

What The CAN-SPAM Act Of 2003
Means for SHRM Chapters and State Councils

On December 16, 2003 President Bush signed into law the “CAN-Spam Act of 2003.” If an SHRM chapter or state council is sending an e-mail for the primary purpose of advertising the sale of a product or service (even if to a member, and even if for a chapter or state council product or service), the chapter or state council will have to comply with the Act.

An overview of the provisions of the Act which are most pertinent to SHRM chapters and state councils is set forth below, followed by a bullet point summary of when the Act applies and what it requires. Also set forth below is a reminder of the Federal limits on unsolicited fax advertisements.

Of course each SHRM chapter or state council, not SHRM, is responsible for compliance by the chapter or state council with all applicable laws and regulations, not just those concerning commercial e-mails and faxes; and consistent with the requirements of the SHRM Bylaws, each chapter and state council should hold itself out to the public as a separate entity from SHRM. However, SHRM wants its chapters and state councils to comply with laws limiting commercial e-mails and faxes, in the same manner as SHRM intends to. Accordingly we are sharing with our chapters and state councils this memo concerning the requirements of such laws as applied to membership organizations such as SHRM, SHRM chapters, and SHRM state councils.

I. Federal Limits on Commercial E-mails - The CAN-Spam Act of 2003

A. Effective Date – January 1, 2004

B. Applies to “Commercial Electronic Mail Message”

1. This is essentially an e-mail message, the primary purpose of which is the commercial advertisement or promotion of a commercial product or service

2. There is no minimum threshold number of e-mails which must be sent before the Act applies (i.e., the e-mails need not be sent in “bulk” for the Act to apply).

3. There is no express exemption for e-mails to members or to others with whom the sender has an established business relationship.

4. “Transactional Messages” are excluded from “Commercial Electronic Mail Messages;” but these relate to transactions and would most likely be helpful to a chapter or state council only in the case of an e-mail such as a dues notice.

5. While a chapter or state council could argue that an e-mail to its members advertising or promoting sale of a chapter or state council product or service which is related to the chapter’s or state council’s tax-exempt purposes is not for the primary purpose of promoting a commercial product, such an aggressive position would present risk of violation of the Act, unless and until the FTC gives support to such a position. Of course, an e-mail to members which advises them of chapter, state council 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.

C. Requirements Applicable to Sender of Commercial E-mail

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

(a) The chapter or state council may comply with the opt-out feature by providing 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 or state council, as long as the list includes an option for not receiving any commercial e-mails from the chapter or state council.

(b) In the case of commercial e-mails sent to members, a chapter or state council should make sure that its opt-out feature does not enable the

member to opt out of receiving non-commercial messages which the chapter or state council might wish to send to its members.

2. 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). There is no express requirement that this notice be in the subject line of the e-mail list (which would cause the e-mail to be blocked by most filters); but the Act instructs the FTC to study this issue in the next 18 months.

(a) One can argue that express “affirmative consent” should be inferred from chapter or state council membership; but the more cautious approach is to identify commercial e-mails as “Advertising” or “Solicitation,” even if to a member.

3. Postal Address - The commercial e-mail must provide a valid physical postal address of the chapter or state council.

4. 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. This general anti-fraud requirement should not present problems for the typical SHRM chapter or state council; but is aimed at the “truly bad” spammers.

5. 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; and it is unlawful for the sender to sell, lease or otherwise transfer the e-mail address of the recipient.

D. Penalties – 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.

E. 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. Therefore, state laws generally prohibiting fraudulent practices by means of commercial e-mails are not preempted; but state opt-in laws such as the California law which requires consent of recipient before sending him/her e-mails, and state laws requiring use of an opt-out feature, are preempted. Furthermore, it would appear that state laws which require commercial e-mails to include “ADV” in the subject line will be preempted.

F. Do-Not-E-mail Registry – The Act authorizes the FTC to establish a Do-Not-E-mail Registry no later than October 1, 2004.

Summary of Applicability of CAN-Spam Act of 2003

- *Applies to e-mails the primary purpose of which is to advertise or promote commercial products.*
- *No express exclusion for e-mails to members.*
- *Safest to assume that e-mail whose primary purpose is to advertise sale of chapter or state council products or services is nevertheless covered just as if advertising were for third party products or services.*
- *E-mail to members for primary purpose of providing chapter, state council, or other HR news is not covered by Act, even if it has incidental advertising*

Summary of Requirements for Covered E-mails

- *Include in e-mail the chapter's or state council's valid physical postal address.*
- *Include in e-mail a conspicuous opt-out feature.*
- *That opt-out feature must be functioning for at least 30 days after e-mail is sent.*
- *Keep list of e-mail addresses which respond with objection.*
- *Do not send objecting recipient more than 10 business days after receipt of objection, an e-mail of a type objected to.*
- *Do not sell e-mail address from which you have received an objection.*
- *Include in e-mail a conspicuous identification that e-mail is advertisement or solicitation (does not need to be in subject line of e-mail).*

II. Don't Forget To Comply with Federal Limits On Unsolicited Faxes

A. The FCC Rule on Unsolicited Fax Advertisements – SHRM chapters and state councils must also be mindful of the fact that the Federal Communications Commission (“FCC”) has also issued a rule under the Telephone Consumer Protection Act which prohibits sending by fax an unsolicited advertisement, without the consent of the recipient.

1. Covered Faxes - The FCC Rule applies only to faxes which “advertise the commercial availability or quality of any property, goods or services.”

(a) Faxes which do not advertise the commercial availability or quality of any property, goods or services (e.g., a legislative alert, or a newsletter setting forth HR news, and containing no advertisements) are not covered by the FCC Rule.

(b) Faxes encouraging members to register for events for which a charge is imposed, or to purchase chapter or state council publications, are covered by the FCC Rule, and do require consent.

2. What Constitutes Member Consent – The FCC Rule requires consent of the recipient to send him/her a fax which is covered by the Rule (i.e., a fax advertisement). The FCC Rule currently includes the “established business relationship” exception, under which consent is automatically inferred from a member to a chapter or state council, or from anyone else with whom the chapter or state council has an established business relationship. Last summer the FCC issued, and then stayed until January 1, 2005, a Rule Amendment which would have eliminated this “established business relationship” exception and required express written consent from a member or customer before the chapter or state council could fax that member or customer an advertisement. As a result of the stay, until January 1, 2005 the old FCC Rule continues, which infers consent from the mere status of member or customer, and which therefore allows a chapter or state council to fax advertisements to a member (or to existing customers), without express written consent. Effective January 1, 2005 when the stay lifts, a chapter or state council will need the express written consent of its member or customer to send

the member or customer an advertisement by fax. That express consent must be signed (although electronic signatures will be allowed), and must set forth the name of the person consenting, and the specific fax number(s) for which consent is given.

3. Additional Requirements - Chapters and state councils should also note that the Telephone Consumer Protection Act also requires that any fax identify on each page or on the first page the date and time it is sent, the sender's identity, and the telephone number of the fax machine sending the transmission.

B. State Laws Limiting Unsolicited Fax Advertisements

Several states also have laws which limit unsolicited fax advertisements. Unlike the CAN-Spam Act of 2003, there is no express federal preemption of such state laws limiting unsolicited fax advertisements. A chapter or state council should check the laws of the state where it is located and of any state to which it may send unsolicited fax advertisements, to make sure that such faxes comply with the laws of such states.