



## **Can Spam Act Q&A**

Electronic marketing provides publishers with a cost-effective, efficient method of communicating with consumers. Unfortunately, the effectiveness of email marketing has been threatened by the proliferation of unwanted fraudulent and offensive spam that has overwhelmed consumers, businesses and Internet Service Providers.

State legislatures have tried to respond to complaints from consumers by enacting a series of anti-spam laws, but these laws have been ineffective in the fight against unwanted email. The Internet is a national, if not international, medium and most experts agree that state regulation alone will not curb the growth of spam.

To help resolve the problem, Congress passed—and the President signed—a new law, effective January 1, 2004, that imposes severe penalties on spammers who send fraudulent and deceptive offers. The Can Spam Act of 2003 also includes several provisions that will affect commercial email solicitations from legitimate marketers. In order to help our members understand the requirements of the new law, MPA has prepared the following responses to the most commonly asked questions.

MPA recommends that members consult with their attorneys to ensure that electronic marketing campaigns comply with the requirements of the law.

### **1. How will the Can Spam Act affect email marketing?**

The law covers commercial electronic mail messages, which are defined as email messages sent with the primary purpose of advertising or promoting a commercial product or service. The law requires that commercial email include:

- A way for consumers to “opt out” of receiving future email solicitations;
- A valid physical postal address of the sender; and,
- A valid email address of the sender.

In addition, unless a marketer has obtained the consumer’s affirmative consent to receive commercial email, an email must also include clear and conspicuous identification that the message is an advertisement or solicitation.

It should be noted that transactional emails, such as bills, do not have to comply with the above requirements. But both commercial email and transactional email are prohibited from using false or misleading subject lines and false transmission or router information.

### **2. Does the Can Spam Act preempt state laws?**

Yes, the new law preempts state laws governing commercial email.

**3. Does the law include a requirement that the Federal Trade Commission (FTC) establish a “Do-Not-Email” list?**

No, but the FTC must study the issue and issue a report in June 2004. The law also authorizes the FTC to establish a Do-Not-Email registry but, at this time, the FTC is expressing reservations about creating such a list.

**4. Who is a sender?**

Depending on the circumstances it can be the marketer, the company whose product is being offered or both. The law defines a “sender” as the person who initiates the e-mail and whose product, service or Internet website is advertised or promoted by the e-mail. It goes on to state that more than one person can be considered to have initiated an e-mail and suggests that where the manufacturer of a product has paid, provided other consideration or has otherwise induced a third party to initiate an e-mail on its behalf, that manufacturer can be treated as if it initiated the e-mail itself.

**5. What information should be given to the consumer regarding the ability to opt-out of receiving future emails?**

The email should contain a clearly identified electronic method to allow consumers to opt-out of receiving future emails from the sender. For example, the email might include instructions on how to reply to the email and not receive future commercial emails or a link to a suppression mechanism.

**6. How promptly should the marketer honor a consumer’s request not to receive future email solicitations?**

The marketer should honor the consumer’s choice within ten (10) business days. However, the FTC may decide to modify the 10-business day requirement if it determines that a different time period would be more reasonable.

**7. Are consumers able to choose what type of commercial emails they wish to receive?**

Yes, the new law allows marketers to provide a menu from which the consumer may choose to receive some commercial emails from a marketer while opting out of others. For example, a consumer may be given the option of declining to receive commercial email from one magazine title while continuing to receive offers for another.

However, such a menu must include an option to allow the consumer to choose not to receive any commercial emails from the sender.

It should be noted that if a consumer has opted not to receive commercial email from one magazine title, a publisher might be able to send the consumer commercial email from other magazine titles. To decide whether to send email from a sister magazine, the publisher should consider whether the consumer would expect to receive commercial

email from the second title. In many cases, this would depend on whether the second publication's name is similar to the first title.

**8. If a consumer chooses not to receive commercial solicitations from a subscription agent, should the publisher include the consumer on his or her suppression list?**

The answer to this question depends on whether the publisher could be considered to be the sender. For more information regarding who is considered the sender, please see the answer to question 4.

**9. What if the marketer uses an email service provider?**

The marketer whose product or service is advertised or promoted by the consumer email must maintain an email suppression list. The marketer must provide this list to email service providers who send commercial email on the marketer's behalf. It is the marketer's responsibility to ensure that the consumer's wishes regarding whether to receive future commercial emails are honored.

**10. If the marketer uses an email service provider, whose name should appear in the "From" line?**

The Direct Marketing Association (DMA) advises that if the marketer is renting the list, the marketer's name should appear in the "From" line. However, if the email service provider is using its list to send email on the marketer's behalf, either the email service provider or the marketer's name should appear in the "From" line.

**11. What information should be included in the subject line?**

The subject line should not be deceptive or misleading. For example, publishers may use the subject line to tell the consumer that the email contains an offer to receive "13 issues for the price of 12" or contains a "special offer".

**12. Does the law require the subject line to include "ADV" or a similar label?**

No, but the law does direct the FTC to study whether it would be beneficial to require such a label. The FTC's report to Congress is due by July 1, 2004.

**13. How should a marketer identify a commercial email as an advertisement?**

The law requires that, unless a consumer has given affirmative consent to receive commercial email, it must be "clearly and conspicuously" identified as an advertisement. The law however allows marketers to choose how to best fulfill this requirement.

The DMA advises that marketers identify the email with words such as "advertisement" or "solicitation" or use phrases like "this is a great offer," or "You might be interested in this product".

**14. How can a marketer obtain the consumer's affirmative consent to receive commercial email?**

The law states that a consumer may either request to receive email, or may give his or her affirmative consent to receive commercial email in response to a clear and conspicuous request for such consent.

**15. What type of records should a marketer keep of a consumer's affirmative consent?**

The law does not include a requirement about what records are needed to demonstrate affirmative consent but the DMA is recommending that the marketer keep a record of how consent was obtained, including the date, time and on which website the consent was granted.

**16. Can a marketer use a post office box as a physical postal address?**

The law is not clear, but the DMA's Email Marketing Best Practices require that marketers provide a physical street address to the consumer, which would exclude Post Office Boxes and mail drops.

If an email service provider sends the email on behalf of the marketer, the marketer is considered the sender. Therefore, the marketer's physical address should be included in the email.

January 2004