

Ensuring Email Communications Comply with Federal CAM SPAM LAW

E-mail communications have evolved into a critical communication method for doing business in literally every industry. In higher education, we use e-mail communications to let students know about courses, dining services, cultural events, and emergencies—to name only a few. We communicate by e-mail with staff, faculty, alumni, contractors, research subjects and others on a variety of topics as well.

Certain types of e-mail communications have raised questions about privacy and system performance—particularly those that are commercial in nature. Congress enacted federal legislation (CAN SPAM) to address these concerns.

Despite its name, the CAN-SPAM Act doesn't apply just to bulk email. It covers all commercial 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," including email that promotes content on commercial websites. The law makes no exception for business-to-business email. That means ALL email – for example, a message to former customers announcing a new product line – must comply with the law.

Each separate email in violation of the CAN-SPAM Act is subject to penalties of up to \$41,484, so non-compliance can be costly. But following the law isn't complicated. Here's a rundown of CAN-SPAM's main requirements:¹

1. **Don't use false or misleading header information.** Your "From," "To," "Reply-To," and routing information – including the originating domain name and email address – must be accurate and identify the person or business who initiated the message.
2. **Don't use deceptive subject lines.** The subject line must accurately reflect the content of the message.
3. **Identify the message as an ad.** The law gives you a lot of leeway in how to do this, but you must disclose clearly and conspicuously that your message is an advertisement.
4. **Tell recipients where you're located.** Your message must include your 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 recipients how to opt out of receiving future email from you.** Your message must include a clear and conspicuous explanation of how the recipient can opt out of getting email from you in the future. Craft the notice in a way that's easy for an ordinary person to recognize, read, and understand. Creative use of type size, color, and location can improve clarity. Give a return email address or another easy Internet-based way to allow people to communicate their choice to you. You may create a menu to allow a recipient to opt out of certain types of messages, but

¹ Information available on the FTC website, <https://www.ftc.gov/tips-advice/business-center/guidance/can-spam-act-compliance-guide-business>

you must include the option to stop all commercial messages from you. Make sure your spam filter doesn't block these opt-out requests.

6. **Honor opt-out requests promptly.** Any opt-out mechanism you offer must be able to process opt-out requests for at least 30 days after you send your message. You must honor a recipient's opt-out request 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 an Internet website as a condition for honoring an opt-out request. Once people have told you they don't want to receive more messages from you, you can't sell or transfer their email addresses, even in the form of a mailing list. The only exception is that you may transfer the addresses to a company you've hired to help you comply with the CAN-SPAM Act.
7. **Monitor what others are doing on your behalf.** The law 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 company whose product is promoted in the message and the company that actually sends the message may be held legally responsible.

The above standards must be applied to email whose primary purpose is commercial in nature. This is the circumstance that ties directly to the federal CAN SPAM regulation. The term "commercial" can be hard to apply in an academic setting, but the following guidance can assist:

- **Revenue generating versus routine academic, research, service, operational e-mail.** While some e-mail communications at the UA advertise a commercial product or service, the vast majority do not. Certainly, the Standards need not be applied, nor are they appropriate, in e-mail messages to students from their professors regarding class assignments or other educational messages, or e-mail messages to staff from supervisors regarding new procedures impacting job functions or University operations. By contrast, the CAN SPAM requirements would apply for example to e-mail messages advertising fee-based tickets to a sporting event or an arts and cultural event, provided those activities are revenue-generating. See below.
- **Revenue-generating versus covering costs.** The term "commercial" in general applies to promotions about revenue-generating activities, and not promotions to cover costs of an event. For example, if the UA is hosting a conference with a significant admissions fee beyond the actual costs associated with the conference, that will likely be considered "commercial" and trigger the CAN SPAM requirements. Similarly, the CAN SPAM requirements apply if a clinical practice is promoting its fee-based services by e-mail. By contrast, if a group at the UA is holding a breakfast meeting and asks for a nominal contribution to cover the costs of the meal, that would not constitute a "commercial" activity. One way of analyzing this comparison is whether the UA would be competing against commercial, for-profit entities when offering the product, such as a professional conference.
- **Fundraising versus commerce-related.** E-mail messages promoting the UA fundraising activities generally need not meet the CAN SPAM requirements, because fundraising is not directly about selling or promoting a commercial product or service.

- ***Communications that a recipient would be entitled to receive because of the relationship with the sender.*** The CAN SPAM requirements exempt communications whose purpose is to facilitate, complete, or otherwise are related to a transaction that the recipient has previously agreed to. For example, they do not apply to messages to people who have purchased event tickets when the message is announcing that the event will take place in a different location. They also generally do not apply to messages to employees promoting employee-discounted programs.
- ***Hosted programs versus FYI e-mail messages from individuals not acting in a commercial capacity.*** The CAN SPAM requirements need not be applied in cases where an individual is sending isolated e-mail messages to friends or colleagues informing them of upcoming conferences and other events when the individual is not engaged in commerce.

Additional Guidance:

- ***Opt-out Notices.*** The notice about the opportunity to opt-out of future email communications should be clear about the scope of the opt-out. For example, a program specific opt-out in a school will need to clearly state that the opt-out pertains only to communications from that program and that the individual may still receive other promotional communication from other programs.
 - Sample opt-out notice: We hope you enjoy receiving e-mail notices and updates from our office. If you do not wish to receive e-mail messages promoting commercial products or services from [office/program], please [reply to this e-mail and change the subject line to “Unsubscribe.”] [e-mail us at_____].
- ***High Frequency and Discretionary Messages.*** While the CAN SPAM requirements only apply to messages that are “commercial,” it is a good practice to apply the law’s requirements to communications that are sent at a relatively high frequency to be mindful of privacy concerns that result from these types of communications.