

The CAN-SPAM Act & Related Issues

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Outline of Presentation

- State spam laws pre-S. 877
- Status of S. 877
- What marketers must do
- Detail on each requirement
- What can happen to you if you don't comply
- Checklist for marketers

Requirements of State Laws pre-S. 877

- Notice and opt-out
- Some ADV labeling
- Some prohibitions against “outlaw spammer tactics”
- Some EBR exceptions
- Utah--private right of action
- California opt-in law

S. 877 preempts state laws!

but

State fraud and trespass laws which may be applied to e-mails are not preempted.

Preemption

- Preempts state laws expressly regulating commercial e-mail
- Preserves state laws to the extent they prohibit falsity or deception in commercial e-mail and state common law rules
 - state trespass, contract or tort laws
 - laws that relate to fraud or computer crime
- Creates a uniform national standard for commercial e-mail communications while preserving state laws, such as Virginia state spam law, used successfully in litigation against deceptive spam

Status of S. 877

- President expected to sign the bill shortly
- Effective date is January 1, 2004

What Marketers Must Do for All Commercial E-Mails

- Give clear and conspicuous notice of the opportunity to opt-out
- Provide a functioning opt-out in every commercial e-mail
- Provide a valid physical postal address of the sender
- Be clear that the e-mail is an advertisement (for non opt-in)
- Use a valid header
- Use a valid subject line

What is a Commercial E-mail?

- Focuses on “Primary Purpose”
- Exception for transactional or relationship messages

Whose Responsibility is it to See That the Requirements are Followed?

- Sender (B2B, nonprofits included?)
- Initiator
- Procurer
- Affiliate
- ISP

Who is the Sender?

- Person who initiates the e-mail message

AND

- Whose product, service or Internet Web site is advertised by the message
- Separate lines of business

Who “Initiates?”

- The term “initiate,” when used with respect to a commercial electronic mail message, means to originate or transmit such message or to procure the origination or transmission of such message, but shall not include actions that constitute routine conveyance of such message. More than one person may be considered to have initiated the message.

The “From” Line

- The “from” line may be from any initiator
- Does the opt-out apply to just the sender or also the “from” line if not the sender?

Details

- **Give notice of the opportunity to opt-out**
 - Clear and conspicuous
 - To whom does opt-out apply?

Details

- **Provide a functioning opt-out in every commercial e-mail**
 - Clear and conspicuous
 - Internet based
 - Must work and continue to work 30 days after transmission
 - Must be implemented within 10 business days
 - May provide consumers opt-out options
 - Restrictions on list rental, etc. after opt-out request

Details

- **Provide a valid physical address of the sender**
 - Address of sender
- **DMA GUIDELINES REQUIRE A STREET ADDRESS**
 - No P.O Box
 - No Mail Drops
 - Geographic location (where consumers can find you)

Details

- **Be clear that the e-mail is an advertisement (for non opt-in consumers)**
 - Subject line and content should be clear, not misleading
 - There is no prescribed language or symbol
 - Consistent with DMA Guidelines

Details

- **Use a valid header**
 - No materially false or misleading headers
 - Not obtained by false pretenses
 - An accurate “from” line
 - No false identification of the computer used

Details

- **Use a valid subject line**
 - Cannot knowingly be misleading or false

Sexually Oriented Advertising

- Must mark the e-mail, in subject line or on the first page, as a sexually oriented advertisement
- Sexually oriented content must not be visible when e-mail is opened -- another click to arrive at the content is required

QUESTIONS

What Happens if You Don't Follow the Law?

- **Criminal Penalties -- Jail**
 - False registrations for getting an e-mail account to use to send
 - Open relays to deceive blocking mechanisms
 - Hiding the identity of the sending computer
 - False headers

Consequences

- **Civil Penalties**
 - Up to \$2 million fine
 - FTC, States, and ISP actions only
 - Trebled damages if harvesting or using dictionary attacks
 - Attorneys fees (ISP actions the prevailing party may obtain, not just ISP if it prevails)

Wireless E-mail

- FCC to issue rules to protect consumers from “unwanted mobile service communications”
 - Mobile commercial messages are messages transmitted directly to a wireless device
- FCC must define rules that will provide subscribers to commercial mobile services with ability to avoid receiving mobile service commercial messages
- FCC must consider whether to require providers of commercial mobile services to allow subscribers to indicate a desire not to receive future mobile service commercial messages at the time of subscribing to such service

Action Items for Marketers

- Chart how your business/divisions/affiliates/brands/product lines use and approve e-mail marketing
- What 3rd parties send messages on your behalf?

Action Items for Marketers

- **Assign Responsibility**
 - Who decides the primary purpose of your e-mails?
 - Who assures the opt-out is included?
 - Who assures the opt-out requests are honored--within 10 business days?
 - Who assures the e-mail addresses opted-out are not rented, etc.?

Action Items for Marketers

- Who prevents harvesting and dictionary attacks?
- Who assures that addresses obtained from 3rd parties have been provided notice and opt-out or have, in fact, opted-in?

Action Items for Marketers

- Create WRITTEN procedures
- Train your employees in those procedures
- Document compliance procedures
- Update procedures
- Monitor performance of your employees and your agents

Upcoming Rulemakings, Reports & Studies Required by S. 877

- FTC general rulemaking authority
- Definition of primary purpose
 - FTC to define criteria for determining primary purpose of an electronic mail message (within 12 months of enactment)
- Time frame for honoring opt-out
 - FTC authority to modify 10 business day period for businesses to honor opt-out requests

Rulemakings, Reports & Studies cont'd

- FTC prescription of marks for sexually oriented material
 - Marks and notices to be included in or associated with e-mail messages that are sexually oriented (within 120 days of enactment)
- Do-Not-E-mail registry
 - FTC is not required to implement a registry
 - FTC is required, in a report to Congress, to set forth a plan and timetable for establishing nationwide do-not-e-mail registry
 - including explanation of any practical, technical, security, privacy, enforceability, or other concerns

Rulemakings, Reports & Studies cont'd

- Do-Not-E-mail registry cont'd
 - Report to include explanation of how registry would be applied with respect to children's e-mail accounts
 - Report to be transmitted to Congress within 6 months of enactment
 - FTC may establish and implement the plan 9 months after enactment
- Study on effects of commercial e-mail
 - FTC, DOJ, and others to report to Congress on effectiveness and enforcement of law (within 24 months of enactment)

Rulemakings, Reports & Studies cont'd

- Reward report
 - FTC to report on a system for rewarding those who supply information re: violations of act (within 9 months of enactment)
- ADV labeling report
 - FTC required to report to Congress on plan for requiring CEMs to include ADV in subject line or other comparable identifier
 - report to explain any concerns causing recommendation against such a plan (within 18 months of enactment)
- Wireless
 - FCC together with FTC to promulgate rules to protect consumers from unwanted mobile service commercial messages
 - rules must be set within 180 days--presumably from effective date

QUESTIONS

THANK YOU

