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The CAN SPAM Act And Your Chapter/State Council Communication Plan

Henry A. Hart, General Counsel ▪ SHRM ▪ May 20, 2010

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The CAN SPAM Act And Your Chapter/State Council Communication Plan

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Applicability of CAN SPAM Act – General Rules

Sources

The Act - Controlling the Assault of Non-Solicited
Pornography and Marketing Act of 2003 (CAN SPAM Act)
– 15 U.S.C. 7701 et seq.

FTC Regulations – 16 CFR Part 316

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Applicability of CAN SPAM Act – General Rules (cont.)

- The CAN-Spam Act of 2003 - Applies only to “Commercial Electronic Mail Message”
- This is essentially an e-mail message, the primary purpose of which is the commercial advertisement or promotion of a commercial product or service
- We will further define this in Section II below

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Applicability of CAN SPAM Act – General Rules (cont.)

- The act applies to commercial emails, regardless of the volume sent
- There is no express exemption for e-mails to members or to others with whom the sender has an established business relationship.

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Applicability of CAN SPAM Act – General Rules (cont.)

- Purely “Transactional Messages” are excluded from “Commercial Electronic Mail Messages.”
 - > A “*transactional*” content e-mail includes in pertinent part for chapters and state councils, an e-mail which facilitates, completes or confirms a commercial transaction that the recipient *has previously agreed to enter into* with the sender.

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Applicability of CAN SPAM Act – General Rules (cont.)

- An e-mail to chapter members advertising or promoting sale of a chapter product or service will be treated as a covered commercial e-mail message.
- An e-mail to members which advises them of chapter or other HR news (e.g., a legislative alert) and does not promote a meeting or service for which a fee is charged, would not be a covered commercial e-mail

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Applicability of CAN SPAM Act – General Rules (cont.)

- Preemption of State Law – The Act does preempt state laws and regulations which regulate the use of e-mail to send commercial messages, except to the extent that certain state laws prohibit falsity or deception in commercial e-mails.

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Applicability of CAN SPAM Act – General Rules (cont.)

- State Laws Preempted Would include
 - > state opt-in laws which requires consent of recipient before sending him/her e-mails
 - > state laws requiring use of an opt-out feature
 - > state laws which require commercial e-mails to include “ADV” in the subject line
- State Laws Not Preempted Would Include
 - > state laws generally prohibiting fraudulent practices by means of commercial e-mails

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When is an Email a “Commercial” Email

- The FTC Final Rule divides e-mails into four categories, and then applies a separate rule for each category to determine whether it is a commercial primary-purpose e-mail.
- These categories and their resulting rules are as follows:

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When is an Email a “Commercial” Email (cont.)

- *Category 1 - Purely Commercial—The CAN-SPAM Act Applies.*
- Where an e-mail consists exclusively of a commercial advertisement or promotion of commercial products or services, not surprisingly the “primary purpose” of the e-mail shall be deemed to be commercial.
- **EXAMPLE** - an email to chapter members advertising or promoting sale of a chapter product or service (e.g., meeting registration, membership acquisition, renewals, etc.) will be treated as a covered commercial email message.

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When is an Email a “Commercial” Email (cont.)

- *Category 2 - Exclusively Transactional - CAN-SPAM Act Does Not Apply.*
- Where an e-mail consists exclusively of “transactional” content, not surprisingly, the e-mail will *not* be treated as a commercial primary purpose e-mail
- EXAMPLE - the following Category 2 email is NOT covered by the CAN SPAM Act:
 - a transactional email to an account sending a past due notice

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When is an Email a “Commercial” Email (cont.)

- *Category 3 - Content that is both Commercial and Transactional in Nature.* Such content will *not* be deemed commercial primary-purpose content if it meets *both* of the following criteria:
 - > the subject line does not imply that the message contains commercial content; *and*
 - > The transactional content appears in whole or substantial part at the beginning of the body of the message.
- EXAMPLE - an email to a member advising of a past due account and also promoting an upcoming chapter meeting for which a fee is charged.

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When is an Email a “Commercial” Email (cont.)

- *Category 4 - Content Consisting of Both Commercial Content and Other Content that is not Transactional in Nature.*
- Such an e-mail will not be treated as commercial primary purpose if *both* of the following criteria are met:

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When is an Email a “Commercial” Email (cont.)

Category 4 (cont.)

- > The subject line does not imply that the content is commercial; *and*
- > the “*net impression*” of the body of the message is *not* commercial. Factors relevant to a commercial net impression are:

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When is an Email a “Commercial” Email (cont.)

Category 4 (cont.)

Whether the commercial content in whole or substantial part is placed at the beginning of the body of the message;

What proportion of the message is dedicated to commercial vs. non-commercial content; and

How color, graphic, type size and style are used to highlight commercial content.

- **EXAMPLE** - an e-newsletter sent to members which addresses current HR issues and also has advertising.

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Penalties For Non-Compliance

- The FTC may enforce violations of the Act as unfair or deceptive practices.
- In addition, states' Attorneys General may seek substantial monetary damages of up to \$250 per unlawful e-mail, not to exceed \$2 Million, plus attorneys fees.
- No private right of action is provided to recipient.

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CAN SPAM Act Requirements

SUMMARY

- Must Contain Opt-out Feature
- Must be Identified as Advertising
- Must Include Sender's Postal Address
- Can't Falsify Header Information or Use Deceptive Subject Headings
- Can't Send Commercial E-mail to Recipient after Objection

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CAN SPAM Act Requirements (cont.)

- Must Contain Opt-out Feature – The commercial e-mail must include:
 - > a clear and conspicuous notice of the opportunity to decline further commercial e-mails from the sender
 - > a functioning return e-mail address (or other internet-based mechanism) that the recipient may use to submit in a manner specified in the message, a reply e-mail (or other form of internet-based communication) requesting not to receive future commercial e-mail messages from sender

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CAN SPAM Act Requirements (cont.)

- > May not require recipient, in order to opt out, to pay any fee or provide any information other than email address and opt out preferences, or take any steps other than sending reply email message or visiting a single internet web page.

Such opt-out feature must remain capable of receiving such responses for at least 30 days after transmission of the original message.

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CAN SPAM Act Requirements (cont.)

Opt-out Feature

- Must provide the option to opt out of **receiving all commercial e-mails** from the chapter.
- May also provide recipient a list or menu as to the specific types of commercial e-mails that the recipient wants to receive or does not want to receive from the chapter.

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CAN SPAM Act Requirements (cont.)

- Must be Identified as Advertising – The commercial e-mail must contain a clear and conspicuous identification that the message is an advertisement or solicitation (unless the recipient has given prior express “affirmative consent” to receipt of the message)
- Postal Address - The commercial e-mail must provide a valid physical postal address of the chapter.

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CAN SPAM Act Requirements (cont.)

Can't Falsify Header Information or Use Deceptive Subject Headings – The “header” (i.e., source, destination, and routing information) of a commercial e-mail cannot be materially falsified; nor can sender use deceptive subject headings in a commercial e-mail.

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CAN SPAM Act Requirements (cont.)

- Can't Send Commercial E-mail to Recipient after Objection – If a recipient has used the opt-out mechanism to indicate that he/she does not want to receive some or any commercial e-mail from the sender, it is unlawful for the sender to initiate e-mails which fall in the scope of the request, to the recipient more than 10 business days after receipt of such objection;
- It is unlawful for the sender to sell, lease or otherwise transfer the e-mail address of the recipient.

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Two Party Emails Can Be Structured to Have Only One “Sender” for CAN SPAM Purposes

- Many times, two parties will want to send an email on their joint behalf
- For example, SHRM and a chapter might want to send an email to chapter-only members promoting membership in SHRM and continued membership in the chapter

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Two Party Emails Can Be Structured to Have Only One “Sender” for CAN SPAM Purposes (cont.)

- But who is the “sender” of the email for CAN SPAM ACT purposes?
- In particular which party must check its opt out list to see whether a recipient has opted out to receiving any emails from it, or must both parties?
- And if a recipient responds to the email with an opt-out notice, which party is bound by that response, or are both parties?

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Two Party Emails Can Be Structured to Have Only One “Sender” for CAN SPAM Purposes (cont.)

- May 2008 amended FTC CAN SPAM rule
- Under the amended rule, where a commercial e-mail promotes more than one person’s products or services, the parties may by agreement treat one of those persons as the “Sender” for CAN SPAM purposes
- Only that person who is treated as the “Sender” will have CAN SPAM responsibilities for that e-mail.

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Two Party Emails Can Be Structured to Have Only One “Sender” for CAN SPAM Purposes (cont.)

- To avail themselves of the “single sender” rule on an email which promotes two parties’ products or services, the parties must do the following the following:
 - > Insert the name of the agreed upon “sender” in the “From” line of the e-mail.
 - > Have a “From” line and “Subject” line which is not fraudulent.

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Two Party Emails Can Be Structured to Have Only One “Sender” for CAN SPAM Purposes (cont.)

- > Include in the e-mail an opt-out provision which complies with CAN SPAM.
- > Include in the e-mail a clear and conspicuous statement that the message contains advertising material.
- > Include in the e-mail the physical (postal) address of the designated “Sender.”

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Two Party Emails Can Be Structured to Have Only One “Sender” for CAN SPAM Purposes (cont.)

- So in the above example of the joint email from SHRM and chapter to the chapter-only members promoting membership in both SHRM and the Chapter, SHRM and the chapter rely on this single sender rule.

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Two Party Emails Can Be Structured to Have Only One “Sender” for CAN SPAM Purposes (cont.)

- The chapter sends the email to the chapter-only members. The email promotes both SHRM and the chapter services (i.e., membership in both). SHRM and the chapter expressly agree that the chapter is the sole “sender” for CAN SPAM Act purposes.

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SUMMARY

- Know when the Act applies
 - > If you are sending a commercial email (i.e., an email whose primary purpose is the commercial advertisement or promotion of the sale of a commercial product or service
 - > Regardless of number of emails sent and regardless of whether sent to a member or a stranger
 - > If a mixed purpose email (both commercial and non-commercial purpose), look to the rules to see if “primarily commercial purpose” and therefore subject to the Act

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SUMMARY (cont.)

- Requirements of the Act When It Does Apply
 - > Must Contain Opt-out Feature
 - > Must be Identified as Advertising
 - > Must Include Sender's Postal Address
 - > Can't Falsify Header Information or Use Deceptive Subject Headings
 - > Can't Send Commercial E-mail to Recipient after Objection