief commercial content near the end of the message, such as a reference to association publications available for purchase; provided, however, that the subject line references the transactional purpose of the message and the commercial content does not overshadow the transactional nature of the message.
- **Commercial Content and Informational Content:** E-mail messages containing both commercial content and noncommercial or nontransactional information are commercial messages subject to the CAN-SPAM Act’s requirements if either the subject line or the body of the message would lead a reasonable recipient to conclude that the message contains

commercial content or has the purpose of providing a commercial advertisement or promotion. The FTC uses a “net impression” test to evaluate these messages, looking to the totality of the message and its impression left on a reasonable recipient.

- E-mails containing an association’s newsletter or legislative updates may contain some commercial content, provided that the subject line of the e-mail references the informational nature of the message and is not misleading, the informational portion of the message is at the beginning of the message, the proportion of the message dedicated to commercial content is small, and the color, graphics and style used to highlight any commercial content are minimal.

The remaining provisions of the CAN-SPAM Act are not altered by the FTC’s new Final Rule. E-mail messages containing primarily commercial content must include an indication that they contain an advertisement or solicitation, unless the sender has received affirmative consent from the recipient to receive commercial e-mails from the sender. Associations may obtain affirmative consent to receive commercial e-mails from their members by asking for consent on dues statements, account statements, registration applications and the like.

Regardless of affirmative consent, associations still must include an opt-out mechanism within all commercial e-mails. The opt-out mechanism may be a web page at which the recipient may make opt-out selections from a menu listing all types of e-mail messages originated by the association. Associations must process opt-out requests within ten (10) days and must not then release that person’s e-mail address to anyone, including the association’s own affiliates and members. E-mail addresses of members who

have opted not to receive commercial e-mails from the association must also be removed from the association’s membership directory.

Should you have any questions regarding this bulletin, please contact Michael E. Reed, Esq. (312/609-7640), Amy L. Young, Esq. (312/609-7822) or any other Vedder Price attorney with whom you regularly work.

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About Vedder Price

Vedder, Price, Kaufman & Kammholz, P.C. is a national, full-service law firm with more than 210 attorneys in Chicago, New York and Roseland, New Jersey.

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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:

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- Tax issues;
- Insurance coverage;
- Standard setting, certification and accreditation;
- Publication activities;

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

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