

community BANKER

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Welcome to the latest issue of the COMMUNITY BANKER.

The Community Banker is prepared by attorneys at Olson & Burns P.C. to provide information pertaining to legal developments affecting the field of banking. In order to accomplish this objective, we welcome any comments our readers have regarding the content and format of this publication. Please address your comments to:

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The attorneys at Olson & Burns represent a wide range of clients in the financial and commercial areas. Our attorneys represent more than 30 banks throughout North Dakota.

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CAN-SPAM ACT Compliance

We weren't going to mention the pandemic, but it's a fact that personal sales pitches and bank events are impossible or undesirable during lockdown, quarantine, and social distancing. For many businesses, email advertising is stepping into the breach. Email is a great way to contact your existing customers or to reach out to prospective customers. It's inexpensive! It's fast! You can track its effectiveness as a marketing tool! It can also get you in legal trouble! If you use email marketing, you need to be aware of the CAN-SPAM Act, a law that sets the rules for commercial email. Found at 15 U.S.C. §§ 7701 – 7713, the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 has been effective since January 1, 2004, and regulates the transmission of all commercial electronic mail messages. The Act is enforced primarily by the Federal Trade Commission, and in certain situations may also be enforced by other federal agencies. Commercial e-mails sent to e-mail addresses associated with a wireless device are regulated by the FCC, state attorneys general enforce consumer fraud laws, and Internet Service Providers have enforcement powers beyond the scope of this article.

The CAN-SPAM Act doesn't apply only to mass or bulk email; rather, it applies to *all* commercial email messages, which the law defines as “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service.” This includes email that advertises content on commercial websites. Running afoul of the law can be expensive because *each* separate email in violation of the Act is subject to financial penalties or fines. However, following the law isn't terribly complicated, and the main requirements can be broken down into seven email marketing rules you should know:

1. DO NOT HIDE WHO IS SENDING THE EMAIL. Don't use false or misleading header information. The “From,” “To,” “Reply-To,” and routing information – including the originating domain name and email address – must be accurate and identify the person or business sending the message.

2. USE A TRUTHFUL SUBJECT LINE/DON'T USE MISLEADING SUBJECT LINES. The subject line must accurately reflect the content of the message. It doesn't need to be said that a business should not mislead customers with the information used to attract their patronage. In addition to a violation of the CAN-SPAM Act, allegations of false advertising may lead to legal problems with the North Dakota Attorney General's office.

3. DO NOT HIDE THE FACT THAT YOUR EMAIL MESSAGE IS AN AD. The law gives a business a lot of leeway in how to do this, but you must disclose clearly and conspicuously that your email message is an advertisement. The regulations don't say how or where you must disclose that the message is an ad; it only requires that it be clearly and conspicuously identified as an ad. How you do that is your decision; even something as simple as using a notice at the bottom of the email saying “This advertisement was sent by Small-Town Community Bank” is sufficient.

4. TELL THE RECIPIENTS WHERE YOU'RE LOCATED/GIVE A PHYSICAL ADDRESS. Your email message must include your bank's valid physical postal address. This can be your current street address, a

post office box you've registered with the u.s. postal service, or a private mailbox you've registered with a commercial mail receiving agency established under postal service regulations.

5. TELL THE RECIPIENTS HOW TO OPT OUT OF RECEIVING FUTURE EMAIL. Though it's generally allowed to send an unsolicited email to someone with no confirmation of their consent to the message, your business cannot send that person any further emails once he has indicated that he doesn't want to receive emails from you. in order to make this possible, the act requires that commercial emails include a clear option and way the recipient can opt out of getting email from your business in the future. this is typically done by giving the recipient the option to take his or her name off of an automatic mailing list via an "unsubscribe" link.

The way to unsubscribe should be easy for an ordinary person to recognize and understand; varying the font, font size, or font color for the unsubscribe information is a good way to draw attention to the "unsubscribe." a business is allowed to use a menu letting a recipient opt out of certain types of messages, but it must include the option to stop all commercial messages. finally, check that your spam filter doesn't block these opt-out requests.

6. HONOR THOSE OPT-OUT REQUESTS QUICKLY. Any opt-out method offered must be able to process opt-out requests for at least 30 days after sending the commercial message, and the recipient's opt-out request must be honored within 10 business days. you can't charge a fee, require the recipient to give you any personally-identifying information beyond an email address, or make the recipient take any step other than sending a reply email or visiting a single page on a website as a condition for honoring an opt-out request. once a recipient has advised you that she doesn't want to receive more messages from you, you can't sell or transfer her email address, even in the form of a mailing list. the only exception is that you may transfer an address to a company you've hired to help your business comply with the can-spam act.

7. MONITOR WHAT OTHERS ARE DOING ON YOUR BEHALF. The act makes clear that even if you hire another company to handle your email marketing, you can't contract away your legal responsibility to comply with the law. both the business promoted in the message and the company that actually sends the message may be held legally responsible. in other words, even if you contract your email marketing to one of the many companies that create and send emails to customers, someone at the bank should still be familiar with the rules for email advertisements. that someone should also review advertising emails for any slips that may be a violation of the act.

ASKING THE IMPORTANT QUESTIONS.

HOW DO I KNOW IF THE CAN-SPAM ACT APPLIES TO THE EMAIL I'M SENDING?

The main consideration is the "primary purpose" of the message. An email can contain three different types of information: **1) COMMERCIAL** content advertising or promoting a commercial product or service, including content on a website operated for a commercial purpose; **2) TRANSACTIONAL OR RELATIONSHIP** content – which facilitates an already agreed-upon transaction or updates a customer about an ongoing transaction; and **3) OTHER** content neither commercial nor transactional or relationship.

If the message is commercial, then you must comply with all of the Act's requirements. If the message is a transactional or relationship message, you need only to ensure that the message does not contain false or misleading header or routing information; it's otherwise exempt from most provisions of the CAN-SPAM Act.

HOW DO I KNOW IF THE EMAIL IS A TRANSACTIONAL OR RELATIONSHIP MESSAGE?

The primary purpose of an email is transactional or relationship if it consists only of content that: **1)** facilitates or confirms a commercial transaction that the recipient already has agreed to; **2)** gives warranty, recall, safety, or security information about a product or service purchased by the recipient; **3)** gives information about a change in terms or features or account balance information regarding a membership, subscription, account, loan, or other ongoing commercial relationship (e.g., a gym notifying customers of a change in the terms of gym membership); **4)** provides information about an employment relationship or employee benefits plan in which the recipient is currently participating or enrolled in; or **5)** delivers goods or services as part of a transaction that the recipient already has agreed to (e.g., product updates or upgrades from Microsoft or McAfee).

WHAT IF THE EMAIL COMBINES COMMERCIAL CONTENT AND TRANSACTIONAL OR RELATIONSHIP CONTENT?

Businesses commonly combine commercial content with transactional or relationship content. When an email contains *both* kinds of content, the primary purpose of the message is the deciding factor. According to the FTC guidance, here's how to figure it out: If a recipient reasonably interpreting the subject line would likely infer that the message contains an advertisement or promotion for a commercial product or service or if the message's transactional or relationship content does not appear mainly at the beginning of the message, the primary purpose of the message is commercial. So, when a message contains both kinds of content – commercial and transactional or relationship – if the subject line would lead the recipient to think it's a commercial message, it's a commercial message for purposes of the Act. Likewise, if the bulk of the transactional or relationship part of the message doesn't appear at the beginning, it's a commercial message under the Act. The FTC provides an example:

MESSAGE A:

TO: Jane Smith

FR: XYZ Distributing

RE: Your Account Statement

We shipped your order of 25,000 deluxe widgets to your Springfield warehouse on June 1st. We hope you received them in good working order. Please call our Customer Service Office at (877) 555-7726 if any

widgets were damaged in transit. Per our contract, we must receive your payment of \$1,000 by June 30th. If not, we will impose a 10% surcharge for late payment. If you have any questions, please contact our Accounts Receivable Department.

Visit our website for our exciting new line of mini-widgets!

MESSAGE A is most likely a *transactional or relationship message subject only to CAN-SPAM's requirement of truthful routing information*. One important factor is that information about the customer's account is at the beginning of the message and the brief commercial portion of the message is at the end.

MESSAGE B:

TO: Jane Smith

FR: XYZ Distributing

RE: Your Account Statement

We offer a wide variety of widgets in the most popular designer colors and styles – all at low, low discount prices. Visit our website for our exciting new line of mini-widgets!

Sizzling Summer Special: Order by June 30th and all waterproof commercial-grade super-widgets are 20% off. Show us a bid from one of our competitors and we'll match it. XYZ Distributing will not be undersold.

Your order has been filled and will be delivered on Friday, June 1st.

MESSAGE B is most likely a *commercial message* subject to all CAN-SPAM's requirements. Although the subject line is "Your Account Statement" – generally a sign of a transactional or relationship message – the information at the beginning of the message is commercial in nature and the brief transactional or relationship portion of the message is at the end.

WHAT IF THE EMAIL COMBINES ELEMENTS OF BOTH A COMMERCIAL MESSAGE AND A MESSAGE WITH CONTENT DEFINED AS "OTHER"?

The primary purpose of the email message is commercial and the provisions of the CAN-SPAM Act apply if: **1)** a recipient reasonably interpreting the subject line would likely conclude that the message advertises or promotes a commercial product or service; and **2)** a recipient reasonably interpreting the body of the message would likely conclude that the primary purpose of the message is to advertise or promote a product or service. Relevant inquiries include **1)** the location of the commercial content (is it at the beginning or the end of the message?); **2)** how much of the message is given to commercial content? and **3)** how are color, graphics, type size, style, etc., used to highlight the commercial content?

WHAT ARE THE PENALTIES FOR VIOLATING THE CAN-SPAM ACT?

Each separate email in violation of the law is subject to penalties of up to \$43,280, and more than one person may be held responsible for violations. Both the business whose product is promoted in the message and the business that originated the message may be legally responsible.

For more information, see the FTC guidance at <https://www.ftc.gov/tips-advice/business-center/guidance/can-spam-act-compliance-guide-business>, the Code of Federal Regulations at <https://www.law.cornell.edu/cfr/text/16/316.1>, and the CAN-SPAM Act statutes themselves at <https://www.law.cornell.edu/uscode/text/15/chapter-103>.

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