

PR pros must know SPAM, fax regulations

By Mark Sableman

The CAN-SPAM law, which regulates commercial emails, and the Telephone Consumer Protection Act, which prohibits unsolicited fax ads, must be considered anytime a commercial message is sent out by email or fax.



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Technically, the CAN-SPAM act only regulates emails designed to promote a commercial product or service. Mere informational emails aren't covered. Nor are transactional and relationship emails, such as emails to confirm purchases or notify about recalls, upgrades and account information.

But many regulators take a critical view of informational

communications that fall outside of typical editorial channels. Some courts and regulators unfairly brand every communication made with a commercial purpose which could include PR communications as "advertising" and thus non-informational.

The CAN-SPAM Act permits marketing emails as long as they meet certain requirements. The email header must not be false or misleading, the subject line must accurately reflect the content of the message, the message must be identified as an ad (usually in a footer), and the sender's physical address must be included. Additionally, specific rules for disclosing, allowing and implementing opt-outs must be followed.

Opt-out notices required

The Federal Communications Commission insists that opt-out notices and procedures be provided even for solicited communications and not just unsolicited ads. That position is currently being challenged, but prudent mass emailers will include fully compliant opt-out notices and procedures for all of their commercial emails.

CAN-SPAM essentially sets up an opt-out system for emails. You can send the first one,

but the recipient can opt out of receiving further emails from you or your client or both. Canadian email law, known as CASL, follows an opt-in system. U.S. law means maintaining company-wide opt-out lists, and scrubbing all email-send lists against those opt-outs.

Fax law is stricter

The law that regulates faxes, the TCPA, is full of pitfalls, dangers, and liability risks. It originated in the days when fax machines and paper were expensive, and it seemed improper for someone to send an unsolicited and unwanted ad by fax. So the law prohibits the sending of unsolicited ads by fax, and severely penalizes violations.

You might think PR communications are safe because they aren't ads. But the FCC and some courts have construed ads broadly to include any communication, even informational, that is intended to promote the company and its products or services. While the act exempts faxes to a party with whom the sender has an "established business relationship," that exemption is narrower than the words suggest.

Yes, you probably have an EBR with news outlets that you regularly deal with. But you might not have an EBR if you fax your release to a long list of recipients, and you or your client didn't get those fax numbers from direct past voluntary dealings with the recipients.

Each improper fax, to each recipient, carries a minimum \$500 civil penalty. The TCPA is enforceable by private attorneys, who usually file their claims as class actions. A single mistaken fax to thousands of recipients can lead to millions in liability.

For these reasons, most marketers avoid faxes these days except when they can prove the faxes concern active transactions (like purchase confirmations), or where they can clearly prove an EBR.

Unlike the TCPA, CAN-SPAM prohibitions are not enforceable by private attorneys, and the statutory penalties are far more modest.

CAN-SPAM is fairly friendly to commercial users. Though its title — the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 — suggests an intent to restrict email marketing, the marketing industry actually advocated for the bill, to create a uniform federal standard in lieu of more restrictive California rules that would have otherwise set the de facto national standard.

PR pros may think that subjecting their communications to laws designed for unsolicited advertising is like fitting square pegs into a round hole, but it is worth keeping these laws in mind to avoid any legal snake pits, whether square or round. ○