



# Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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## Inside This Issue

2

Commercial E-mail Disclosures

3

Honoring Opt-Out Requests

3

Exempted E-mails

4

Examples of Real Estate Practice Affected by CAN-SPAM Act

5

Deceptive and Other Prohibited Practices

6

Wisconsin E-mail Law

6

Resources



## Federal Anti-Spam Legislation

On Jan. 1, 2004, Congress passed the “CAN-SPAM” Act of 2003 to create a uniform standard for e-mail in the United States. The Act, which stands for “Controlling the Assault of Non-Solicited Pornography and Marketing,” does not ban e-mails offering the recipient a product or service, nor does it require that recipients give prior consent. Instead, the law requires that an opt-out mechanism and sender identification information be included in commercial e-mails.

The Act targets pornographic e-mails, fraudulent and deceptive offers, and unsolicited e-mails that sell anything from questionable business opportunities to drugs that will help consumers shed unwanted pounds and enhance personal performance. While this legislation is directed at eliminating the annoying Spam e-mails that are found in most e-mail inboxes, it clearly impacts the daily practice of many REALTORS®, associations and multiple listing services.

This *Legal Update* reviews various provisions of the federal anti-spam legislation, beginning with a discussion of which commercial e-mails are covered by the Act and the disclosures and opt-out features that must be included in these transmissions. An overview of exemptions from the commercial e-mail requirements is given, followed by a discussion of the application of the Act to real estate practice. The *Update* concludes with a look at other prohibited practices, a potential do-

not-e-mail registry, enforcement issues, and the Wisconsin law regulating harassing and obscene e-mails.

The Federal Trade Commission (FTC) will be issuing regulations over the next year to further define terminology and clarify implementation of the Act. Some groups also believe that Congress will issue a clarifying document explaining some of the new law and that this clarification will indicate that e-mails between tax-exempt associations and charities and their members and donors are not subject to the Act.

Given this uncertainty, it is difficult to reach any firm judgments about the precise reach of the Act until FTC regulations or other official interpretations are issued – all there is to work with is the text of the Act. Accordingly, prudent practice dictates a conservative approach assuming that the Act does apply in questionable situations, at least until official clarification is provided.

### **Commercial E-Mails**

The Act applies to all solicited and unsolicited commercial e-mails, which are defined as “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service.” This includes e-mails that promote Web sites that are operated for a commercial purpose.

E-mails that promote or sell a product or service for a fee are considered

## Contacts

### EDITORIAL STAFF

#### Author

Debbi Conrad

#### Production

Laura Connolly  
Tracy Rucka  
Rick Staff

### ASSOCIATION MANAGEMENT

#### Chairman

Walter Hellyer, CRB,  
CRS, GRI

#### President

William E. Malkasian, CAE

### ADDRESS/PHONE

The Wisconsin  
REALTORS® Association,  
4801 Forest Run Road,  
Suite 201, Madison,  
WI 53704-7337  
(608)241-2047  
1-800-279-1972

### LEGAL HOTLINE:

Ph (608) 242-2296  
Fax (608) 242-2279  
Web: [www.wra.org](http://www.wra.org)

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commercial e-mails, regardless if they are sent to a large group or to a single recipient. Under the new law, the fact that an e-mail is solicited or unsolicited does not alter the status of an e-mail that has a commercial purpose. While the Act does not define “primary purpose” or “commercial product or service,” these terms may be defined and explained when the FTC issues its regulations over the next year.

Other informational e-mails that do not have a primary commercial purpose are not subject to the Act.

### Commercial E-Mail Disclosures

The Act requires all commercial e-mails to include:

- A legitimate return e-mail address and a valid physical postal address.
- A clear and conspicuous notice of the recipient’s opportunity to “opt-out,” that is, to decline to receive any future commercial e-mail messages.
- A mechanism that may be used or an e-mail address (active for at least 30 days after message transmission) to which a recipient may send a message asking to not receive any future e-mail messages from the sender.
- A clear and conspicuous notice that the message is an advertisement or a solicitation. The Act does not specify where this information must be disclosed, so the fact that the e-mail is an advertisement or a solicitation might be disclosed in the subject line or within the text of the e-mail message.
- Clear notice in subject heading if messages include pornographic or sexual content.

At this point in time, the Act does not require that the subject line of commercial e-mail include “ADV” for “advertising,” something that some

companies already do voluntarily. However, the law does require the FTC to set forth a plan by July 2005 requiring easy identification of commercial e-mail from its subject line by use of “ADV” or other comparable identifier, or to explain its recommendations against such a plan. Such a subject line identification requirement would be problematic because many e-mails containing information desired by a recipient may have to carry this label and thus may be deleted by Spam filters.

*Are there any circumstances where a commercial e-mail does not have to include the notice that the message is an advertisement or solicitation?*

If the recipient has given his or her affirmative consent to receive commercial e-mails from the sender, the sender does not have to include the clear and conspicuous notice that the e-mail is an advertisement or solicitation. Such e-mails, however, must continue to include an opt-out notice and the sender’s return e-mail address and physical postal address.

Affirmative consent means that the recipient has expressly consented to receive the e-mail messages, either in response to a request for such consent or upon the recipient’s own initiative. It is not clear whether a company could consent on behalf of all of the company’s e-mail addresses or whether each individual employee would need to separately consent.

*Who is considered to be the sender of commercial e-mail messages under the Act?*

The sender of a commercial e-mail message means the “person who initiates such a message and whose product, service, or Internet web site is advertised or promoted by the message.” However, if an entity or business “operates through separate lines

of business or divisions and holds itself out to the recipient throughout the message as that particular line of business or division rather than as the entity,” then the sender is the line of business or the division.

## Opt-Out Mechanisms

All commercial e-mail messages must contain an opt-out message alerting the recipient that he or she may ask the sender to not send any more commercial e-mail. A return e-mail address, Internet link or other computer mechanism that the recipient may use to send an opt-out message must be provided.

The opt-out only applies to commercial e-mails. Other informational e-mails that do not have a primary commercial purpose are not subject to the Act. Recipients do not have to be given the choice of opting out of these non-commercial e-mails, which senders may continue to transmit.

There is no magic opt-out language that is recommended for universal use. Each company or business is different and they have the option to allow recipients to pick and choose what types of commercial e-mail messages they wish to receive. Opt-outs may allow the recipient to select the types of commercial e-mails that may and may not be sent, or they can be comprehensive and include all commercial e-mails or even all e-mails.

### *Can the sender offer a menu of opt-out options?*

A sender may give recipients a menu of options from which to choose the types of commercial e-mail they no longer wish to receive, as long as the menu includes an option to receive no further commercial e-mail communications of any kind from the sender.

## Honoring Opt-Out Requests

The Act requires that senders honor all opt-out requests. If a recipient makes a request to not receive commercial mail messages from the sender, it is unlawful for the sender to send another commercial electronic mail message at any time after 10 days from the receipt of the original message unless the recipient has affirmatively consented to receive e-mails subsequent to the first request to not receive commercial e-mails. It is not yet clear whether a company could “opt-out” on behalf of all company e-mail addresses, or whether each employee would need to opt-out separately.

Any database that a company or business uses to manage e-mail communications must flag people who have asked not to receive any more commercial e-mail. Any software used to send messages in bulk quantities must be able to track the do-not-e-mail requests in the database. Procedures must be followed to ensure that opt-out requests are honored within 10 days after receipt.

The Act prohibits the sale, lease, exchange, transfer, or release of the e-mail addresses of all recipients who request an opt-out. These e-mail addresses cannot be furnished to anyone else for any purpose, even to organizations that will not use them for sending commercial e-mails (such as an advocacy group that sends only legislative updates). This provision apparently also includes an association’s related foundations, for-profit subsidiaries, chapters, and other closely affiliated entities. The ban includes transfers of mailing lists that include e-mail addresses, including the sale or rental of membership lists, and the publication of opted-out member e-mail addresses in printed or electronic membership directories.

## Exempted E-Mails

The Act does not include an exemption for e-mails transmitted to recipients with whom the sender has a prior or existing business relationship, as is the case with other FTC and FCC laws. Instead, the Act exempts only “transactional or relationship messages” and provides that these categories of e-mails do not have to contain an opt-out feature or the other disclosures required by the Act for commercial e-mail.

Transactional or relationship messages tend to contain information that is specific to the recipient. A transactional or relationship message is an e-mail message the primary purpose of which is:

- 1.) To facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;
- 2.) 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;
- 3.) To provide notice regarding terms or features, the recipient’s standing or status, or account balance information with respect to a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the recipient’s ongoing purchase or use of products or services offered by the sender;
- 4.) To provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or

5.) 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.

The Act provides that the FTC may, by regulation, modify the definition of “transactional or relationship message” to expand or contract the categories of messages that are treated as commercial e-mails under the Act to the extent necessary to accommodate changes in electronic mail technology or practices and accomplish the purposes of the Act.

Transactional or relationship messages do not have to include the opt-out or the advertisement/solicitation message. Thus, a billing reminder or statement of account e-mail would appear to be outside of the Act and would not have to include a commercial e-mail opt-out message.

### **Accurate Header Information**

The Act requires all commercial and all transactional or relationship e-mail messages to have accurate header information, including the source, destination and routing information attached to an e-mail. It also must include the originating domain name and e-mail address, as well as accurate information in the “from” line of the message. For commercial e-mail, the subject line of the e-mail cannot mislead the recipient about the contents or subject matter of the message.

### **Real Estate Examples**

*Would e-mails sent by a listing agent or broker to a seller who has listed her home for sale, or by an agent or brokerage to a prospective buyer, be considered transactional or relationship messages?*

In either case, as long as the broker or

agent has established a brokerage service relationship with the client, such as listing the property for sale or entering into a buyer’s broker agreement with an interested buyer, such communications between broker/agent and customer/client are probably transactional or relationship messages. The same is arguably true for brokers working with buyers as subagents although it may be more difficult to establish the parameters of the services and products that are to be provided because there is no written contract. Consequently, it may be prudent to create a checklist of the services that will be provided to a customer and have the customer sign the list if the customer will receive any e-mails promoting services and products that are for sale, such as property data e-mails giving information about properties for sale.

Other messages, such as those that solicit sellers or buyers who are not presently clients or who do not consider themselves to presently be customers, are probably commercial messages that must comply with the Act.

*Would e-mails sent by a REALTOR® association or an MLS to its memberships be considered a transactional or relationship message and thus exempt from the Act’s requirements?*

Under the definition of a “transactional or relationship message,” many e-mails sent by an association or MLS to its members may be exempt. For example, under the first primary purpose, associations may process membership dues payments through the use of e-mail without being covered by the Act. Under the third primary purpose, associations could e-mail membership or account information without much concern of being covered.

Associations also may e-mail industry news updates, legislative alerts and other pertinent information to members because these are not commercial e-mails, at least as long as the message does not promote any commercial transaction between the association and the recipient.

But it is also clear that e-mails advertising products or services to members as well as to nonmembers that are not included in the membership package are likely to be construed as commercial e-mails and subject to the Act. If the FTC interprets the term “commercial” broadly, like the FCC did with respect to its “consent to fax” rules, then association e-mails promoting conferences and events for which a fee is charged, or e-mail selling educational publications to either members and nonmembers will be covered by the Act.

A message announcing an annual conference that provides registration payment information (or a link to such information on a Web site) may be viewed as commercial and within the purview of the Act. If the conference announcement is included with a member’s annual electronic dues statement, then the “primary purpose” of the message may be seen as dues, meeting one of the transactional or relationship requirements, while the commercial promotion is seen as secondary and permitted under these circumstances. Unfortunately, this is a bit speculative until the FTC issues further regulatory guidance.

Part of the uncertainty is because there is only the statute to look at – no regulations have been issued yet – and there has been a very uneasy track record this past year between the FTC and the FCC with respect to laws and rules regarding telephone and fax solicitations. Consequently, it is prudent to be a bit cautious for the time being.

Another concern is the practical policy aspect. Until there are some bright lines delineating which e-mails are commercial messages subject to the Act and which ones are exempt, it seems impractical – and a liability risk – to have staff sit and figure out what category of e-mail they are sending out and what disclosure information is required. Associations certainly can send out e-mails to members without the opt-out and other disclosure information if they want to take the time to sort e-mails by content and then determine what disclosures are needed for each category.

*Why does the WRA opt-out language state, “This is an advertisement from the WRA. Name and title of individual, Wisconsin REALTORS® Association, 4801 Forest Run Rd. Suite 201, Madison, WI 53704, Phone: 608-241-2047, Fax: 608-241-5168, [www.wra.org](http://www.wra.org). Unsubscribe: If you unsubscribe to WRA e-mail, you are authorizing the WRA to discontinue all e-mail correspondence with you. You will not receive any further information from the WRA via e-mail ... To unsubscribe, click here ... [unsubscribe@wra.org](mailto:unsubscribe@wra.org)?”*

The WRA opt-out language includes commercial and non-commercial e-mails, and is an “all or nothing” choice as a matter of policy. The WRA does not wish to give a menu of opt-out choices and is not limiting its opt-out to just commercial e-mails. The WRA choice for a recipient is to receive all e-mails or to not receive any e-mails from the WRA. At this time, the association has chosen not to attempt to keep track of a menu of choices for each member, which would then require staff to check on a member’s e-mail status every time an e-mail is initiated. To remember to determine which category of e-mail is being sent and which opt-out or

other information must be included every time an e-mail is sent to members is complicated and creates a potential liability risk.

#### ***What should REALTORS® do to protect themselves from liability under the CAN-SPAM Act?***

Until further guidance and clarification is issued by Congress or the FTC, REALTORS® should assume that all e-mails that sell or promote a product or service are commercial e-mails which are subject to the Act and must include all of the following:

- A return e-mail address,
- A physical postal address,
- A clear and conspicuous opt-out notice,
- A mechanism or e-mail address where the recipient may send a request to not receive future e-mail messages from the sender, and
- A clear and conspicuous notice that the message is an advertisement or solicitation.

The best advice is to add this information to your e-mail signature block so that it will always be there. That way no one will inadvertently expose his or her company or association to potential liability.

REALTORS® should check with their company’s computer consultants for assistance in setting up the opt-out feature and incorporating the required information in their e-mail headers and signature blocks for use in all commercial e-mails.

#### **Deceptive And Other Prohibited Practices**

The CAN-SPAM Act bans certain fraudulent or deceptive practices and criminalizes techniques used by “spammers” to avoid detection. The

Act prohibits:

- E-mail harvesting, a process where e-mail addresses are gathered by computer programs that search public areas on the Internet to capture lists of e-mail addresses from Web pages, newsgroups, chat rooms, and other online destinations;
- Dictionary attacks, a technique to create as many possible letter combinations for e-mail addresses at large ISPs or e-mail services in the hope of finding a valid address;
- Sending bulk Spam from a computer accessed without authorization;
- Sending bulk Spam through open relays, that is, open mail servers configured to accept and transfer e-mail on behalf of any user anywhere, including unrelated third parties. An open relay in your e-mail server allows any e-mail sender anywhere to pass messages through your server and onto the ultimate recipients;
- Falsifying header information;
- Using deceptive subject lines;
- Registering for five or more e-mail accounts using false registration information; and
- Using falsely created accounts to send bulk Spam.

Another prohibition in the Act protects associations that publish membership directories online and do not rent their member e-mail address lists to third parties. The law imposes additional penalties on those who harvest e-mail addresses from a Web site that includes a notice that the owner of the site does not sell or otherwise transfer e-mail addresses to others.

## Do-Not-E-mail Registry

The CAN-SPAM Act requires the FTC to study the possibility of having a do-not-e-mail registry and to submit a report to Congress by July 1, 2004. This report is to include a plan and timetable for establishing a do-not-e-mail registry and give Congress an explanation of practical, technical, security, privacy, enforceability, or other concerns that the FTC has with such a registry.

The Act does not require the FTC to create a do-not-e-mail registry; the FTC will be allowed to determine whether such a registry is feasible. FTC Chairman Timothy Muris has already expressed concern that such a registry would be impossible to enforce because of the difficulty of tracking down the most egregious spammers.

## Enforcement

The Act grants the FTC and other federal and state regulators enforcement authority over most organizations. Internet Service providers (ISPs) may also sue for injunctive relief and damages. There is no private right of action for consumers.

The Act includes criminal and civil penalties for violations. In civil actions, damages of up to \$250 per violation (or treble damages for willful violations), with a maximum award of \$2 million are possible.

There is no safe harbor. However, courts assessing damages may consider whether defendants have implemented and followed commercially reasonable compliance procedures in setting the level of damages.

Criminal charges may be brought for deception and other egregious tactics, such as falsifying header information, hacking, sending large numbers of commercial e-mail, or falsifying registration. These practices are punishable by a maximum of five years imprisonment if com-

mitted in furtherance of any felony. Otherwise, offenders may receive up to three years if the violation meets certain volume and damage thresholds.

State laws exclusively regulating use of e-mail used to send commercial messages are preempted by the Act. However, the Act does not preempt state laws or portions of state laws that prohibit falsity or deception in any e-mail message or attachment to such an e-mail.

## Wisconsin Law

Wis. Stat. § 947.0125 prohibits the unlawful use of computerized communication systems to send threatening or obscene messages. It is illegal to transmit e-mail messages that threaten to inflict injury or physical harm to any person or the property of any person with the intent to frighten, intimidate, threaten, abuse or harass another person. It is also a misdemeanor to send e-mail messages that use any obscene, lewd or profane language or suggest any lewd or lascivious act with intent to frighten, intimidate, threaten or abuse another person. Sending repeated e-mails with the intent to solely harass another person is also illegal and is punishable by forfeiture.

For a copy of § 947.0125, go to [www.legis.state.wi.us/statutes/Stat0947.pdf](http://www.legis.state.wi.us/statutes/Stat0947.pdf).

## Resources

For a CAN-SPAM summary document, see [www.wra.org/pdf/MemberSpamMemo.pdf](http://www.wra.org/pdf/MemberSpamMemo.pdf).

The text of the federal CAN-SPAM legislation is available at [thomas.loc.gov/cgi-bin/query/C?c108:/temp/~c108rGXWT6](http://thomas.loc.gov/cgi-bin/query/C?c108:/temp/~c108rGXWT6).

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4801 Forest Run Road,  
Suite 201, Madison,  
WI, 53704-7337

(608) 241-2047  
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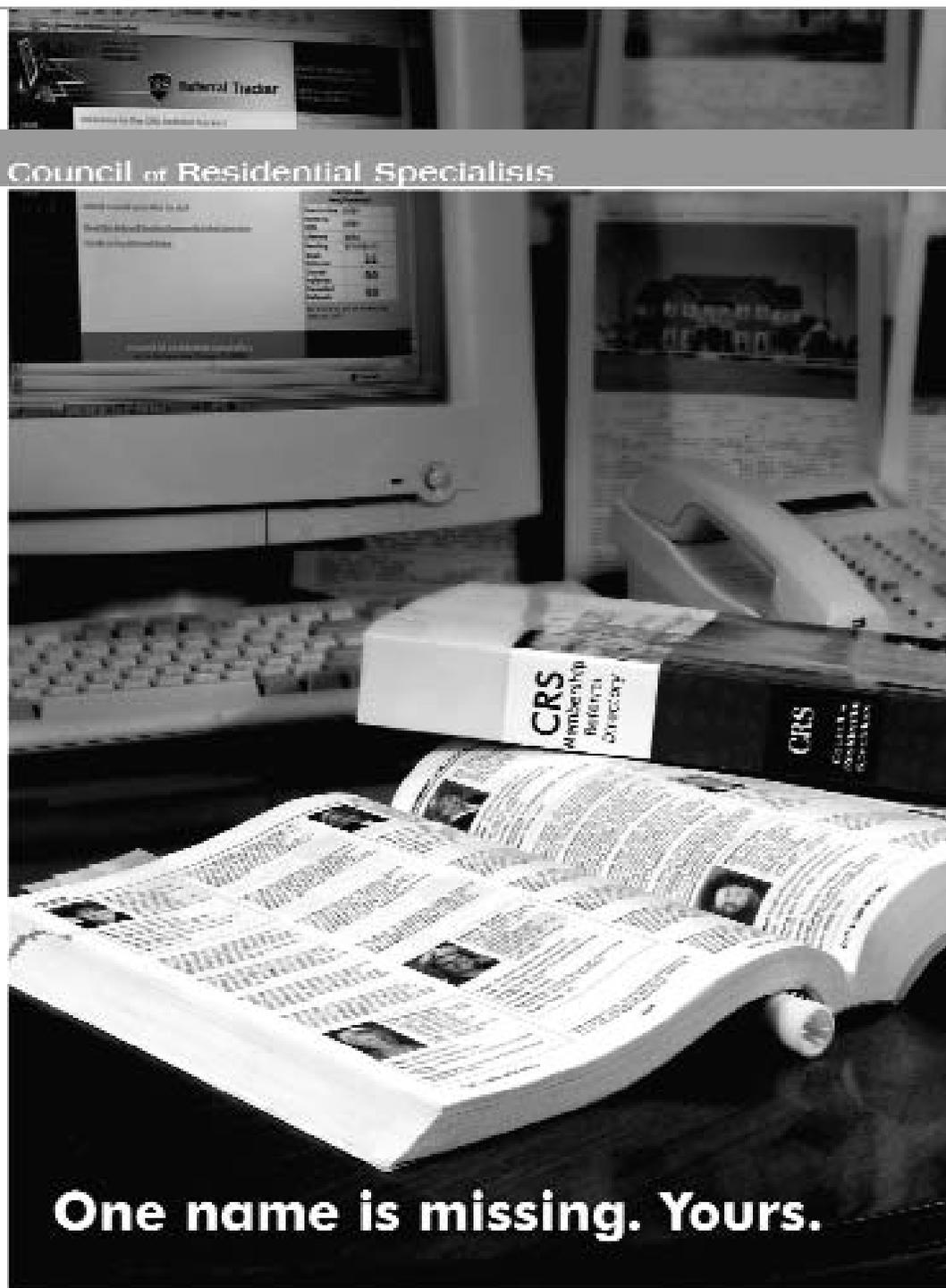


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