

MEMORANDUM

TO: RIMS Chapter Leaders

FROM: Mark Prysock, General Counsel

DATE: April 15th 2015

RE: CAN-SPAM Compliance for Chapter E-Mail Messages

BACKGROUND

The CAN-SPAM Act (the “Act”) is a US federal law that sets the rules for commercial e-mail messages. It requires the sender of a commercial e-mail message to include a number of items in the e-mail; it further requires the sender to stop sending commercial e-mail messages to those who do not wish to receive them. The penalty for non-compliance can run as high as \$16,000 per e-mail sent.

WHAT IS A COMMERCIAL E-MAIL MESSAGE?

The Act defines a commercial e-mail message as “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service,” including e-mail that promotes content on commercial websites. The Act makes no exception for business-to-business e-mail. That means *all* e-mail must comply with the Act.

HOW DOES MY CHAPTER COMPLY WITH CAN-SPAM REQUIREMENTS?

The Federal Trade Commission (FTC) has developed compliance regulations for the Act. Their website sets out the requirements for anyone who wants to send a commercial e-mail message. We reproduce the relevant language from the FTC website below:

- 1 **Don’t use false or misleading header information.** Your “From,” “To,” “Reply-To,” and routing information – including the originating domain name and e-mail address – must be accurate and identify the person or business who initiated the message.

- 2 **Don't use deceptive subject lines.** The subject line must accurately reflect the content of the message.
- 3 **Identify the message as an ad.** The law gives you a lot of leeway in how to do this, but you must disclose clearly and conspicuously that your message is an advertisement.
- 4 **Tell recipients where you're located.** Your message must include your valid physical postal address. This can be your current street address, a post office box you've registered with the U.S. Postal Service, or a private mailbox you've registered with a commercial mail receiving agency established under Postal Service regulations.
- 5 **Tell recipients how to opt out of receiving future email from you.** Your message must include a clear and conspicuous explanation of how the recipient can opt out of getting e-mail from you in the future. Craft the notice in a way that's easy for an ordinary person to recognize, read, and understand. Creative use of type size, color, and location can improve clarity. Give a return e-mail address or another easy Internet-based way to allow people to communicate their choice to you. You may create a menu to allow a recipient to opt out of certain types of messages, but you must include the option to stop all commercial messages from you. Make sure your spam filter doesn't block these opt-out requests.
- 6 **Honor opt-out requests promptly.** Any opt-out mechanism you offer must be able to process opt-out requests for at least 30 days after you send your message. You must honor a recipient's opt-out request within 10 business days. You can't charge a fee, require the recipient to give you any personally identifying information beyond an e-mail address, or make the recipient take any step other than sending a reply e-mail or visiting a single page on an Internet website as a condition for honoring an opt-out request. Once people have told you they don't want to receive more messages from you, you can't sell or transfer their e-mail addresses, even in the form of a mailing list. The only exception is that you may transfer the addresses to a company you've hired to help you comply with the CAN-SPAM Act.
- 7 **Monitor what others are doing on your behalf.** The law makes clear that even if you hire another company to handle your e-mail marketing, you can't contract away your legal responsibility to comply with the law. Both

the company whose product is promoted in the message and the company that actually sends the message may be held legally responsible.

ARE THERE ANY EXCEPTIONS TO THE LAW'S REQUIREMENTS

While the Act does not recognize any exceptions to its basic requirements, it does contemplate the sending of “transactional or relationship” messages that need not comply with the Act’s requirements. What is a transactional or relationship message? Again, we reproduce the language from the FTC website below:

The primary purpose of an e-mail is transactional or relationship if it consists only of content that:

- facilitates or confirms a commercial transaction that the recipient already has agreed to;
- gives warranty, recall, safety, or security information about a product or service;
- gives information about a change in terms or features or account balance information regarding a membership, subscription, account, loan or other ongoing commercial relationship;
- provides information about an employment relationship or employee benefits; or
- delivers goods or services as part of a transaction that the recipient already has agreed to.

Some of these five primary purposes are more useful to associations than others. Under the first primary purpose, you 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, you 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 you 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.

What remains unclear is just how broadly this fifth "transactional or relationship" sub-category will be construed and applied to associations. Certainly, an association that wishes to send "transactional or relationship" messages to its members to deliver something that the member is entitled to receive should make it clear to members (in writing) that such messages will be delivered throughout the course of their relationship with the association. According to the FTC, determining whether an e-mail message should be deemed "transactional or relationship" under this fifth sub-category requires consideration of the recipient's understanding of what he or she is entitled to receive under the terms of the agreed-upon transaction. 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.

CONCLUSION

Given the severity of the penalties for not complying with the Act's requirements, we would urge you to take a conservative approach to e-mailing your members. Put succinctly: if you have any concerns that your e-mail message could be construed as commercial in nature, then please take the time to comply with the Act's requirements as outlined above. Doing so should ensure that you do not receive any unpleasant correspondence from the FTC.

If you have any questions about CAN-SPAM, please don't hesitate to contact me directly. I can be reached at mprysock@rims.org.