

April 11, 2005

## **CAN-SPAM Update: Primary Purpose of E-Mail**

As many people are aware, the CAN-SPAM Act provided restrictions regarding the distribution of commercial e-mail messages. The Act defined commercial messages as e-mail whose “primary purpose is the commercial advertisement or promotion of a commercial product or service.” However, the Act explicitly excluded transactional or relationship messages from being considered as commercial messages.

Businesses have struggled to determine the “primary purpose” of individual e-mails and, in particular, how to classify a message that includes both commercial and transactional content. To assist businesses with this issue, the Federal Trade Commission (“FTC”) issued a final rule that provides some guidance. While the final rule and tests to be used for making the “primary purpose” are lengthy, here are some basic guidelines:

- If an email contains exclusively commercial advertisement or promotion, then it is a commercial message and will need to comply with the requires of the CAN-SPAM Act.
- If an email contains exclusively transactional messages, then it is a transactional message.
- If an email is a blend of commercial and transactional messages, the FTC will look to the reasonable interpretation of the recipient of the email to determine the primary purpose of the e-mail. Factors that affect a reasonable interpretation include the placement of content that is the commercial advertisement, in whole or in substantial part, at the beginning of the body of the message; the proportion of the message dedicated to such content; and how color, graphics, type size, and style are used to highlight commercial content.

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## **Outsourcing Tip: Maintain Your Advantage With Competitive Benchmarking**

As more companies rely on outsourcing for controlling costs and maintaining quality outside of their core competency, one major concern is the ability to maintain market pricing and quality of services throughout the duration of the outsourcing. While the pricing and quality offered by outsourcing vendors at the beginning of the relationship may be attractive and provide a competitive advantage, they could become the veritable albatross around your company’s neck as conditions in the outsourcing market change.

At first glance, the natural response to this issue is to include a most favored nations clause to the outsourcing agreement; however, most favored nation clauses only focus on the outsourcer’s other engagements to determine whether the current outsourcing is at least as good on a price and quality basis as the outsourcer’s other engagements. Unfortunately, these clauses do not address whether

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the prices and quality originally agreed to have remained competitive with other outsourcing options in the market.

Accordingly, companies entering into outsourcing arrangements should consider including a benchmarking process in the outsourcing agreement. A carefully constructed benchmarking process can enable the company and the outsourcer to compare the price and quality of the outsourcer's services with those being provided by other outsourcers to ensure that the price and quality remain competitive in the industry throughout the duration of the outsourcing. In one notable instance, on the strength of a benchmarking clause, an outsourcing customer was able to allege overcharges totaling nearly \$200 million. In evaluating benchmarking clauses here are a few of the items that should be considered:

- How often will the benchmarking process occur?
- When will the first benchmarking occur?
- Who will select the benchmarker?
- Who will serve as the benchmarker?
- What factors will be considered in the benchmarking process in order to obtain an apples to apples comparison?
- Will the benchmarking look at certain categories of services and price, or will tasks within categories be analyzed individually?
- What process will be involved in resetting the fees and services, and will they be retroactive to any prior period of time?

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