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What You Need to Know About the New “CAN-SPAM” Law

By John Mack

The CAN-SPAM Act of 2003 (Controlling the Assault of Non-Solicited Pornography and Marketing) was signed into law by President Bush last month and became effective January 1, 2004.

Although this law is often portrayed as a white knight that will save us from dastardly e-mail spammers and pornographers, many of its provisions cover *all* commercial e-mail, even permission-based, opt-in e-mail. It is also applicable to B2B e-mail communications and one-to-one commercial e-mail messages such as e-mail from sales representatives to physicians.

Consequently, all e-mail sent by or initiated by pharmaceutical marketers as well as sales personnel—including newsletters, product announcements, compliance messages, event announcements, edetailing messages, etc.—may be subject to this law.

Harder for Honest Marketers, Easier for Spammers?

As is often the case with such laws, the CAN-SPAM Act may actually make it harder for honest marketers—including pharmaceutical companies—while it is predicted to have little impact on the real spammers who will flaunt the law or use it to their advantage.

In fact, many people feel that the law gives spammers a roadmap for designing and delivering legal unsolicited commercial e-mail (UCE). Also, it will be tough to enforce the law against offshore

offenders who are responsible for the bulk of spam e-mail sent to U.S. consumers.

Michael Goodman, FTC Staff Attorney, Bureau of Consumer Protection, who spoke recently at a MarketingSherpa teleconference, admits that CAN-SPAM “is not going to be a silver bullet for spam.”

Preemption of State Laws

The good news is that CAN-SPAM supercedes or preempts at least part of the 36 or 37 state laws that regulate spam e-mail. This includes the strict California Spam Bill (SB 186) that would have required e-mail marketers to obtain permission from consumers before sending them any commercial e-mail messages. That law also would have given California residents the right to sue violators for up to \$1,000 per message and up to \$1 million in total damages.

CAN-SPAM does not, however, preempt state laws relating to false or deceptive practices in e-mail. Also, the law does not preempt broader state marketing laws such as the new Texas medical privacy law (SB 1136). That law requires prior authorization for certain marketing communications

sent to patients (see “Pharmaceutical Marketing in Texas: look out for state privacy laws!”, <http://www.pharma-mkting.com/news/pmn25-article01.pdf>).

Another concern is whether or not CAN-SPAM supercedes the Junk Fax Law—the Telephone

“This law does not stop a single spam from being sent. It only makes that spam slightly more truthful. It also gives a federal stamp of approval for every legitimate marketer in the U.S. to start using unsolicited e-mail as a marketing tool. Congress has listened to the marketers and not to consumers, and we have no faith that this law will significantly reduce the amount of spam that American Internet users receive.”

— Scott Hazen Mueller, Chairman, The Coalition Against Unsolicited Commercial E-Mail (CAUCE)

Consumer Protection Act of 1991 (TCPA)—which many people claim can be applied to e-mail as well as faxes.

Under this law, it is unlawful “to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement” to any “equipment which has the capacity (A) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.”

The Junk Fax law, as opposed to the CAN-SPAM act, has a private right of action—individuals can sue the senders of illegal “junk fax” for \$500 per copy. Last year, an individual won a judgment in small-claims court after accusing a marketer (Sears) of sending him spam, basing his claim on the Junk Fax Law.

Enforcement: Civil Penalties Are Onerous

Although individuals cannot bring suit under CAN-SPAM, the FTC, certain other federal agencies, state attorneys general, and Internet Service Providers (ISPs) can.

A hospital or physician practice network system administrator could be considered an ISP and bring suit under CAN-SPAM. It's not difficult to imagine a physician making a complaint to his or her network administrator regarding a non-compliant UCE from a pharmaceutical sales representative.

The law also calls for the FTC to submit a plan for a bounty reward for individuals who supply information about violations of the Act. Such whistleblowers could reap up to 20% of the total civil penalty collected. This penalty could be up to

What is Spam?

Although the law is called CAN-SPAM, nowhere in the act is ‘spam’ defined or even mentioned by name, except in one instance in the findings section: “Spam has become the method of choice for those who distribute pornography, perpetrate fraudulent schemes, and introduce viruses, worms, and Trojan horses into personal and business computer systems;”

According to Ray Everett-Church of the ePrivacy Group, “This law is a result of the direct-marketing lobby's success in convincing Congress to redefine the spam problem as being about dishonesty rather than the negative effects of massive volumes of unwanted e-mail.”

There are several definitions of ‘spam’ available. Only a few are presented here.

- Unsolicited “junk” e-mail sent to large numbers of people to promote products or services. Unsolicited Commercial E-mail (The Coalition Against Unsolicited Commercial E-Mail, CAUCE, www.cauce.org).
- In a recent judicial decision rendered by the Supreme Court of the State of Washington, the justices of that state's highest court formally endorsed the view that: The term ‘spam’ refers broadly to unsolicited bulk e-mail (or ‘junk’ e-mail), which “can be either commercial (such as an advertisement) or noncommercial (such as a joke or chain letter).”
- An electronic message is “spam” IF: (1) the recipient's personal identity and context are irrelevant because the message is equally applicable to many other potential recipients; AND (2) the recipient has not verifiably granted deliberate, explicit, and still-revocable permission for it to be sent; AND (3) the transmission and reception of the message appears to the recipient to give a disproportionate benefit to the sender. (Mail Abuse Prevention System, LLC; <http://mail-abuse.org/standard.html>).
- The word “Spam” as applied to e-mail means Unsolicited Bulk Email (“UBE”). (The Spamhaus Project, <http://www.spamhaus.org/definition.html>).
- Robert Wientzen, president of the Direct Marketing Association, said during an appearance on CBS News that spam is “e-mail that misrepresents an offer or misrepresents the originator—or in some way attempts to confuse or defraud people.”

Whatever the technical definition of spam is, people just want to receive LESS unwanted e-mail. The CAN-SPAM law, unfortunately, is not expected to lessen the amount of spam. In fact, some people claim it will make it easier for spammers to send legal UCE to consumers.

\$11,000 per violation. The FTC considers each noncompliant e-mail message—not the total campaign—as a violation. Whistleblowers could make a good living!

According to Goodman, the law does not provide for any grace period with regard to enforcement and the FTC intends to enforce the law immediately, even before rulemaking is complete. In fact, it is under considerable pressure from Congress to do so.

The law does not specify any threshold with regard to number of messages below which it does not apply. Consequently, one noncompliant e-mail message sent to one person can trigger enforcement of the law. Remember, one person blew the whistle on Lilly's e-mail *faux pas*. If you think that was an industry-shaking event, then you don't want to be the first pharmaceutical CAN-SPAM test case.

It's a New World for e-Mail Marketers!

Many provisions of the CAN-SPAM law apply to "commercial e-mail," which the law defines as "any 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)." Spam, on the other hand, is a special class of commercial e-mail that is generally defined as "unsolicited commercial e-mail" (see box for other definitions in vogue).

Since many provisions of the law apply to all kinds of commercial e-mail, legitimate opt-in e-mail advertisers, including pharmaceutical companies and their agencies, as well as opt-in list owners that rent their lists, need to comply with the law. According to Anne Holland, Managing Editor of MarketingSherpa, "the Act has *significant* repercussions for permission mailers."

The law is very broad and pharmaceutical companies need to determine how it affects their marketing to consumers as well as health professionals. Pharmaceutical marketing, after all, has its own specific requirements that are not explicitly addressed in the law. Joan Antokol, Chief Privacy Officer at Novartis Pharmaceuticals agrees, and said that "the law presents some challenges from the process and implementation standpoint, especially with regard to vendor-assisted e-mail marketing campaigns."

Clear and Conspicuous: The Law vs. Best Practices

CAN-SPAM requires a commercial e-mail message to provide "clear and conspicuous identification that the message is an advertisement or solicitation." It's not sufficient to rely on inference or context. According to FTC's Goodman, "relying on inference is risky business."

Currently, there is no requirement that the e-mail message be identified as an ad in the subject line of the message. However, the law requires the FTC to submit a report within 18 months that sets forth "a plan for requiring commercial electronic mail to be identifiable from its subject line." It suggested that the FTC look into the use of the characters 'ADV' in the subject line as an identifier. Importantly, CAN-SPAM allows an exception to this disclosure requirement "if the recipient has given prior affirmative consent to receipt of the message." Other disclosures not required by the law under these circumstances are inclusion of "a valid physical postal address of the sender" and an opt-out mechanism. Nevertheless, most legitimate marketers intend to comply with the law for all commercial e-mail messages that they send, including permission-based e-mail.

Most marketers would agree that deceptive subject lines cause people to opt out—an undesirable outcome at best. The American Association of Advertising Agencies (AAAA), the Association of National Advertisers (ANA), and the Direct Marketing Association (The DMA) recently released a set of nine guidelines that call on marketers to institute certain practices that will defend and enhance the viability of legitimate e-mail marketing. The first guideline states: "The subject line of an e-mail must be honest and not misleading or deceptive." CAN-SPAM makes this a legal requirement for all commercial e-mail.

"Best practices in healthcare communications," suggests Jay Bolling, Executive Vice President, Roska Direct, "generate the most successful campaigns. You want to engage the end user and provide a positive experience. The best practice is, and always has been, to make your subject line as clear and truthful as possible."

Primary Purpose

The law applies to any "electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service..." It leaves it up to the FTC to

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CAN-SPAM Act Summary

Definitions

“The term ‘commercial electronic mail message’ means any 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).”

INITIATE- “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 a message.”

SENDER – “the term ‘sender’, when used with respect to a commercial electronic mail message, means a person who initiates such a message and whose product, service, or Internet web site is advertised or promoted by the message.” There can be multiple senders. When renting lists, for example, both the advertiser and the list owner may be considered senders.

Major Provisions

- Prohibits commercial e-mailers from disguising their identities by using false return addresses with the intent to “deceive or mislead recipients” about the origin of a commercial e-mail message.
- Requires that instructions be included in every unsolicited e-mail message so that recipients “opt out” of receiving future e-mail. Opt out requests must be honored by the marketer within 10 days of each request.
- All commercial e-mail messages must provide “clear and conspicuous identification that the message is an advertisement or solicitation” unless “the recipient has given prior affirmative consent to receipt of the message.”
- Prohibits the sending of commercial e-mail with deceptive subject lines that “would be likely to mislead a recipient.”
- Unsolicited commercial e-mail messages must contain “a valid physical postal address of the sender.” Some people contend that a Post Office Box number is not sufficient. The Direct Marketing Association, a major sponsor of the CAN-SPAM Act, in its Online Marketing Guidelines, suggests that “The marketer’s street address should be made available in the e-mail solicitation...”
- The law authorizes the Federal Trade Commission to research and develop a plan for a “do-not-spam” list, although it does not require such a list to be implemented.
- Provides the ability for ISP’s and attorney generals to sue offenders for up to \$2 million per offense. A hospital or physician practice network system administrator could be considered an ISP and bring suit under CAN-SPAM.

FTC Rulemaking

The law requires the FTC to develop rules to further define and interpret the law. Members of the public will have a chance to comment on proposed rules in the Federal Register, which should be available in March, 2004.

- FTC has a year to study and make a final ruling on the definition of “commercial electronic mail message.”
- The FTC also is directed to define “primary purpose.” Specifically, the CAN-SPAM Act states: “Not later than 12 months after the date of the enactment of this Act, the Commission shall issue regulations pursuant to section 13 defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message.”
- The FTC has 18 months to submit a report that sets forth “a plan for requiring commercial electronic mail to be identifiable from its subject line.” The FTC is directed to look into the use of the characters ‘ADV’ in the subject line as an identifier.
- The FTC will also review the ten-day limit for honoring opt outs.

develop regulations that determine the criteria by which the primary purpose of an e-mail message will be determined. Until then, it is a matter of interpretation.

For example, is the primary purpose of e-mail messages sent from sales reps to physicians announcing “lunch and learn” sessions commercial or educational? On the one hand, there is an ongoing commercial relationship between the sender (sales rep/pharma company) and the recipient (physician). Therefore, the recipient is likely to perceive the primary purpose of the message to be commercial. On the other hand, the primary purpose, from the sender’s perspective may be educational since the “contents or circumstances of the message indicate a primary purpose other than commercial advertisement or promotion of a commercial product or service.” eDetailing messages clearly have a commercial purpose and would be covered by the CAN-SPAM law.

Opt-Out Issues

The CAN-SPAM law is essentially an “opt-out” law and does not require permission before commercial e-mail can be sent to consumers. It has been said that CAN-SPAM does not prevent the “first bite of the apple” – you are free to send at least one unsolicited e-mail message to anyone without permission as long as you include an opt-out mechanism.

Surprisingly, CAN-SPAM does NOT require marketers to honor opt outs received by means other than “electronic mail message or other form of Internet-based communication”! The requirement for inclusion of a postal address in unsolicited commercial e-mail is actually to aid in the enforcement of the law – i.e., make it easier to locate offenders – and is not cited in the law as a mechanism by which to receive opt out requests!

The trend in pharma permission-based marketing, according to several privacy and marketing executives I spoke to, is towards better use of technology to manage opt outs, no matter through which channel they come. Internally, pharma companies need to get rid of their client data silos and invest in a single centralized database to track their customers, how they were acquired, what permissions were granted, and what they have opted out of. A Web page could present this information to consumers and allow them to update their choices.

Opt out requests from physicians should also be honored and tracked centrally. If a physician opts

out from ALL e-mail communications from a pharmaceutical company, and a sales representative from that company sends the physician an e-mail message, it might trigger a CAN-SPAM complaint!

Another trend within pharma may be to use “blanket opt-ins” whereby consumers are asked for permission to send them information about any product marketed by the company. Rob Stuart, Vice President of Marketing at HCPPro, opined that this might be a good strategy for dealing with opt-ins, but it doesn’t help with the opt-out situation. His colleague, David Beardsley, Director of Strategic Development, expanded on Stuart’s concern about blanket opt-ins, noting that this approach could lead to higher opt-out rates because it is more effective to send information specific to the needs of each recipient. Keep in mind, also, that the more general an email message is, the more likely it is to be considered spam, even by recipients who opted-in (and who may have forgotten exactly what they opted-in for).

Stuart suggested that “the days where product teams maintain their own lists are over.” There is a danger of using multiple lists maintained by different product teams because everything is not in the same database. In that situation it is difficult to be sure that all opt out requests have been accounted for. A recipient may want to opt out from ALL e-mail from the pharma company, not just from one product.

You might want to get even more granular with opt outs. Roska Direct, for example, uses what they call “Opt out with Options.” They have found that giving recipients a choice about what they want to opt out of reduces overall opt out rates by 30%. For example, some recipients want fewer messages (change in frequency) or want messages delivered in a different medium (postal mail vs. e-mail).

Suppression Files and Privacy

Pharmaceutical companies, as well as other marketers, often use third party list owners or brokers to help with their e-mail marketing campaigns. For example, pharmaceutical marketers may rent a list from an opt-in list owner and have that entity send out marketing e-mail messages on their behalf.

Marketers are advised to maintain “suppression files,” which include e-mail addresses of people who have opted out of commercial e-mail messages initiated by them. If the marketer uses a third party such as a list owner to “press the

button,” that third party also should maintain a suppression file. The marketer and the list owner or third-party vendor must find ways to share suppression files without violating their privacy policies. Various options have been suggested to work around this, including encryption and the use of independent third-party vendors – a promising cottage industry in the next several months.

Conclusion

You can be sure to hear more about the CAN-SPAM Act in the near future as the FTC pursues

test cases and develops its regulations and recommendations for Congress.

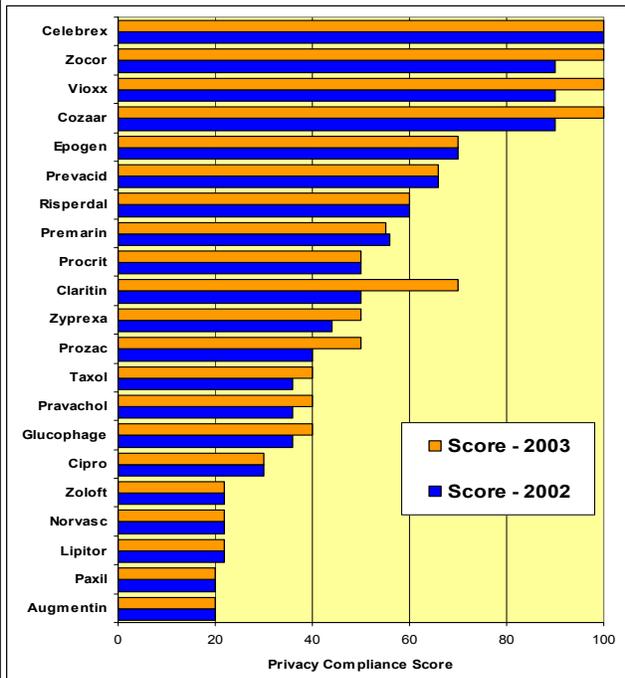
Implementing changes to comply with CAN-SPAM may be a challenge for some organizations. Email is a very powerful marketing, communication, and customer retention tool. Those organizations that make the effort to overcome the challenge and manage the risk of using commercial e-mail will win!

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