



## 110:Antispam Laws after One Year

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## Faculty Biographies

### **Nancy Kirschner Bowen**

Nancy Kirschner Bowen is cochair of ACC's Information Technology Law and eCommerce Committee. Prior to her recent relocation to Oxford, Ohio, she was senior counsel for MicroStrategy Incorporated in McLean, Virginia. Ms. Bowen has more than 20 years of experience working with both small and large in-house legal teams providing advice on corporate and business matters to domestic and multi-national companies. She has been responsible for intellectual property, IT mergers and acquisitions, technology transfers, software development, software licensing, systems integration, IT outsourcing, and IT professional services.

Ms. Bowen worked for IT companies in Silicon Valley and in England before moving back to the United States with Marconi as general counsel of the services division.

She is a California-licensed attorney and also qualified to practice law in England and Wales as a solicitor, having been among the first non-British lawyers to pass the Qualified Lawyers Transfer Test.

### **L. Rachel Gervin**

L. Rachel Gervin is senior corporate counsel for Best Software, located in Norcross, Georgia. Best Software is a part of The Sage Group Plc., the leading supplier of accounting and business management to small and mid-sized business customers worldwide. Best Software's U.S. legal department is ten lawyers strong. Ms. Gervin has responsibility for the small business division located in Atlanta.

Ms. Gervin began her legal career in the Washington, DC office of Kirkland & Ellis where she had a broad practice including commercial litigation, regulatory/administrative law, and international trade matters. Ms. Gervin left Kirkland & Ellis to become one of the founding associates of the Northern Virginia office of Wilson, Sonsini, Goodrich & Rosati, where her focus was securities litigation. Just prior to joining Best Software, Ms. Gervin was a litigator with Crowel & Moring in Washington, DC.


Ms. Gervin earned a BA from the University of California at Los Angeles and a JD, cum laude, from Howard University School of Law.

### **Kenneth Hirschman**

Kenneth Hirschman is vice president and general counsel of Digital Impact, Inc. in San Mateo, California, a provider of integrated direct marketing solutions for enterprises, where he is responsible for managing the company's legal and privacy departments.

Prior to joining Digital Impact, Mr. Hirschman worked with the international law firm of Shearman & Sterling, for whom he founded a Silicon Valley-based compensation & benefits practice group. Before joining Shearman & Sterling, Mr. Hirschman practiced aviation and commercial leasing law with Lord Day & Lord, Barrett Smith in New York.


He speaks publicly regarding spam issues and the laws of online direct marketing and in 2003, testified before Congress in connection with federal legislative initiatives designed to combat spam. Mr. Hirschman holds a BA from the University of Pennsylvania and a JD from Cornell Law School.



# 110 Antispam Laws after One Year

**Nancy Kirschner Bowen**  
**Rachel Gervin**  
**Ken Hirschman**

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## Overview

- Who am I?
- 10 Steps to CAN-SPAM Compliance
- Q & A

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## Who Am I?

- Rachel Gervin
- I was one of several people who suggested this topic at the end of last year's conference because at that time I was in the heat of becoming an "expert," to the extent any in-house lawyer has the time to do so, on the developing CAN-SPAM laws.
- I am here a year later to share my experience and hopefully in the process pass along some ideas for how to tame the CAN-SPAM beast.
- Important to the context of the presentation, my company sells accounting and contact management software products directly and via distribution channels to small- to mid-sized companies all over the world and conducts marketing efforts through various media including e-mail.

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## Step 1: Read the Law

- It's long and convoluted, but there is nothing more valuable when determining how to set up your compliance program than intimate knowledge of the ins and outs.
- There were numerous webcasts, CLE courses, and free law firm seminars on this topic and in each one that I participated, I disagreed with at least one interpretation of the law, at least as it relates to my company.

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## Step 2: Determine Whether the Law Applies to Your Business.

- We sell computer software, not porn.
- We never “harvest” e-mail addresses from the Internet.
- We send e-mail messages to our own customer base offering our products and services for sale and occasionally purchase a list targeted to businesses that might use our products.
- We market to small- and mid-sized businesses, not “consumers”.
- Our e-mails are not “fraudulent or deceptive”.
- **CAN-SPAM UNQUESTIONABLY APPLIES TO OUR BUSINESS MODEL AND PROBABLY ALSO APPLIES TO YOURS.**

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## Step 3: Issue an E-mail Marketing Policy.

- We rolled out a new e-mail policy to all employees (copied in relevant part below):
  - ◆ All e-mails that contain promotional or marketing material must include: (a) **a subject line that is not misleading**; (b) **a clear & conspicuous notice that the e-mail is an advertisement or solicitation**; (c) **a clear & conspicuous way for the recipient to opt-out of future e-mails**; and (d) **the sender's physical address**.
  - ◆ On January 2, 2004, the new footer will be automatically added to outgoing e-mails:
  - ◆ Before you send an e-mail, you must check in the appropriate customer database to make certain the customer you are e-mailing has not opted-out of receiving promotional e-mails from us. Because the law requires us to capture customer e-mail option preferences within 10 days, **it is crucial that all employees who are permitted to send e-mail check the relevant database daily**.
  - ◆ In the instance where a customer has requested that an employee send promotional material via e-mail, the employee must still check that customer's opting preferences. If that customer has opted-out of receiving e-mail communications, the employee must then add the following disclaimer at the top of the e-mail:
  - ◆ This e-mail message is being sent in response to your specific inquiry and is considered a transactional or relationship message, which is specifically excluded from the federal law regulating e-mail communication.
  - ◆ **Failure to follow this e-mail policy will result in disciplinary action, up to and potentially including termination.**
  - ◆ **To be clear, if you are not in one of the approved e-mail groups, you must not send e-mails advertising or promoting our products or services to anyone.** If you believe you have a need to send such e-mails and the template did not automatically drop onto your outgoing e-mail, or if you have questions or concerns, please call the legal department.

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### Step 3: Issue an E-mail Marketing Policy.

- Exceptions to Our Policy:
  - Auto-Reply E-mails
    - “transactional or relationship” message (order confirmation, service expiration, “software update available” message, etc.) without marketing material = no CAN-SPAM footer required.
    - Same with marketing material (more than a simple “click here for info. re: our products” live link) = CAN-SPAM footer required.
  - Individual E-mails
    - One-off message from sales to “special” customer re: pre-announcement of new product and encouragement to buy = CAN-SPAM footer required.
    - One-off e-mail from shipping dept. to small list of “free upgrade” customers to notify them of ship date for free product = no CAN-SPAM footer required.

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### Step 4: Designate Approved E-mailers and Add Auto-footers

- Approved E-mailers: We identified an authorized group of employees (sales teams) and created an auto-footer that populates every e-mail they send to anyone. Any other “marketing” e-mails are now forbidden.
- The auto-footer includes:
  - “If you do not wish to receive promotional e-mail messages from us in the future, please click here” (live link to opt-out page.)
  - Our physical address
  - “This e-mail communication may contain an offer to purchase a product or service for your business.”
  - 3<sup>rd</sup> party e-mail blast companies may require their own footer. (Liability still remains with your company; might look confusing to have more than one opt-out; still need to have your physical address and “commercial e-mail” disclaimer; you must make sure that you can capture any opt-outs that go to the e-mail blast company’s link.)

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## **Step 5: Buy Spam Filtering Software.**

- Spam Filter: We instituted an outgoing spam filter, including various words and phrases common in marketing material.
- Legal Dept. monitored for 3 months after the roll out to make sure any rogue “spammers” were properly handled.
- Helped us determine who we missed in our approved e-mailers/auto filter system.

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## **Step 6: Set up New IS Mechanisms.**

- Our information technology dept. set up a behind the scenes system for capturing and updating customer opt-out preferences whether obtained via the website, in response to a direct mail piece sent from a third party or from an e-mail (in-house or 3<sup>rd</sup> party blast).
- Too large of a job and penalty too high to rely on a manual system (set up a reply e-mail address, have an individual monitor the mail box and update the customer database.)

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## **Step 7: Train Customer-Facing Reps.**

- All employees received the new e-mail policy.
- All call center employees were trained in how to respond to a customer who either requests to opt-out, or complains about receiving an e-mail after opting out.

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## **Step 8: Set up Checks & Balances**

- Important to set up periodic checks of how well capture of opt-out requests is working.
- Have your name added to the seed list for e-mails and once every few months, opt-out (and then get added back in.)
- IS dept. can also follow the opt-outs manually after an e-mail blast to confirm that they have been captured.

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### Step 9: Track changes in number of opt-outs

- Not a huge increase in opt-outs for my company.
- Marketing Depts. will want to monitor the effect of the law on response rate related to e-mail marketing.
- I attempt to meet with the marketing dept. periodically to update them on the law and its aftershocks.

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### Step 10: Keep Up With the Law

- 6/15/04 FTC reported to Congress that the "Do Not Spam" registry is likely to "fail to reduce the amount of spam, might increase it, and could not be enforced effectively."
- Much of the interpretation of the law remains to be settled.
  - Whether "ADV" will be required in the subject line at some point in the future.
  - "Primary Purpose" criteria
  - Keep an eye on the changes. Best website to monitor [www.ftc.gov](http://www.ftc.gov) (under "hot topics" click on the link for "Spam email.")

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## Overview

- Who am I?
- Background; Pre-emption
- CAN-SPAM Overview
- Enforcement and Penalties
- Regulatory and Litigation Updates
- Line of Business Compliance
- Predictions
- Compliance Recommendations
- Q & A

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## Who am I?

- Ken Hirschman
  - General Counsel of Digital Impact, an online direct marketing pioneer (focus on email)
  - Speak publicly frequently re CAN-SPAM
    - Usually to marketers
  - Frequently called in to advise F500 clients re compliance
  - Trained large service force to spot CAN-SPAM issues
  - Helped draft legislation

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## Background; Pre-emption

- Background
  - Law signed by President Bush December 2003
  - Law effective January 1, 2004
  
- Pre-emption
  - Pre-empts state laws regulating commercial email
  - States may continue to regulate email **fraud**
    - Several states now implementing spam fraud laws
  - Pre-empts California's SB 186

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## CAN-SPAM Overview

- Prohibitions
  - False header information (deception re source of email)
  - Deceptive subject lines (deception re content of email)
  - "Aggravated offenses" – either of the above together with:
    - Address harvesting
    - Dictionary attacks
    - Unauthorized relays
    - Unauthorized sending through third-party computers
  - Sending more than 10 business days following opt out
- Required Inclusions
  - Clear and conspicuous notice that email is commercial
    - Does not apply if sender has "affirmative consent" of recipient
  - Clear and conspicuous notice of ability to opt out
  - Working unsubscribe functionality
    - Return email address
    - Internet-based mechanism
  - Valid physical postal address (OK to include PO box with street address)
- Who bears obligations?
  - "Sender" = Advertiser; more complicated facts have other results (affiliate programs, 3P mailings)
- Soap Box – Spam is not a problem that can be solved with laws

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## Enforcement and Penalties

- Civil enforcement
  - Federal Trade Commission
    - Applicable general regulatory agency enforces for financial institutions
      - OCC, Fed, FDIC
    - Standard enforcement powers of particular agency
  - State enforcement agencies
    - \$250 per violation; \$2 million cap
    - Injunctive relief
  - "Internet access services" – primarily ISPs
    - \$25/\$100 per violation; \$1 million cap
    - Injunctive relief
  - "Good actor" damage reduction
  - Court may triple damages for aggravated violations
- Criminal enforcement
  - DOJ enforcement
  - One year in prison
  - Up to five years for aggravated or repeated violations

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## CAN-SPAM Regulatory Update

- *Adult Material Rulemaking – early 2004*
- *Advanced Notice of Proposed Rulemaking*
  - Issued March 2004
  - Requested:
    - Comments on merits of Do-Not-Email Registry
    - Ideas for prospective rulemakings:
      - transactional or relationship emails
      - 10-business-day rule for unsubscribe
      - "primary purpose" test
      - forward-to-a-friend
      - multiple sender problem
  - FTC issued recommendation AGAINST DNE registry
  - Next steps for ANPR
    - FTC to issue proposed regulations and invite further comment
- *FCC ban on wireless UCE – August 2004*
- *Other rulemakings and reports due next year*
  - Notable: whether to require subject-line labeling

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## CAN-SPAM Litigation Update

- March 2004
  - AMEY cases
    - AOL, MSN, Yahoo! and Earthlink cooperating in litigation effort
    - Several spammers sued; focus on false header violations
    - Goal – well-publicized suits and ensuing personal bankruptcies should dissuade spammers from this line of business
  - *Hypertouch v BobVila.com*
    - Aggressive, litigious, small ISP suing Bob Vila's online business
    - Probably not a case of intentionally fraudulent header information, but an example of how sloppy practices can invite unnecessary attention
- April 2004
  - First government prosecutions filed April 27 by FTC
    - Defendants in Michigan and Australia
    - Fraudulent header information
    - Promoting fraudulent products
    - TRO; asset freeze
- Additional FTC cases filed during Summer 2004

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## Sample Disclosure

"Commercial" notice

↓

This is a promotional email from Nextel Communications, Inc. If you wish to unsubscribe from Nextel customer emails or to change your email address, please [click here](#) or use the link below.

<http://nextel.m0.net/m/u/nex/n.asp?e=khirschman%40digitalimpact.com&cid=XXXXXXXXXX>

Nextel Communications, Inc. is located at 2001 Edmund Halley Drive, Reston, VA 20191.

<i>Placement</i>	Just below creative, but above disclaimers
<i>Size</i>	Same as text in ad, larger than disclaimers
<i>Color</i>	Black – same as ad, darker than disclaimers

Opt out notice and functionality

Valid physical postal address

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## Sender Compliance (1)

- Definition permits compliance by line of business (LOB)
  - LOBs may share email addresses
    - But questionable permission practice
  - Must provide opportunity to unsub at LOB level
    - Menu of sub-lists OK
    - As long as LOB-level opt-out offered
- What is a line of business?
  - Definition
  - Two-part analysis:
    - Separate business operation
      - Separate corporate structure?
      - Separate P&L? Broken out for investors?
      - Separate business groups in LOB (sales, marketing, finance, etc.)?
    - Separate branding
      - Viewed from the consumer's perspective
      - Analyzed based on message content, not general practices

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## Sender Compliance (2)

### SEPARATE LINES OF BUSINESS OR DIVISIONS

If an entity

**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 of which such line of business or division is a part

*then*

the line of business or the division shall be treated as the sender of such message for purposes of this Act.

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## Sender Compliance (3)

- How to ensure compliance by LOB?
  - Define LOBs for CAN-SPAM purposes asap
  - Consolidate mailing activity along LOB lines
    - If using multiple mailers (e.g., one vendor and one in-house solution), ensure frequent data exchanges
  - Always offer opt-out at LOB level
    - Or **ABOVE LOB** level, to avoid marketers making judgment calls
    - Caveat – marketers will oppose going above LOB level for obvious reasons
    - Ensure your system can handle a LOB-level opt-out

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## Compliance Recommendations

- Review the FTC's "clear and conspicuous" guidance
  - FTC "dot com disclosure" guidance:  
<http://www.ftc.gov/bcp/online/pubs/buspubs/dotcom/index.html#III>
  - Important factors: placement, prominence, distractions, understandability
- Avoid accidentally deceptive subject lines
- Review unsubscribe practices
  - Offering ability to unsubscribe from sender or just program?
  - Is 10-business day rule manageable?
- Use commercial notice despite possible "affirmative consent" exception
- Use your company name in the "from" line
  - Any party initiating is sufficient to comply with CAN-SPAM
- Make sure DNS registrations are up to date
  - Avoid attention from small litigious internet access services
  - Matching your domain to an IP address will be required for deliverability
- Create an email marketing policy

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## Q&A

- Are “opt-in” commercial emails subject to CAN-SPAM?
- Are one-off sales force emails subject to CAN-SPAM?
- Can I still rent third-party email lists?
- Do separate divisions of the same company have to share opt-out lists?
- Should I put “ADV” in my subject line?
- How do you analyze CAN-SPAM fact patterns?
- More questions – khirschman**AT**digitalimpact.com

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## Commercial Notice – “ADV” Not Recommended

- Subject line identification not required
  - Section 11 requires FTC report in 18 months (June 2005)
    - Plan and comments on subject line identification for commercial email
    - Alternatively, FTC may recommend against such an identifier, explaining its concerns with such a plan
    - No indication yet from FTC on position
  - Section 13 prohibits FTC from requiring specific ID for commercial emails
    - Prohibits FTC from requiring marketers “to include any specific words, characters, marks, or labels in a commercial electronic commercial email message, or to include [such notices] in any particular part of such a mail message (such as the subject line or body).”
- “ADV” in subject line not recommended
  - Deliverability concerns
    - Labeling requirement under widely ignored state spam laws
    - Expect universal filtering on “ADV:”
  - Compliance concerns
    - Consider whether “ADV:” in the subject line satisfies the clear and conspicuous commercial notice requirement – how educated are consumers on this?
    - Straightforward commercial notice in email probably better disclosure

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## Analyzing Fact Patterns under CAN-SPAM

- **Is my email “commercial”?**
  - Is the email’s primary purpose promotional?
  - If partly promotional, would I send it w/o the promotional part?
  - If email is not commercial, stop worrying about compliance
- **Am I “initiating” the email?** (can be many parties)
  - Am I transmitting the email?
  - Am I inducing a third party to send emails?
  - Obligations of party or parties initiating
    - At least one initiating party must be identified in “from” line
    - Inclusion of “commercial” notice unless opt-in
    - Don’t use subject lines you know or should have known are misleading
- **Am I the “sender” of the email?** (typically just the advertiser)
  - Am I initiating?
  - If so, are my products or services promoted in the email?
  - Obligations of sender
    - Inclusion of opt out notice and functionality
    - Don’t send to prior opt-outs
    - Inclusion of street address

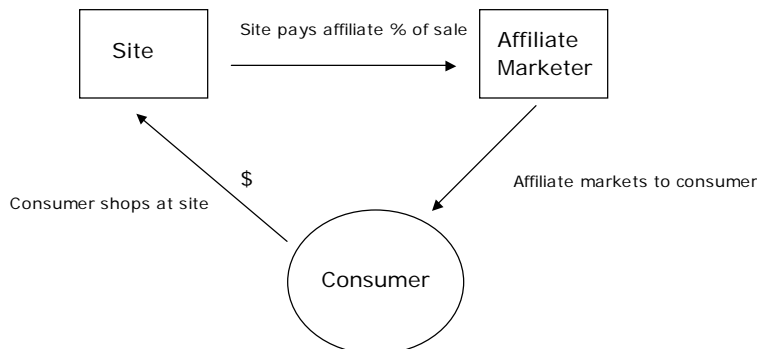
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## Affiliate Marketing Programs (1)

- Are affiliate programs covered by CAN-SPAM?
- If so, who bears the obligations?



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## Affiliate Marketing Programs (2)

- Affiliate marketing programs are covered by CAN-SPAM
  - All commercial emails are covered by CAN-SPAM
- Most likely, the SITE bears the CAN-SPAM obligations – Why?
  - “Senders” of commercial email must comply with CAN-SPAM
  - A “sender” is one who both “initiates” a commercial email and whose products or services are promoted in that email
  - The Site’s products or services are promoted, not the affiliate’s
  - But has the Site “initiated” the email?
    - Most likely it has
    - “Initiate” means to transmit or procure transmission of a commercial email
    - “Procure” means to pay, provide other consideration or induce someone to send commercial emails on your behalf
  - Economics of Site/Affiliate Marketer relationship suggest that Site has induced the affiliate marketer to email Site’s commercial content with hopes of financial gain

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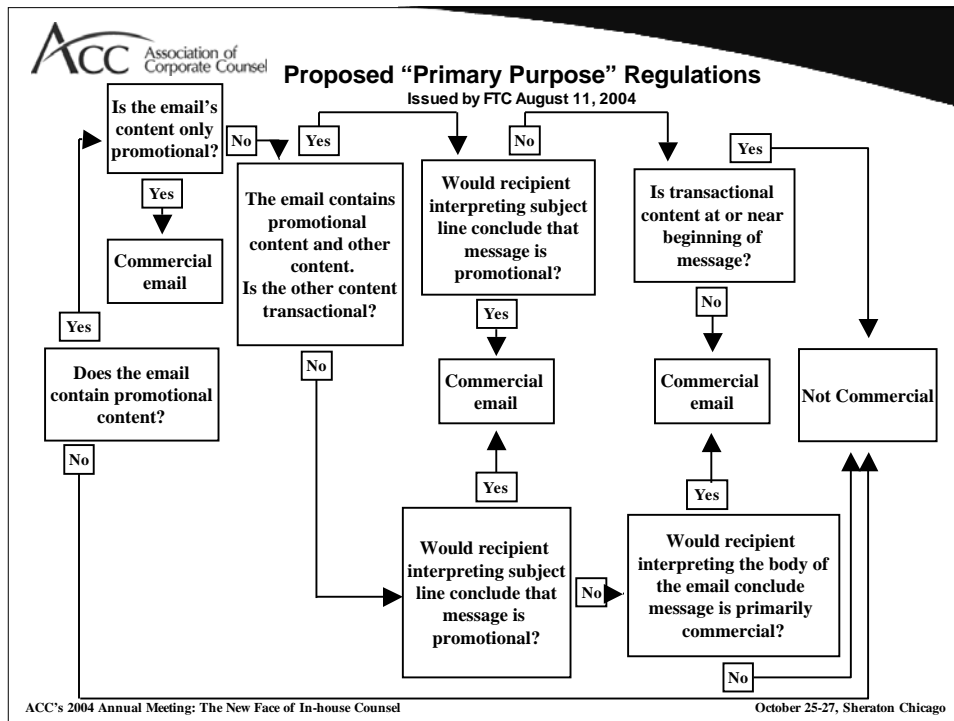


## Affiliate Marketing Programs (3)

- If Site is a “sender,” what does that mean?
- Site must comply with CAN-SPAM
- In other words, CAN-SPAM views these emails as if they were originated and sent directly by Site
- Practical issues:
  - Site must scrub affiliate’s mailing list against Site’s suppression list
  - Affiliate’s emails must contain a Site unsubscribe function
  - Affiliate’s emails must contain Site’s street address and standard commercial notice
- Practical next steps:
  - Evaluate affiliate marketing relationships
  - Analyze risk vs reward
  - Site controls contract – consider prohibiting email marketing
  - Consider third-party safe suppression services

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## Foreign Email Legislation

- **European Union — E-Commerce Directive**
  - Requires recipient's prior consent
  - Prior business relationship allowed, as long as opportunity to opt out at address collection is provided and advertisements regard similar goods
  - Recipient must be provided with a valid address to which opt-out requests may be sent
- **Canada—Personal Information and Protection of Electronic Documents Act (PIPEDA)**
  - PIPEDA governs the collection and use of personally identifiable information
  - For most forms of commercial email, consent is required (opt-in)
  - Industry guidelines – no UCE
- **Australia—Spam Bill 2003**
  - Requires opt-in, either explicit (opt in) or implicit (prior business relationship)

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## California's New Privacy Laws

- **Online Privacy Protection Act**
  - Requires an operator of a commercial web site collecting personally identifiable information to post what is collected and how it is used
  
- **Financial Information Privacy Act**
  - Generally prohibits financial service companies from sharing or selling "nonpublic personal information" without consent
  
- **Security Breach Notification Law**
  - Requires companies conducting business in CA to promptly notify customers when those customers are affected by breaches in database security