Independent Insurance Agents & Brokers of America, Inc.

**THE CAN-SPAM ACT OF 2003: LEGISLATIVE BACKGROUND AND IIABA LEGISLATIVE AND REGULATORY ACTION PLAN**

December 29, 2003

The CAN-SPAM Act of 2003 was signed into law, and becomes effective on January 1, 2004. Following is the legislative and political background on this new Act, with additional information on IIABA's legislative and regulatory action plan.

In July 2003, IIABA considered the pending "spam" legislation a possible threat to the ability of our state associations and IIABA to market their respective products and services, including those offered through for-profit subsidiaries. Interestingly, ASAE and many other trade associations thought IIABA was "overreacting" to the pending spam legislation and that our interpretation of it as a threat to the for-profit and commercial activities of associations was wrong. Despite the different interpretations of other associations, IIABA began lobbying the issue on Capitol Hill. Our specific concern centered on the proposed legislation's primary focus -- providing email recipients with an ability to "opt-out" of certain email communications, thereby creating a substantial administrative burden for associations with commercial activities, whether offered through the associations or their for-profit subsidiaries.

The U.S. Senate Commerce Committee passed a spam bill very quickly in June 2003 with no opposition, but the U.S. House Commerce Committee had a significant logjam over two competing bills due to disagreements over enforcement mechanisms. The Big I lobbying staff met with all of the major cosponsors of both bills (Rep. Richard Burr, House Majority Whip Roy Blunt, Rep. Heather Wilson, and Chairman Billy Tauzin) to explain to the Members and their staffs that Congress' war on pornographic and fraudulent email could end up unintentionally including appropriate and valued business communications from associations to their members. Specifically, we pointed out that anyone who voluntarily joins a trade association has, in effect, "opted-in" to receiving emails from their association, and therefore the emails should not be restricted or governed by the Act. Both bills included an exemption for "transactional or relationship" emails involving ongoing business dealings, such as updates about benefits under a company-sponsored HMO, new terms for existing credit cards, and other business relationships that the recipient "opted-in" to. IIABA drafted language which made this distinction clear by extending the exemption from the Act to all not-for-profit professional and trade associations and their wholly-owned subsidiaries.

In October 2003, then-Governor Gray Davis, in an 11th hour effort to appeal to voters as a protector of consumer's rights, signed a draconian anti-spam bill. This bill, which was scheduled to take effect in California on January 1, 2004, was filled with administrative provisions that would make compliance extremely difficult and costly to those who send legitimate commercial email unintentionally to a recipient who does not want it. This California law sparked a full-court press from the Chamber of Commerce, the Direct Marketers and other organizations for the U.S. House either to come to a consensus on its competing spam bills or pass a version similar to the Senate's version, which was significantly more business friendly than the alternative – complying with the new California law.

In late November 2003, the U.S. House Commerce Committee prepared to suspend the House rules and adopt the Senate version of the CAN-SPAM Act of 2003, with a few minor technical changes. Adjournment for Congress was right around the corner and a federal anti-spam bill was necessary to preempt any state spam laws, such as the onerous California law. IIABA immediately began to call its contacts on the House Commerce Committee in an effort to obtain clarifying language in this unexpected substitute bill, which was passed by the House of Representatives on November 21st.

The House Commerce Committee was unable to add all of IIABA's draft exemption language since the Committee adopted the Senate version of the bill to avoid the need for a conference committee, but, to IIABA's credit, did add the word "membership" in one section of the definition of "transactional or relationship message." IIABA lobbyists' initial interpretation of this was that it provided language to support the intent of Congress that email from an association to its members would be exempt from the bill's definition of spam. IIABA was the only association to advocate for the amended language since everyone else thought associations already were exempt. It is very rare for a bill to be changed in this manner since, when a suspension of the rules has been declared, changes to a bill are only permitted if they are technically germane and have a nominal affect on the original version. This was a significant accomplishment by IIABA, but did not create the explicit and broader exemption we were seeking. The bill then went to the Senate, and back to the House before going to the President to be signed into law.

While procedural limitations made it impossible for us to get additional clarifying language to go along with the word "membership" we had gotten inserted, IIABA was able to get Rep. Richard Burr (R-NC), an original sponsor of one of the competing spam bills in the House, to provide an eloquent explanation on the floor of the U.S. House that he interpreted email between trade associations and their members to be exempt from the bill as "transactional or relationship" messages.

We also fought back a provision on the enforcement front that would have granted the FTC enforcement authority over the insurance industry. IIABA was able to persuade the bill negotiators to remove enforcement from the FTC with respect to the insurance industry generally, in favor of the respective state insurance departments, subject to some provisions of the Gramm-Leach-Bliley Act.

Due to the speed with which Congress passed this legislation, there was no report language after the House of Representatives passed the final version of the bill. A committee report would have given us a vehicle to clarify our exempt status in the bill before it became law. Instead, the bill was sent to the President, which he signed on December 16th with an effective date of January 1, 2004.

After the Act was signed into law, ASAE continued initially with its position that associations and their commercial activities were totally exempt from compliance with the Act. Later, ASAE changed its position and acknowledged that while the association-member relationship should be exempt, there is no definitive answer on that issue, causing ASAE to recommend that "all email communications sent to members … include an opt-out mechanism and a valid postal address." IIABA does not see any support for the ASAE recommendation that all emails include an opt-out mechanism and valid postal address, as the Act addresses only commercial email advertising or promoting products or services, not all emails.

IIABA's interpretation is consistent with what many law firms have recommended -- that association commercial email messages that advertise or promote products or services comply with the Act until the FTC issues regulations, at which point associations should reassess the application of the Act to their activities.

Most members of Congress we consulted and their respective staffs have said all along that the bill is not intended to apply to associations or their for-profit subsidiaries. In light of this fact, and the need for clarity, IIABA is coordinating a full-fledged campaign in an effort to have the FTC regulations make clear that association commercial email messages are exempt from compliance with the Act. IIABA soon will be filing comments with the FTC, and we will be asking Big I state associations to do so as well. In addition, we are putting together a coalition of associations to lobby the FTC on this issue, and we will be asking key members of Congress to file comments with the FTC in support of our position.

We have a strong action plan, and we will be working hard on this issue to support the needs of our members. This will remain a priority for us as we move into 2004, and IIABA will keep you apprised of significant developments as they arise.

For additional information about the legislative and regulatory issues on this legislation or IIABA plans for action on this Act, please contact Patrick O'Brien by telephone at (202) 863-7000 or by email at patrick.obrien@iiaba.net. For information about the implementation of the Act and how it may affect IIABA agency and brokerage firm members and state associations, please refer to IIABA's FAQ entitled "The Can-Spam Act: Frequently Asked Questions" which is available at www.independentagent.net by clicking on Legal Advocacy.