



E-Mail Marketing and the CAN-SPAM Act

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In December 2003, President Bush signed into law the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, commonly known as the “CAN-SPAM Act.” The CAN-SPAM Act is Public Law 108-187, and is codified at 15 U.S.C. §7701 et seq. This article addresses FAQs about the key issues arising under the CAN-SPAM Act.

1. Is this a replay of the unsolicited fax rules?

No. As discussed below, there are several important differences, but for commercial insurance brokerages, two in particular. First, the mechanism for people to decline to receive commercial e-mails is an “opt-out” approach, so no *advance* permission is required; (2) enforcement is by federal and state agencies and Internet Service Providers (“ISPs”) only. Consumers may not file private lawsuits against spammers, as they can under the federal “junk fax” rules.

2. What does the CAN-SPAM Act say?

The principal rule that is directly relevant to insurance brokerages prohibits the sending of bulk commercial e-mail messages unless: (1) the e-mails include a notice to recipients that they may “opt out” of future e-mails (and there is a mechanism for doing so); or (2) recipients have already given “affirmative consent” to receive the e-mails.

3. What is “commercial e-mail”?

The term used in the Act is “commercial electronic mail message,” and it is defined as “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service.”

4. What kinds of e-mails from brokerages does this definition apply to?

Congress provided limited guidance. The legislative history says only that the “definition is intended to cover marketing e-mails. Advertisements for content on an Internet Web site operated for a commercial purpose are included within the definition . . . however; the definition is not intended to cover an e-mail that has a primary purpose other than marketing, even if it mentions or contains a link to the Web site of a commercial company or contains an ancillary marketing pitch.”

The Federal Trade Commission has been directed to issue regulations not later than

December 2004, defining the relevant factors to be considered. However, brokerages should assume that any e-mail messages whose principal purpose is to promote the purchase of insurance or related services will be treated as commercial electronic mail messages.”

5. What typical e-mails from insurance brokerages would *not* be considered “commercial”?

E-mail messages whose principal message is *not* the promotion or sale of insurance. For example:

- Newsletters and other informational materials (even if they include ads since the “primary purpose” would still not be “commercial”);
- Client surveys;
- Promotions for client seminars that are offered without charge;
- Invitations to noncommercial events sponsored by the brokerage, such as charity fundraisers or other community events (even if the brokerage is publicized as a sponsor); or
- Requests for proposals.

The CAN-SPAM Act also excludes certain “transactional or relational” e-mails from the

definition of a commercial e-mail message. These include messages whose primary purpose is, with respect to an existing commercial relationship, to:

- Facilitate, complete, or confirm a previously agreed-upon transaction;
- Provide product warranty, recall, safety, or security information to existing customers or clients; or
- Provide notice of changes in terms or features; notice of a change in the recipient’s standing or status; or notice of account information.

Recognizing that e-mail is an evolving service, Congress authorized the Federal Trade Commission to expand or contract the categories of messages that are treated as “transactional or “relational” messages “to the extent . . . necessary to accommodate changes in electronic mail technology or practices and accomplish the purposes of this Act.”

6. Assuming an e-mail is “commercial” under the Act, what is the definition of “bulk”?

A commercial e-mail is a “bulk” e-mail, and therefore regulated by the Act, if it is sent to more than 100 addresses during a 24-hour period, more than 1,000 addresses during a 30-day period, or more than 10,000 addresses during a 1-year period.

7. Do we need advance approval to send a bulk commercial e-mail message?

No. The Act adopts an “opt out” approach. That is, if there has been no advance permission, then bulk commercial e-mails can still be sent, but the sender must establish a mechanism for recipients to opt out of future emails and so notify recipients. Prior “affirmative consent” (discussed below) is permitted, but not required, and may be superseded by a subsequent “opt-out” described below.

8. What “opt-out” mechanism must be established?

Any bulk commercial e-mail that is sent without advance written consent from the recipient must include a functioning return e-mail address or other conspicuous Web-based mechanism by which the recipient can request not to receive future commercial e-mail at the recipient’s electronic mailbox. The mechanism must be functioning for at least 30 days (with allowances for temporary and unexpected tech-

nical problems) after the commercial e-mail message was sent. The reply mechanism may also permit the recipient to select from a menu of types of e-mails, electing to receive some and not receive others.

9. When does the recipient’s “opt-out” request become effective?

In general, the sender may not transmit any additional commercial e-mails more than 10 business days after receiving an “opt-out” request from a recipient. Of course, good customer relations may suggest that the sender should implement the “opt-out” request sooner.

10. What other rules are in the CAN-SPAM Act?

Senders of commercial e-mail are prohibited from deceiving or misleading recipients as to the origin of messages, materially falsifying information in the header, and using deceptive subject headings. In addition, without prior affirmative consent to the receipt of the e-mail from the recipient, the message must include “clear and conspicuous” identification that the message is an advertisement and notice of the opt-out opportunity, and the sender’s valid physical postal address.

11. What is “affirmative consent?”

“Affirmative consent” means that the recipient expressly consented to receive the message either in response to a clear and conspicuous request for consent, or at the recipient’s initiative. Affirmative consent may be obtained at any time, and should be obtained from new clients at the outset of the relationship. This may avoid problems if the rules are changed in the future.

12. Can State anti-spam laws also be enforced?

The Act preempts State anti-spam laws, so there will be uniform nationwide regulation.

13. How will the CAN-SPAM Act be enforced?

The primary enforcement body is the Federal Trade Commission. State Attorneys General may bring civil actions, and Internet Service Providers, such as AOL, may also take spammers to court. Some lawsuits have already been filed.

The good news for marketers is that no one else, including recipients of commercial e-mails, will be able to sue. Consumer lawsuits have been a significant problem under the federal law prohibiting unsolicited faxes, and many senders have been compelled to pay to settle claims in what amounts to legalized extortion.

14. Will there also be a “Do-Not-Spam” registry?

Not in the near future. The CAN-SPAM Act required the FTC to report to Congress by mid-June, setting forth a timetable for establishing a “Do-Not-E-Mail” registry, and explaining any technical, privacy, and other concerns. The FTC report concluded that present technical issues would probably prevent a “Do-Not-E-Mail” registry from reducing spam, might lead to an increase in spam, and could not be enforced effectively. If the technical problems are solved, the FTC believes that a registry would be unnecessary.

15. What are the penalties for violations of the CAN-SPAM Act?

In addition to civil penalties that may be enforced by the FTC, a State Attorney General may obtain statutory damages of \$250 per resident per e-mail, up to \$2 million. Criminal penalties may include fines and up to three years in prison. Injunctive relief and forfeiture of hardware and software used to transmit spam in violation of the Act are also available

remedies. Penalties may be mitigated if the offender has implemented commercially reasonable practices and procedures to prevent violations.

16. When was the Act effective?

January 1, 2004.

17. Based on the above, is there any specific action we should be taking now?

Brokerages that communicate with customers by e-mail should review their bulk e-mail practices to ensure that they are in compliance with the Act. Various types of bulk e-mail should be identified and classified with respect to its primary purpose—advertising and promotion, other information, “transactional and relational,” etc. Bulk commercial e-mails should be reviewed to ensure that they include the required “opt-out” information, and that all header, subject matter, and other identifying information is truthful. As new initiatives are begun, these should be reviewed against the CAN-SPAM Act rules to ensure that violations do not occur.

Before contracting with a third party that will perform e-mail advertising for the brokerage, the brokerage should conduct due diligence regarding the contractor’s operations to satisfy itself that the contractor is committed to compliance with the CAN-SPAM Act, should require the contractor to provide appropriate warranties and indemnifications in the event of violations of the Act, and should be able to suspend or terminate the contract immediately if violations are alleged or have occurred.

Readers with questions about the CAN-SPAM Act may contact Mr. Watkins at (202) 785-9500, Ext. 34, or at cwatkins@wc-b.com.