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## **Electronic Communications and You: How CAN-SPAM and the TCPA Affect Communications by Nonprofit Organizations**

The CAN-SPAM Act of 2003 (Controlling the Assault of Non-Solicited Pornography and Marketing Act) regulates unsolicited commercial e-mail or “spam.” Nonprofit organizations usually do not run afoul of CAN-SPAM. This is because the subject matter and purpose of nonprofit organizations’ messages are usually not covered by CAN-SPAM. In the simplest terms, CAN SPAM regulates “commercial electronic mail messages.” A commercial electronic mail message is “an electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose).” As long as nonprofits keep to their non-commercial purposes in their e-mail communications, it is unlikely that they will run afoul of CAN-SPAM. The FTC provides additional information in an easy-to-understand guide at <http://www.ftc.gov/bcp/online/pubs/buspubs/canspam.shtm>.

The Telephone Consumer Protection Act of 1991 (“TCPA”) regulates telephone, fax, and similar solicitation communications.

The Telemarketing Sales Rule under the TCPA regulates telephone solicitations and provides for a national Do-Not-Call list. Nonprofit telephone solicitations rarely run afoul of TCPA. The FCC has stated that “messages that do not promote a commercial product or service, including all messages involving political or religious discourse, such as a request for a donation to a political campaign, political action committee or charitable organization, are not unsolicited advertisements under the TCPA” and are therefore not covered by the TCPA.

Nevertheless, TCPA did not preempt state regulation of some telemarketing practices (e.g. some states use their own Do-Not-Call registries) and organizations should be sure to investigate the requirements of states in which they will solicit over the phone.

Fax and text message solicitations are a different matter. The FTC and FCC see junk faxes (sometimes called “blast faxes”) as particularly evil because they unilaterally cause the receiver to expend paper, toner, and other resources in order to receive the fax. The FCC also identifies mobile device text messages (sometimes called “short message service” messages or “SMS” [Type text])

messages) as being onerous to receivers for much the same reason inasmuch as receivers of such messages must usually pay their mobile providers some amount in order to receive the text messages on their mobile devices. The regulatory process with regard to fax and SMS solicitations has proceeded for years in fits and starts and has been confusing in many ways.

While it is true that many fax or text messages are not prohibited *per se* by the TCPA or the FCC regulations, the regulations provide for formatting and content requirements that are technical and counterintuitive to many nonprofits. It is generally best to simply avoid fax and/or SMS solicitations altogether unless there is a compelling reason to send them and the organization retains counsel versed in such matters to advise it.

For more information, see the FCC's guides on telephone solicitation at <http://www.fcc.gov/cgb/consumerfacts/tcpa.html>, and on junk faxes at <http://www.fcc.gov/cgb/consumerfacts/unwantedfaxes.html>

This update has focused mainly on the nature of the message as being noncommercial and the nature of the sending organization as being nonprofit. Other exemptions exist, such as those for existing relationships, transactional/relationship messages and other factors. Additionally, organizations can take a belt-and-suspenders approach by including certain notices and opt-out provisions usually associated with commercial communications. In any case, each organization should review its own status, mission, and activities and give due attention to the nature and means of any proposed communications before going forward with e-mail, telephonic, and other electronic communications.

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