

Complying with Federal Anti-Spam Law: University of California Guidelines

January 28, 2004

Background

The federal CAN-SPAM Act (Controlling the Assault of Non-Solicited Pornography and Marketing),¹ designed to control unwanted electronic mail, was signed into law in December 2003 and took effect January 1, 2004. This federal law preempts most of the more restrictive California anti-spam legislation; however, it does not restrict the provisions of the California law that relate to fraud and deceptive practices.

The CAN-SPAM Act applies to “commercial electronic mail messages.” The law defines such messages as electronic mail whose *primary purpose* is the “commercial advertisement or promotion of a commercial product or service.” The law does not define “commercial.” The law applies equally to mass mailings and to individual e-mail messages. Over the next two years, the Federal Trade Commission is charged with clarifying some of the law’s key terms, such as “primary purpose.” It is not charged with defining the term “commercial.”

Application of the Law at UC

Electronic mail sent by the University for the primary purpose of promoting the University’s commercial “products” or “services” must comply with the CAN-SPAM Act. Examples of such products or services include athletic events, cultural/arts performances, licensing opportunities, publications, and membership solicitations (e.g., for museums or recreations centers).

The Act is applicable only to e-mail that constitutes a commercial advertisement or promotion of a commercial *product* or *service*. The Act is not applicable to commercial e-mail in general, to e-mail advertising or promoting “activity,” or to e-mail simply because the e-mail references or solicits funds. Further, it is not applicable to e-mail messages sent to provide information about the University’s undergraduate, graduate, or professional degree-granting programs. Some programs not a part of the regular campus curriculum might be considered commercial “services” depending upon the facts. Advice should be sought about such programs.

What to Do to Comply with the Anti-Spam Law

The CAN-SPAM law requires that a commercial e-mail message, referred to below simply as “e-mail,” include the following three items:

¹ The Act is available at the Library of Congress “Thomas” locator for legislative information on the Internet: <http://thomas.loc.gov/>. Search for the Act using the term “can-spam,” and select the item labeled “enrolled.”

- **Message Identification.** The e-mail must include a “clear and conspicuous identification that the message is an advertisement or solicitation.” The Act does not require the identification to appear in the subject line. **The message identification requirement is not applicable if the recipient has given previous permission to send such messages.**
- **Opt-out Requirements.** Recipients must be given an opportunity to “opt-out” of further solicitations. This must be achieved by including either a functioning return e-mail address or a link to another Internet-based mechanism that may be used for opting-out. The opt-out mechanism must remain available to the recipient for thirty days after the e-mail transmission. The sender must honor the opt-out request within ten days from receipt of the request. **Even if a recipient has given prior consent to receipt of e-mail, the message must contain an opt-out provision.**
 - a. A sender may include an option for a recipient to opt out of some but not all messages. For example, Continuing Education of the Bar could give recipients the choice to opt out of different types of communications corresponding with its different subject-matter publications.
 - b. If an entity has “separate lines of business or divisions,” an opt-out by an e-mail recipient will be treated as an opt-out only for that line or division, provided that the e-mail has identified the sender as a line or division within the entity. Thus, e-mails from different divisions in the Office of the President and from different units at the campuses should use such identifiers so that a recipient's opting out of one division's or department's e-mail messages will not be treated as an opt-out of all e-mail messages sent by the University.
 - c. A vendor who sends messages on behalf of a University unit must also include the opt-out provisions.
- **Sender Identification.** Senders must include a valid physical address.

The Act exempts “transactional or relationship messages” from the procedural requirements when the *primary purpose* of the message is to achieve one of the following:

- To facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to, such as messages confirming registration, purchase, or reservations.
- To provide warranty information, or product recall or safety/security information with respect to a product or service used or purchased by the recipient.
- To notify the recipient about substantive changes in an existing subscription, membership, account, loan, or comparable commercial relationship.
- To provide information directly related to an employment relationship or related benefit plan in which the recipient is currently participating.
- To deliver goods or services, including updates or upgrades, which the recipient has previously requested or ordered from the sender.

Who to Contact with Questions

Berkeley: Karen Eft

Davis: Steve Drown, Deborah Allison

Irvine: Bob Daly, Stephen Franklin

Los Angeles: Kent Wada

Merced: Chris Volkerts

Riverside: Charles Rowley

San Diego: Anthony Wood

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