

**Dianne @ DDS Group**

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**Subject:** FW: FCC Spam Email

-----Original Message-----

**From:** jennifer.ian@prsa.org [mailto:jennifer.ian@prsa.org]**Sent:** Tuesday, April 20, 2004 2:09 PM**To:** ddsmith@ulum.com**Subject:** FCC Spam Email**FAQ on Anti-Spam Legislation**

On December 16, 2003, the President signed the "CAN SPAM" Act of 2003 (S.877) into law, which will go into effect January 1, 2004. Though the legislation ultimately targets the peddlers of pornography, false business opportunities, and body enhancing solutions and those that use "fraudulent" or "deceptive practices," there are some implications for the association community. ASAE is pleased to offer the following FAQ on the "CAN SPAM" Act. (Please note that this information is based on ASAE's reading of the new law and discussions with key Congressional staff and interested parties. This information should not be taken as either legal advice or a legal opinion.)

**What is the definition of a "commercial electronic mail message"?**

The term commercial electronic mail message is defined as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose)."p>

**What must senders of "commercial" e-mail messages do to comply with the rules of the legislation?**

The law establishes 3 criteria for e-mail when messages are commercial in nature:

"Clear and conspicuous identification that the message is an advertisement or solicitation" (not necessarily in the e-mail subject line; this requirement does not apply if the sender receives "affirmative consent" from the recipient to send the e-mail)

An ability to "opt-out" electronically from future emails of this nature

A valid postal address of the sender

Also note that once someone "opts out" of receiving future commercial e-mail messages, the new law prohibits the sender of the e-mail from transferring or releasing that "opted out" e-mail address to anyone for any purpose.

**Are there any exceptions to this definition of "commercial" e-mail?**

Yes. The definition does not cover what has been termed "transaction or relationship" messages. To see a full definition of either of these terms, please visit Sec 3. Definitions of S.877.

**What effect does this have on e-mails from associations to its respective members and donors?**

It is ASAE's understanding that Congress did not intend for communications between tax-exempt associations and charities and their respective members and donors to be affected by the new law provided that the communication is in furtherance of the organization's exempt purpose. This understanding is based on numerous discussions with key members of Congress and their staffs. However, it is evident that ASAE will have to work directly with the Federal Trade Commission (FTC) to clarify this.

The FTC will begin promulgating regulations later in 2004. Clearly, the FTC has been given the authority to clarify those e-mails that must comply with the requirements of this law, and ASAE will work closely with the FTC to make sure that e-mail communications between the association community and its members and donors do not fall within the targeted realm of the legislation.

On March 11, the FTC published a Federal Register notice today seeking public comment on the CAN-SPAM Act. Specifically, the FTC is seeking comment on the mandatory "primary purpose" rulemaking, which seeks to define how

the CAN-SPAM Act applies to certain electronic messages. ASAE will be filing comments on this issue with the FTC, and will make those comments publicly accessible. Comments are due April 12.

Until the FTC issues regulations, note that the law does not provide a definitive, express exemption for e-mail messages sent to members or donors. It is ASAE's position (based on conversations with key Capitol Hill staff) that the association-member relationship should fit within the definition of "affirmative consent." Further, ASAE does not believe that e-mails sent that promote activities that are related to an organization's tax-exempt purposes should be construed as "commercial" under the new law. Of course, definitive answers will need to await guidance from the FTC.

Self-regulation has always been one of the strengths of the association community. Thus, regardless of whether an express exemption for association e-mail messages were included in FTC regulations, ASAE strongly recommends that all e-mail communications sent to members and donors include an opt-out mechanism and a valid postal address. This should be accepted standard practice.

### **What happens to current and pending state laws on Spam?**

The "CAN SPAM" Act generally pre-empts all existing and pending state laws on Spam, including the California Spam Law, which was supposed to go into effect January 1, 2004, except to the extent that such laws prohibit falsity or deception in commercial e-mail messages.

### **Will there be a do-not-spam registry?**

The FTC has 6 months to report back with a plan on establishing a do-not-spam registry, similar to the popular do-not-call registry. FTC Chairman Tim Muris has expressed concerns that e-mail does not lend itself to this type of registry. However, Congress has strongly pushed for such a registry, so one can be certain that the FTC will give it due consideration.

### **Our legal counsel is advising us to comply with all the provisions of the new law until the FTC issues implementing regulations. What should we do?**

You should obviously do whatever you feel comfortable doing — some associations may believe that it is prudent to treat even e-mails that promote educational events and similar "related" products or services as subject to the law's disclosure requirements. ASAE strongly believes, based upon conversations with key staff from the committees of jurisdiction on Capitol Hill, that (1) the "affirmative consent" definition should extend to associations' relationships with their members, thereby exempting association e-mails to members from the identification requirements of the law, and that (2) "commercial" e-mail should be defined in a manner that excludes all association e-mails in furtherance of their tax-exempt purposes. Definitive answers should be provided soon, and your association should make an independent determination regarding how it wishes to act until such definitive answers are provided.

### **End Notes**

As the FTC begins to promulgate rules implementing the new law, ASAE will provide updates on important information that the association community needs to know concerning the "CAN SPAM" Act.

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