



THE CAN-SPAM ACT OF 2003: FREQUENTLY ASKED QUESTIONS

This FAQ is not intended to provide specific advice about individual legal, business, or other questions. It was prepared solely as a guide, and is not a recommendation that a particular course of action be followed. If specific legal or other expert advice is required or desired, the services of an appropriate, competent professional should be sought.

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Introduction

These FAQs are an Executive Summary of key provisions of The Can-Spam Act of 2003 (“Act”), including the Federal Trade Commission (“FTC”) Rule (issued December 16, 2004 and effective February 18, 2005) defining the “primary purpose” of an electronic message.

These FAQs are divided into sections, as follows:

- **General Background** (covering when the law was enacted; key definitions; and preemption of state law)—FAQs 1 – 6
- **Compliance Obligations** (covering how to comply with the Act and opt-out requirements)—FAQs 7 – 10
- **Treatment of Different Types of Emails, Senders, and Recipients** (covering exemptions under the Act; mixed purpose emails; business references and links in emails; email messages from insurance carriers; email messages from divisions/lines of businesses, associations, and their subsidiaries; and emails sent by service provider)—FAQs 11 – 19
- **Email Labeling and Header Information** (covering special labels and headers for covered emails)—FAQs 20 – 21
- **Wireless, Internet, and Registry Issues** (covering a do-not-email registry; application to wireless messages; and obtaining email addresses from Internet sites)—FAQs 22 – 24
- **Enforcement** (covering what entities can enforce the Act; penalties for failure to comply; and enforcement before regulations are issued)—FAQs 25 – 26

General Background

1. What is the CAN-SPAM Act of 2003 and when is it effective?

The CAN-SPAM Act of 2003 (“Act”) is The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003. It creates a national standard to address the growing problem of commercial email, and went into effect on January 1, 2004. The Federal Trade Commission’s Rule issued on December 16, 2004 defined the criteria to determine the primary purpose of an electronic mail message, including if it is a commercial email, and it goes into effect on February 18, 2005.

2. Are all emails regulated under the Act?

No, the Act regulates only “spam” emails. Spam emails are defined under the Act as:

“any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service....”

In essence, the Act regulates commercial emails promoting or advertising products or services, whether solicited or unsolicited.

3. Does the Act preempt state laws?

The Act preempts state laws regulating commercial email messages. However, state laws are preserved to the extent that they prohibit false or misleading communications, whether in commercial email messages or in any other form.

4. How are emails sent by IIABA agency and broker members to their current customers and clients treated under the Act?

Generally, emails from IIABA member agencies and brokerage firms should fall outside the Act’s definition of commercial email messages and should not be subject to compliance with the Act. This is because the vast majority of these emails will fall under the Act’s exemption for “transactional or relationship messages.” (*See* FAQ 5.)

Commercial email messages sent by IIABA members that do not either qualify as transactional or relationship messages or meet some other exception under the Act must comply with the Act. For example, an email to a current customer about a new product or service would not qualify as a transactional or relationship message. (*See* FAQs 7, 8 and 9.)

5. What is a “transactional or relationship message” under the Act?

In summary, a transactional or relationship message is an email that relates to a commercial transaction previously agreed to by the email recipient. These emails are exempt from compliance with the Act.

More specifically, the definition of a transactional or relationship message under the Act is an email message the primary purpose of which is:

- (a) to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;
- (b) to provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient;
- (c) with respect to a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender, to provide –
 - (i) notification concerning a change in terms or features;
 - (ii) notification of a change in the recipient’s standing or status; or
 - (iii) at regular periodic intervals, account balance or other type of account statement;
- (d) to provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; **or**;
- (e) to deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.

6. How can the sender determine if an email message has a commercial primary purpose, making it subject to the provisions of the Act?

The FTC Rule defines the primary purpose of email messages as follows:

- (a) If the email message consists exclusively of the commercial advertisement or promotion of a commercial product or service, the primary purpose of the message will be deemed to be commercial;
- (b) If the email message contains both the commercial advertisement or promotion of a commercial product or service *and* transactional or relationship content, the primary purpose of the message will be deemed to be commercial if: (i) a recipient reasonably interpreting the subject line of the email would likely conclude that the message contains the commercial advertisement or promotion of a commercial product or service; or (ii) the email’s transactional or relationship content does not appear, in whole or substantial part, at the beginning of the body

of the message; (Note: In describing how to apply these criteria, the FTC has stated that the “net impression” of the message is not the basis for assessing if an email message is commercial.);

- (c) If the email message contains both the commercial advertisement or promotion of a commercial product or service *and* other content that is not transactional or relationship content, the primary purpose of the message will be deemed to be commercial if either: 1) a recipient reasonably interpreting the subject line of the email message would likely conclude that the message contains the commercial advertisement or promotion of a commercial product or service; or 2) a recipient reasonably interpreting the body of the message would likely conclude that the primary purpose of the message is the commercial advertisement or promotion of a commercial product or service. Factors illustrative of those relevant to this interpretation include the placement of content that is the commercial advertisement or promotion of a commercial product or service, in whole or in substantial part, at the beginning of the body of the message; the proportion of the message dedicated to commercial content, and how color, graphics, type size, and style are used to highlight commercial content; (Note: In describing how to apply these criteria, the FTC has stated that the “net impression” of the message is a factor in assessing the placement factor.); and
- (d) If the email message contains only transactional or relationship content, the message will be deemed to have a transactional or relationship primary purpose and will not be commercial.

Compliance Obligations

7. If an email is a commercial message and does not fall under any exception under the Act, what obligations do IIABA member agencies and brokerage firms have when sending such an email?

Commercial email messages that do not fall under any exceptions under the Act **must** include three things, as follows:

- (a) clear and conspicuous identification that the message is an advertisement or solicitation (*see* FAQ 20);
- (b) clear and conspicuous notice of the opportunity to “opt out” of receiving future commercial email messages (*see* FAQ 8); **and**
- (c) a valid physical postal address of the sender.

8. What is required for an opt-out mechanism to comply with the Act?

For an opt-out mechanism to comply with the Act, it **must**:

- (a) be clear and conspicuous on all commercial email messages covered by the Act;
- (b) include a clear and conspicuous functioning return email address to which a recipient can submit – in a manner specified in the email message itself – a request not to receive future commercial email messages from the sender. This requirement can be met by providing a list from which the recipient can choose the specific types of commercial email messages the recipient wants or does not want, provided the list includes an option to receive no commercial email messages from the sender. The sender’s return email address can be included in the email itself or accessible by an Internet-based mechanism, such as a hot link. The sender’s return email address must remain capable of receiving messages for at least 30 days after transmission of the original message to the recipient; **and**
- (c) have a valid physical postal address of the sender.

There is no specific design or implementation mechanism required; each sender can determine its own opt-out content and process.

9. What are a sender’s obligations if a commercial email recipient makes an opt-out request?

After a recipient makes an opt-out request to a sender, it is unlawful for the sender or any person or entity acting on the sender’s behalf, to send that recipient another commercial email message more than 10 days after the opt-out request was made. The only exceptions to this provision are if either the email qualifies for the transactional or relationship message exception (described in FAQ 5) or the recipient gives affirmative consent to receive such email messages subsequent to the opt-out request.

When an opt-out request is received from an employee of a company, it is not clear if the opt-out request applies only to the individual making the request or to all employees in that organization as this issue is not addressed in the Act or the FTC Rule. (*See* also FAQ 10.)

In addition, the sender cannot sell, lease, exchange, transfer, or release the email address of the person who opted out to any other person or entity for any purpose (except as required by law). This restriction applies even if the email address would be used for informational or other purposes that are not commercial. For example, the email address of anyone who opts out cannot be included in a membership directory. This restriction also prohibits a sender from sharing the email address with vendors. For example, if a vendor is hired to send out a mailing via the U.S. Post Office, the database provided to the vendor cannot include the email address of anyone who opted out. It is unclear if this restriction applies to associations that share their email addresses with their for-profit subsidiaries, but it appears that it does.

10. Is a sender in violation of the Act if the sender temporarily is unable to receive or process opt-out requests?

A sender is not in violation of the Act if its return email address or other opt-out mechanism is unexpectedly and temporarily unable to receive messages or process requests due to a technical problem beyond the control of the sender, provided the problem is corrected within a reasonable period of time.

Treatment of Different Types of Emails, Senders, and Recipients

11. What are some examples of commercial email messages that do not fall under any exemptions under the Act?

Examples of commercial email messages that do not meet any exceptions to the Act include:

- advertisements for any commercial products or services;
- solicitations for business to new prospective customers or clients;
- solicitations for business to past clients or customers with whom a sender is not currently conducting business (*See* FAQ 13);
- invitations to seminars/conferences which attendees must pay to attend; **or**
- mixed purpose messages when the primary purpose of the message is a commercial advertisement or promotion of a commercial product or service, even if other information is included.

12. Is email that references a business or links to the website of a business automatically considered commercial email under the Act?

No. If the primary purpose of the email is not a commercial advertisement or promotion of a commercial product or service, the inclusion of a reference to a business or a link to a commercial entity should not alone cause the email to be treated as a commercial email message under the Act. But, if the reference or link is to content on an Internet website operated for a commercial purpose, that reference or link will be treated as commercial content for the purpose of assessing if the primary purpose of the email is commercial.

13. Are email messages to prospective or past customers considered commercial email under the Act?

Not automatically. If an email to a past customer qualifies as a transactional or relationship message or meets some other exception under the Act, the obligations of the Act do not apply. (*See* FAQ 5). However, it is unlikely that an email to a prospective customer would fall under the transactional or relationship message definition. (*See* FAQs 5 and 11.)

14. Is email from an insurance carrier to an insurance agency or brokerage firm considered commercial email under the Act?

No, not if the email is a transactional or relationship message, such as would be the case for the agency's own insurance transactions.

As to emails concerning the agency's role under an appointment contract from a carrier, it is likely that those emails would be considered transactional or relationship and be exempt from compliance with the Act. For example, this would encompass emails concerning new insurance products the agent is authorized by the appointment contract to sell for the carrier.

However, if the email message is a commercial message and not exempt, the sender must comply with all of the Act's requirements. The duty to comply with the Act is not affected by whether the sender or the recipient is an individual or an entity – it is the primary purpose of the message that determines any compliance obligations. (*See FAQs 2, 5 and 6.*)

15. Is email from a trade association to a member covered under the Act?

No, not if it:

- (a) is a transactional or relationship email, such as a message about the recipient's membership status or an update about a product purchased by the member;
- (b) an informational email, such as an update about new legislation; or
- (c) an email without any solicitations or promotions for products or services, such as an announcement that the office of the association has moved.

Further, an association can send commercial email messages to members who have given affirmative consent to receive such emails. This could occur in response to a request for consent (such as on a membership application or renewal form) or at the member's own initiative. (*See FAQ 9.*)

16. Is email from a trade association to a non-member covered under the Act?

No, not if it:

- (a) is a transactional or relationship email, such as a message about an upcoming convention the non-member registered for and paid to attend;
- (b) an informational email, such as an update about new legislation; or
- (c) an email without any solicitations or promotions of products or services, such as an announcement that the office of the association has moved.

However, if the primary purpose of the email is a commercial advertisement or promotion of a commercial product or service, then it would be considered commercial email and would have to comply with the requirements of Act.

17. How is an email from a for-profit subsidiary of a trade association to an association member affected by the Act?

It will be treated in the same way as email from any other entity – if it qualifies as a transactional or relationship message, an informational message, or is otherwise without any commercial advertisements or promotions of commercial products or services, there are no compliance obligations under the Act. But, if the primary purpose of the email message is commercial and if it is not covered by any exceptions, the sender must adhere to all of the requirements in the Act.

18. How does the Act apply to email messages sent by separate divisions or lines of business?

The Act treats separate divisions and lines of business as senders when their email messages identify the sender as a separate line of business or division. When that happens, the separate line of business or division must comply with the Act on its own.

For example, suppose the ABC Company has a benefits division. If the benefits division sends an email from johndoe@benefits.net about a new product to prospective customers, the benefits division is subject to compliance with the Act. This is because the email from johndoe@benefits.net does not reference that it came from ABC Company. This compliance is separate from any compliance obligation ABC Company has on any emails it sends that are covered by the Act.

19. Does the Act apply to email messages sent on behalf of the sender by a service provider?

Yes. Messages sent by a service provider, vendor, or other party on behalf of a sender must comply with the Act just as would be required if sent by the sender directly. For example, if a recipient opts out of receiving commercial email messages from the sender, the opt-out also applies to any person or entity sending commercial email messages on behalf of the sender.

Email Labeling and Subject Line Information

20. Do commercial email messages have to be specially labeled?

In general, yes. All commercial email messages covered by the Act must include a clear and conspicuous notice that the message is an advertisement or solicitation. The Act prohibits the FTC from requiring specific words or characters (such as “ADV” or

“Advertisement”) to label commercial emails and also prohibits the FTC from directing that the identification be in a particular part of a commercial email message.

But, messages to a recipient who has given prior affirmative consent to receive commercial email messages need not include such a label.

21. Are there any special rules for commercial email header information?

Yes. The Act prohibits false and/or misleading header information, which includes:

- (a) an originating email address, domain name, or Internet Protocol address obtained under false or fraudulent pretenses;
- (b) misidentifying the person who initiated the email in the “from” line of the message;
- (c) failing to identify the computer from which the email was sent in order to disguise the email’s origin; and
- (d) using a subject heading if the sender knows or should know that the heading would be likely to mislead the recipient about a material fact regarding the content or subject matter of the message.

In summary, the law requires commercial email messages to have accurate header information (including source, destination, and routing information) even if the messages qualify as a transaction or relationship emails.

Wireless, Internet, and Registry Issues

22. Does the Act create a Do-Not-Email registry?

No.

23. Does the Act have implications that reach beyond electronic email messages?

Yes. The Act applies to wireless commercial messages as well as electronic commercial mail messages. The Act requires that the Federal Communications Commission, in consultation with the FTC, make rules to protect consumers from unwanted mobile service commercial messages.

24. Does the Act impose restrictions on how email addresses are obtained?

Yes. One key prohibition bars obtaining email addresses from a Web site using an automated means if the Web site includes a notice that the site does not sell or otherwise transfer email addresses to others. Thus, agency and brokerage firm members and trade

associations and their subsidiaries may want to include a notice on each of their Web sites, such as:

Notice: This Web site does not sell or otherwise transfer email addresses to others.

Enforcement

25. How is the Act enforced for the insurance industry and trade associations?

The Act authorizes state insurance authorities to enforce it as to all people and entities over which the state insurance authority has jurisdiction, such as insurance agencies and brokerage firms, including agencies owned by a state association. In any state in which the state insurance authority elects not to exercise this power, the enforcement authority reverts to the FTC. As to other senders, the FTC has enforcement authority over trade associations, and the FTC and other federal regulators have enforcement authority over other businesses.

26. What are the penalties for failure to comply with the Act?

The Act provides penalties and remedies for violations, including an injunction to prevent further violations of the Act and monetary damages of up to \$250 per violation up to a maximum of \$2 million (which a court can triple, up to \$6 million for aggravating circumstances).

The Act also provides criminal penalties for deception and other egregious tactics (such as falsifying header information, hacking, sending large numbers of commercial email, or falsifying registration). Unlawful practices under the Act are punishable by a maximum of five years imprisonment if committed in furtherance of any felony. Otherwise, the offender can be imprisoned for up to three years if the violation meets certain volume and damage thresholds.

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