

## The Federal Spam Law: FTC Issues Additional Guidelines and Proposes New Rules for Complying with the CAN-SPAM Act

By Jeffrey S. Tenenbaum and Ellen E. Traupman

The FTC has proposed new rules for complying with certain provisions of the CAN-SPAM Act, including a rule that would reduce the time period that associations and other marketers have to honor opt-out requests from 10 business days to three business days. The FTC also has issued guidelines for complying with certain other provisions of the Act, including additional guidelines on “transactional or relationship” messages and “forward-to-a-friend” scenarios.

These guidelines and proposed rules follow on the heels of an earlier rulemaking in which the FTC set forth guidelines for determining which e-mail messages are subject to the CAN-SPAM Act. Although there is no blanket exemption for messages sent by nonprofits, certain member communications may fall outside the Act’s definition of “commercial” messages.

Since the *Controlling the Assault of Non-Solicited Pornography and Market-*

*ing Act of 2003* (“CAN-SPAM” or the “Act”) took effect, the association community has fervently argued that the Federal Trade Commission (“FTC”) should exempt the e-mail messages they send—at least messages sent to members—from the Act’s requirements for “commercial” messages. By their very nature, most e-mail messages sent by tax-exempt nonprofits would not seem to be “commercial.” When sent to members in furtherance of association business, these messages appear nothing like “spam.” Nonetheless, the FTC has taken the position that recipients of promotional or advertising e-mail messages sent from a nonprofit entity should be afforded the same privacy and other protections as those who receive such messages from for-profit entities.

CAN-SPAM regulates all “commercial electronic mail messages,” whether unsolicited or not, and whether sent alone or in bulk. One of the most difficult aspects of CAN-SPAM compliance has been determining whether a message is “commercial,” particularly in difficult cases when a message includes both commercial and non-commercial content. The Act defines “commercial electronic mail message” as any message that has the “primary purpose” of advertising or promoting a commercial product or service, including content on a web site operated for a commercial purpose. According to the FTC, anything intended to sell something may be treated as a commercial message. For example, a message from an association promoting a seminar may be considered a “commercial product

or service” if attendees must pay an admission/registration charge.

The process of determining whether an e-mail has the primary purpose of advertising or promoting a commercial product or service has proven to be quite challenging, but it is an important task for compliance purposes. Messages that fall under the “commercial” category are subject to three key requirements: (i) provision of an opt-out mechanism that recipients can use to refuse future commercial e-mail solicitations from the sender, (ii) prominent disclosure of the fact that the e-mail contains an “advertisement” or “solicitation,” and (iii) inclusion of the sender’s valid physical postal address. If a commercial e-mail recipient opts-out of receiving future commercial messages, significant and onerous additional requirements apply. For starters, senders of commercial email messages must honor opt-out requests within 10 business days after receiving such requests, although the FTC has proposed to reduce that time period to three business days. Additional requirements regarding opt-out requests are described below.

### Exemptions to the rule

As it stands, there is only one category of messages—called “transactional or relationship” messages—that Congress has declared statutorily exempt from the “commercial” category. And, there are some messages—such as legislative alerts, industry news updates, and charitable contribution solicitations—that are neither “commercial” nor “transactional or relationship.” Rules issued by the FTC in December 2004 are designed to help e-mail senders determine how to categorize their messages and which CAN-SPAM requirements apply, particularly in the case of so-called “dual purpose” messages, which have both commercial and non-commercial content. These rules took effect on March 28, 2005.

Notably, the FTC has acknowledged that “it is possible—or even likely—that messages between a nonprofit and its members could constitute ‘transactional or relationship’ messages.” The FTC’s statement may strengthen the argument that certain messages to association members fall under

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the “transactional or relationship” category, if they are provided to the member in the course of delivering benefits that the member expects to receive. Of course, association e-mails to non-members would likely fall outside the scope of the “transactional or relationship” category. Moreover, not *all* e-mail messages to members would necessarily be considered “transactional or relationship.”

### Transactional or relationship messages

“Transactional or relationship messages,” by definition, are not “commercial” messages. Although transactional or relationship messages are largely exempt from most of *CAN-SPAM*’s requirements, they need to comply with the requirement that the message contain non-misleading “header” information, as explained below.

As defined by the Act, “transactional or relationship messages” are messages that have at least one of the following five primary purposes:

1. Facilitating, completing or confirming a commercial transaction that the recipient previously agreed to enter into with the sender;
2. Providing warranty information, product recall information, or safety or security information about a commercial product or service;
3. Providing information regarding a membership, subscription, account, loan, or other ongoing commercial relationship;
4. Providing information related to an employment relationship or benefit plan; or
5. Delivering goods or services that the recipient is entitled to receive under the terms of a transaction that the recipient previously agreed to enter with the sender.

Some of these five primary purposes are more useful to associations than others. Under the first primary purpose, associations may facilitate the invoicing, processing, payment, and confirmation of membership dues through the use of e-mail without being subject to the Act’s requirements for commercial messages. Under the third primary purpose, associations should be able to continue e-mailing membership status or account information without much concern of being covered. Such messages could include notification concerning the terms or features of the membership, notification

of a change in the recipient’s standing or status with respect to the association, confirmation of a conference or meeting registration, confirmation of a publication sale, or account statements that the association may send on a regular basis.

The fifth primary purpose may allow associations to communicate with members within the bounds of the membership relationship, even if the message contains “commercial” content. For example, if one benefit of membership is discounts on association publications or meeting or conference registration fees, then a message to members promoting a publication or meeting/conference at the discounted rate may constitute delivering a good or service that the recipient is entitled to receive.

If the terms of being a member include accepting receipt of member communications by e-mail, and if the member understands that the association frequently communicates to its members by e-mail, then it may be possible to classify many association messages to members as “transactional or relationship.” Keep in mind, however, that the same message sent to non-members would not fall under the fifth “transactional or relationship” category because the non-member would not have previously entered into any sort of “transaction” (*i.e.*, the payment of membership dues) with the association.

### Use careful planning

Incorporating such a policy into the association’s marketing and communications program will require careful planning by the association to ensure that members understand how the association uses e-mail. The FTC has warned that there are limits to expectations set by the message sender. If the message is overwhelmed by commercial content that clearly exceeds what the recipient might reasonably expect, then the sender’s argument that the message is intended to deliver content that the recipient is entitled to receive becomes much less persuasive.

### Dual-purpose messages

The “transactional or relationship” categories are helpful in many cases, but where do electronic newsletters, industry news updates, officer and director nominee announcements, and other “non-commercial” messages fall? For instance, e-newsletters generally will not be construed as

either commercial messages or transactional or relationship messages. But what if the newsletter is supported by paid advertising, or includes a general promotion for the association’s annual conference (for which a registration fee is charged)—does that change the conclusion?

**Primary Purpose Tests.** The FTC has established rules for determining the “primary purpose” of messages that include both commercial and “transactional or relationship” content, and both commercial and non-commercial content.

Under these rules, messages that include both commercial content and “transactional or relationship” content should be treated as commercial if either (i) a recipient reasonably interpreting the *subject line* of the message would likely conclude that the message contains the commercial advertisement or promotion of a commercial product or service; or (ii) the message’s transactional or relationship content does *not* appear, in whole or in substantial part, at the beginning of the body of the message. The FTC has explained that use of the term “substantial” does not refer to volume, but to the nature of the content. According to the FTC, the transactional or relationship content that appears at the beginning of the message must be something recognizable as transactional or relationship content, such as account balance information. Additional related information, such as recent account activity, could be provided below the commercial content. The FTC clearly noted that simply stating “Your Account” at the top of the message would not be sufficiently substantial. The FTC believes that placing transactional or relationship content at or near the beginning of the message will allow recipients to quickly identify messages providing transactional or relationship content without first having to scroll through the commercial content.

Messages that include both commercial and non-commercial content that is *not* “transactional or relationship” content will be deemed commercial if either (i) a recipient reasonably interpreting the *subject line* of the message would likely conclude that the message contains the commercial advertisement or promotion of a commercial product or service, or (ii) a recipient reasonably interpreting the *body* of the message would likely conclude that the primary purpose of the message is the commercial advertisement or promo-

tion of a commercial product or service. According to the FTC, this “net impression” test is designed to evaluate the message in its totality and looks to the impression the entire message makes on the reasonable recipient. Factors relevant to the “net impression” evaluation include the placement of commercial content at or near the beginning of the message; the proportion of the message dedicated to commercial content; and the use of color, graphics, type size, and style to highlight commercial content. If the sender draws attention to the commercial content, then the message may leave the impression that it is commercial. The FTC has noted that nothing in its rules or guidelines prohibits senders from formulating its messages in ways that result in a net impression that is not commercial.

### CAN-SPAM requirements

**Header Information.** The Act requires commercial electronic mail messages, as well as “transactional or relationship messages,” to use header information that is not materially false or materially misleading. Header information includes the source, destination and routing information attached to each message. Header information also includes the originating domain name and the originating e-mail address, and any other information that appears in the “from” line of a message. A message has header information that is *materially* false or misleading if it disguises the origin of the messages such that an Internet Service Provider processing the message, a state or federal agency enforcing the *CAN-SPAM Act*, or a person receiving the message cannot locate the sender. There are no other requirements for transactional or relationship messages.

*CAN-SPAM* provides that a “from” line that accurately identifies any person who

initiated the message shall not be considered materially false or materially misleading. According to the FTC, the “from” line need not contain the formal or full legal name of someone responsible for transmitting the message, but may include the name of a person at the organization sending the message, a screen name, a trade name, or a business division or department. Thus, a commercial email message sent to prospective members may be “from” the “Membership Department.”

**Subject Lines.** Under *CAN-SPAM*, the “subject” line of a commercial message must be accurate and non-misleading and give the recipient some idea as to what the body of the message will hold. While this requirement may not seem burdensome, the FTC believes that the “subject” line of a message is often the first and most telling clue as to whether a message has the primary purpose of advertising or promoting a commercial product or service.

**Advertisement or Solicitation Notice Requirement.** Unless the recipient has provided his or her “affirmative consent” to receive commercial e-mails from the association, commercial messages also must include clear and conspicuous notice that the message contains an “advertisement” or “solicitation.” Under *CAN-SPAM*, “affirmative consent” means that the recipient has expressly consented to receive the messages, either in response to a request for such consent or at the recipient’s own initiative. (It is not clear whether a member company could consent on behalf of all of the company’s e-mail addresses or whether each employee would need to separately consent.) *CAN-SPAM* does not require that the “advertisement or solicitation” notice be given in the subject line of a message or in any particular form; labels such as “ADV” and other tags in the subject line are

not required. Given the broad definition of commercial e-mail, such an “ADV” requirement (which would allow spam filters to easily block such messages) could have devastating consequences for associations. Any implementation of such a requirement would need to first be approved by Congress.

**Opt-Out Requirement.** Likely the most burdensome requirement for trade and professional associations, *CAN-SPAM* requires commercial messages to notify recipients that they can opt-out of receiving future commercial messages from that sender. As part of this requirement, the message must allow recipients to send an opt-out request by replying to the message or by accessing a web-based mechanism, such as an “unsubscribe” page, that the sender can use to manage opt-out requests. A web-based mechanism can include a list or menu of different types of messages that the sender transmits, thereby allowing the recipient to select among the types of messages he or she does and does not want to receive, as long as the list or menu includes one option that allows the recipient to opt-out of *all* commercial e-mails from the sender. For example, the recipient may wish to receive information by e-mail about upcoming conferences and seminars and about research reports and studies sold by the association, but not information about opportunities to exhibit at the association’s trade shows, advertise in its publications, or serve as a corporate sponsor. Note that the association need not give recipients the option to opt-out of receiving e-mails that are either “transactional or relationship” or non-commercial; in fact, it generally is advisable *not* to provide such options, because if a recipient opts-out of receiving such messages, the association likely is obliged to honor such requests (with the obligation arising not

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under *CAN-SPAM*, but under other legal principles).

Any database that the association uses to manage e-mail communications must flag individuals who have requested not to receive commercial e-mail. Any software that the association uses to send messages in bulk quantities must be able to track the do-not-e-mail notations in the database. The only way to resume sending commercial e-mail to members or non-members after an opt-out request is to obtain subsequent affirmative consent.

It is not clear whether a member company could opt-out on behalf of all company e-mail addresses, or whether each employee would need to opt-out separately. It also is not clear whether an opt-out request to the association would extend to its subsidiaries and affiliates, although *CAN-SPAM* provides that "separate lines of business or divisions" that are held out to e-mail recipients as separate shall be treated individually as "senders" of e-mail for purposes of the Act.

The opt-out requirement is particularly burdensome for several reasons. First, message recipients may remove themselves from the association's e-mail marketing database (at least with respect to commercial e-mails), an action that would literally sever what is generally the most direct and cost-effective line of communication from the association to the recipient. Second, there are significant and onerous restrictions that apply to an e-mail address once that address opts-out of receiving commercial e-mails from the association. Once a person makes an opt-out request, *CAN-SPAM* prohibits the sale, lease, exchange, transfer, or release of that person's e-mail address to anyone else for any purpose (except as required by law). This provision is written broadly and prohibits any transfer or release of e-mail addresses that have opted out, even to organizations that

will not use them for sending commercial e-mail messages (such as an advocacy group that will send only legislative updates or a charity that will send only fund-raising solicitations)—and, technically, even when the e-mail address holder provides his or her consent for such a transfer or release. Whether the ban (on transferring or releasing opted-out e-mail addresses) extends to associations' related foundations, for-profit subsidiaries, chapters, and other closely affiliated (but legally separate) entities is unclear, although it appears to apply to such entities. Certainly, the transfer or release of opted-out e-mail addresses to endorsed affinity partners or to nonprofit or for-profit entities with which the association partners in a joint venture or coalition, for instance, would be prohibited.

The Act's ban also expressly applies to the inclusion of opted-out e-mail addresses in mailing/membership lists that are sold, rented, swapped, or otherwise transferred. Thus, if an association rents its membership list to others, it may not include the e-mail addresses of those who have elected not to receive commercial e-mail. Finally, the ban appears to extend to the publication of opted-out member e-mail addresses in associations' printed or electronic membership directories—even if the member consents to such publication.

#### **Why aren't association e-mail messages exempt?**

Under the *Federal Trade Commission Act*, the FTC's jurisdiction over entities that do not operate "for their own profit or the profit of their members" is limited. However, under the standard set forth by the U.S. Supreme Court in the *California Dental Association* decision, virtually all trade and professional associations are subject to the FTC's jurisdiction. While certain other nonprofits such as charities

and social welfare organizations may not be subject to the *FTC Act*, this jurisdictional restriction does not entirely exclude such nonprofits from the ambit of *CAN-SPAM*; such a nonprofit that sends a commercial message in violation of the Act may need to defend itself in an action brought by a state attorney general or an Internet service provider, both of which have congressional authority to enforce *CAN-SPAM* (along with the FTC) and are not subject to the jurisdictional limits of the FTC. *CAN-SPAM* is enforceable by way of injunctions, restraining orders, and/or fines. Importantly, unlike the federal law governing unsolicited commercial faxes, *CAN-SPAM* provides for no private right of action; a recipient of an unlawful e-mail cannot bring suit against the sender. However, there may be opportunities for private individuals to earn rewards for reporting "spammers." The law orders the FTC to establish a "bounty hunting" system that would give 20 percent of any civil penalty collected to people who identify *CAN-SPAM* violators and provide information leading to their arrest. ☐

*Additional requests related to physical postage addresses, national registry, 'forward to friends,' joint/multiple senders and other issues that may also apply to chamber bulk mail practices may be answered by visiting [http://www.venable.com/publications.cfm?action=view&publication\\_id=1172&publication\\_type\\_id=2](http://www.venable.com/publications.cfm?action=view&publication_id=1172&publication_type_id=2)*

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