

The DMA Safe Harbor Program Contract

THE DMA SAFE HARBOR PROGRAM: MARK AND DISPUTE RESOLUTION AGREEMENT

THIS AGREEMENT (this “*Agreement*”), is made as of _____ (the “*Effective Date*”) by and between The Direct Marketing Association, Inc., a not-for-profit association located at 1120 Avenue of the Americas, New York, New York 10036-6700 (“*The DMA*”), and _____, a _____ located at _____ (the “*Participant*”), that may operate a site on the World Wide Web at and under the domain name(s) set forth in the signature block below (the “*Participant Site*”), with respect to the Participant’s use of The DMA Safe Harbor Mark, as set forth in Attachment [A] (“*The DMA Safe Harbor Mark*”), and The DMA Safe Harbor Program, as set forth in *The DMA Safe Harbor Program: A Guide for Businesses* (the “*DMASHP*”). The DMASHP applies to claims brought by data subjects of a European Union member country (“*E.U. data subjects*”) against participating U.S. companies in connection with personal data in the possession or control of Participant that is subject to the U.S.-E.U. Safe Harbor Privacy Principles, FAQs and other relevant E.U. documents (collectively, the “*Safe Harbor*”), as set forth in Attachment [B].

NOW, THEREFORE, in consideration of the mutual promises herein, The DMA and Participant, intending to be legally bound, agree as follows:

1. ELIGIBILITY REQUIREMENTS.

- A. For the Safe Harbor— Participant warrants and represents that it has or, within twenty (20) days of signing this Agreement, will become self-certified (“*Self-Certification*”), as set forth and made available by the U.S. Department of Commerce (“*USDOC*”) and on the World Wide Web at the USDOC Export Portal at www.export.gov/safeharbor/ and subsidiary and linked pages (the “*USDOC Safe Harbor Site*”). Participant additionally agrees to immediately notify The DMA of any changes in Participant’s Self-Certification status or eligibility.
 - B. To Resolve Disputes Based on the Safe Harbor Privacy Principles— When available, E.U. data subjects should seek redress through Participant’s internal compliance mechanism prior to bringing a claim to the DMASHP. Participant agrees that any claim of an individual arising from the personal data in the possession or control of Participant, which is subject to the Safe Harbor (“*Personal Data*”), shall be resolved according to the DMASHP. Participant further agrees that any decision made by the DMASHP Committee shall be based upon the Safe Harbor and that Participant will abide by all rules and decisions of the DMASHP.
 - C. Notice to Individuals— Consistent with the Safe Harbor, Participant will provide individuals with contact information to enable them to submit questions and complaints about Personal Data. Participant is required to provide individuals with conspicuous notice of the DMASHP, including all DMASHP contact information, as set forth in Attachment [C], if such individuals are not satisfied with the decisions rendered by Participant’s internal complaint mechanism.
2. **SCOPE.** The DMASHP applies to claims brought by E.U. data subjects against Participant in connection with online and offline Personal Data of those data subjects.
 3. **APPLICANTS.** The DMA will review each applicant for membership. If The DMA determines, at its sole discretion, for any reason that it does not wish to enter into this Agreement with an applicant, it shall so notify applicant.

3. USE AND OWNERSHIP OF THE DMA SAFE HARBOR MARK.

- A. Permitted Use — The DMA hereby grants to Participant a non-exclusive limited right during the term and subject to this Agreement to use, display and distribute The DMA Safe Harbor Mark solely for the purposes set forth in this Agreement and in the form provided to Participant by The DMA and subject to any use guidelines The DMA may publish from time to time. Participant acknowledges that any unauthorized or misuse of The DMA Safe Harbor Mark will cause irreparable harm to The DMA and agrees that The DMA is entitled to the immediate entry of a permanent injunction therefor.
- B. Ownership Acknowledgement and Use of The DMA Safe Harbor Mark— Participant acknowledges that The DMA is the sole and exclusive owner of all rights, title and interest in and to The DMA Safe Harbor Mark. Participant agrees that: (i) Participant shall do nothing inconsistent with such ownership either during the Agreement or at any time afterwards; (ii) Participant shall take no action that will interfere with or diminish The DMA’s right in The DMA Safe Harbor Mark; (iii) Participant shall use The DMA Safe Harbor Mark so as to create a separate and distinct impression from any other mark or trademark that might be used by Participant; and (iv) Participant will not display The DMA Safe Harbor Mark in any manner that is misleading, unlawful, or violative of the rights of third parties, or inconsistent with the terms and conditions imposed on its use by The DMA.
- C. Non-Alteration— Participant shall not alter The DMA Safe Harbor Mark in any form. If used on Participant’s Site, The DMA Safe Harbor Mark, shall reside on the Participant’s server. Participant shall not alter The DMA Safe Harbor Mark by changing the data contained within the image, changing the file name of the image, or changing the proportion or shape of the image. Notwithstanding anything to the contrary in this Section of this Agreement, Participant may permit its providers to host The DMA Safe Harbor Mark solely for the furtherance of the purposes of this Agreement, and provided that if The DMA Safe Harbor Mark resides on a server other than the Participant’s own server, Participant shall ensure that such third-party conforms to the requirements of this Agreement with regard to The DMA Safe Harbor Mark.

4. DURATION OF AGREEMENT AND TERMINATION.

- A. Initial and Renewal Terms— The term of this Agreement is one (1) year and may be renewed annually, beginning on the Effective Date of this Agreement, which shall be the date it is executed by The DMA. This Agreement may be extended by The DMA on an annual basis, but The DMA is under no obligation to do so, nor is it under any obligation to continue the DMASHP.
- B. Termination—
 - i. *For Breach*— The DMA may terminate this Agreement immediately if Participant breaches any of the terms of this Agreement for any reason.
 - ii. *Termination By Either Party For Convenience*— Either party may terminate this Agreement at any time with not less than thirty (30) days prior written notice to the other party for any reason or no reason.
 - iii. *Effect of Termination On Participant’s Rights*— Upon expiration or termination, all rights or benefits granted to Participant hereunder shall cease immediately. Notwithstanding anything to the contrary herein, this Agreement shall survive expiration or termination only to the extent necessary to permit Participant to comply with obligations that arise under this Agreement prior to such expiration or termination, including without limitation participation in the DMASHP.

- 5. **CHANGES TO THE DMASHP.** The DMA may alter, and/or update the DMASHP (“*Amended Terms*”) at any time and from time to time by any reasonable means, and notify Participant by any

reasonable means, including in electronic or print form, of such Amended Terms to The DMA's Site on the World Wide Web at the "the-dma.org". Participant shall be responsible for periodically checking the Web site for any changes to the DMASHP. Participant's continued use of The DMA Safe Harbor Mark shall be deemed conclusive acceptance of all such Amended Terms.

6. PUBLICITY. The DMA may refer to or list Participant as a member of the DMASHP in proposals and marketing materials and regulatory filings. The DMASHP Committee, at its discretion, may publicly disclose the name of a Participant, the facts of a dispute, and/or the legal reasoning leading to a decision as well as any adverse decisions.

7. CONFIDENTIAL INFORMATION. Other than the information stated in Section 7, Participant may request for information to be treated as confidential. In seeking such treatment, Participant shall: (a) identify which materials are confidential and which are not; and (b) affirm in writing that the information for which confidentiality is claimed is not publicly available. Any such requests may be granted at the sole discretion of The DMA.

9. INVESTIGATION.

A. After diligent inquiry and in good faith, Participant covenants and attests that at the time of entering into this Agreement, Participant is not involved in a formal or informal investigation by any known governmental entity or other self-regulation program in any country, including without limitation the Attorney General of any State, the United States Federal Trade Commission, any law enforcement agency, any other state or federal governmental agency with jurisdiction over this matter, or any foreign privacy authority or other foreign government authority, of which it has been notified of the misuse of Personal Data.

B. If Participant becomes the subject of any such allegation of misuse of Personal Data or a defendant in any action by any of the aforementioned authorities, it shall, except to the extent prohibited by law, provide immediate notice of the allegation to The DMA and, if applicable, the name of the agency, the purpose of the investigation, and the status of the investigation.

C. If such investigation, involving Participant, is referred to a law enforcement agency or any other governmental agency for further investigation, The DMA may publish a notice of such investigation, including descriptive references, as The DMA deems appropriate in its sole discretion.

D. Participant's failure to comply with any and all remedies resulting from the DMASHP may, pursuant to the Safe Harbor, result in The DMA's notifying any known governmental entity or other self-regulation program in any country, including without limitation the Attorney General of any State, the United States Federal Trade Commission, any law enforcement agency, any other state or federal governmental agency with jurisdiction over this matter, or any foreign privacy authority or other foreign government authority, of Participant's non-compliance.

E. Participant agrees to hold The DMA and each and every member of the Safe Harbor Program Committee harmless from all claims arising out of or related to The DMASHP, including, but not limited to, in the event that The DMA notifies any known governmental entity or other self-regulation program in any country, including without limitation the Attorney General of any State, the United States Federal Trade Commission, any law enforcement agency, any other state or federal governmental agency with jurisdiction over this matter, or any foreign privacy authority or other foreign government authority.

10. REPRESENTATIONS AND WARRANTIES.

A. Participant Representations and Warranties—

(i) *General*— Participant represents and warrants the following: (i) Participant is and will remain in compliance with the Eligibility Requirements in Section [1] of this Agreement; (ii)

all of the information provided to The DMA is accurate and truthful; and (iii) the individual signing on behalf of Participant has the authority to bind Participant to the terms and conditions of this Agreement.

(ii) *Cooperation to Resolve A Complaint*— If Participant is the subject of a complaint submitted by any party to The DMA of an alleged violation of the Safe Harbor by Participant, Participant shall comply with the DMASHP in an effort to resolve the complaint. Participant agrees that any decision made by the DMASHP Committee will be based upon the then current Safe Harbor. Participant further agrees to abide by the result and any decision of the DMASHP.

(iii) *No Modification of the Agreement*— Participant warrants that at the time of submitting this Agreement to The DMA that Participant has not modified either the form or content of this Agreement from the form and content of the original Agreement as posted on The DMA Web site or as otherwise obtained from The DMA.

B. DMA— The DMA represents and warrants that it has the right, power and authority to enter into and perform this Agreement.

C. Disclaimer— EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, TO THE MAXIMUM EXTENT PERMISSIBLE BY LAW, THE DMA DISCLAIMS ANY AND ALL OTHER WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT OR NON-MISAPPROPRIATION OF INTELLECTUAL PROPERTY RIGHTS OF A THIRD-PARTY, TITLE, CUSTOM, TRADE, QUIET ENJOYMENT, ACCURACY OF INFORMATIONAL CONTENT, OR SYSTEM INTEGRATION. EACH PARTY FURTHER ACKNOWLEDGES THAT ALL SERVICES ARE PROVIDED “AS IS” TO THE MAXIMUM EXTENT PERMITTED BY LAW.

D. Limitation of Liability— IN NO EVENT SHALL THE DMA BE LIABLE TO THE PARTICIPANT FOR INCIDENTAL, SPECIAL, INDIRECT, PUNITIVE, EXEMPLARY OR CONSEQUENTIAL DAMAGES (INCLUDING, WITHOUT LIMITATION, ANY DAMAGES RELATING TO LOST PROFITS OR LOSS OF BUSINESS OPPORTUNITY) EVEN IF THE DMA IS GIVEN NOTICE OF THE POSSIBILITY OF DAMAGES OR EVEN IF PARTICIPANT, CLAIMING SUCH DAMAGES, HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. PARTICIPANT ACKNOWLEDGES THAT THE LIMITATION OF LIABILITIES AND DISCLAIMERS OF WARRANTY CONTAINED HEREIN CONSTITUTE AN AGREED UPON ALLOCATION OF RISK BETWEEN THE PARTIES AND ARE AN ESSENTIAL ELEMENT OF THE BARGAIN BETWEEN THE PARTIES.

11. GOVERNING LAW/JURISDICTION/VENUE/ATTORNEYS’ FEES. This Agreement shall be construed in accordance with, and governed by the laws of the State of New York, exclusive of its conflicts of law principles, as if this agreement were made and to be performed in the State, County and City of New York. The parties hereby consent to exclusive venue and jurisdiction for actions governing this Agreement in the federal or state court having jurisdiction where The DMA’s principal office is located at the time the suit is filed. In any action to interpret or enforce this Agreement, the prevailing party shall be awarded all court costs and attorneys’ fees incurred.

12. INDEMNITY. Participant agrees to indemnify, defend, and hold The DMA and each and every member of the Safe Harbor Program Committee harmless from all claims, actions, losses, costs and liabilities, including without limitation litigation costs and attorneys’ fees, and relating to Participant’s failure to comply with the terms and conditions of this Agreement.

13. SANCTIONS. The DMASHP Committee shall have the authority to issue certain sanctions as a result of their decision. The sanctions available to the DMASHP Committee shall include, but are not limited to:

- A. Correction of actions found not to be in compliance with the E.U. Directive on Data Protection or the Safe Harbor;
- B. Correction or deletion of inaccurate personal information;
- C. Reimbursement by Participant to an E.U. resident of actual, direct monetary damages incurred by that individual as the result of the Participant's violation of the Safe Harbor;
- D. Removal from the DMASHP and revocation, if any, of Participant's ability to display the DMA Safe Harbor Mark;
- E. Public notification of the decision and action taken by the DMASHP Committee;
- F. Notification to the USDOC or any relevant U.S. or European authority, as mentioned in Section 9, of the DMASHP Committee's decision and a request for removal from the Safe Harbor Certification List due to a failure to comply with the Safe Harbor;
- G. Referral of the matter to the U.S. Federal Trade Commission, USDOC, or other appropriate governmental agency for enforcement action.

14. GENERAL PROVISIONS.

- A. Entire Agreement— This Agreement embodies the entire agreement between The DMA and Participant and supercedes any prior agreements, understandings, and obligations between said parties.
- B. Assignment— Participant may not assign or transfer, directly or indirectly (including without limitation by merger or operation of law), any of its rights or delegate any of its duties under this Agreement without the prior written consent of The DMA. Any attempt by Participant to assign this Agreement without The DMA's consent shall be void and of no force and effect.
- C. Captions— The headings of the Sections herein are inserted for convenience only and are not intended to affect the meaning or interpretation of this Agreement.
- D. Severability— The provisions of this Agreement are severable. In the event that any provision of this Agreement is determined by a Court of competent jurisdiction or a governmental regulatory entity to be invalid or unenforceable, in whole or in part, that provision shall be construed or limited in such a way as to make it enforceable and consistent with the manifest intentions of the parties. If such construction or limitation is impossible, the unenforceable provision shall be stricken, and the remaining provisions of this Agreement shall remain valid and enforceable.
- E. Survival— Sections 4(B), 5(B)(iii), and 9(C) and (E), survive the expiration or termination of this Agreement.
- F. Acceptance— Upon ratification, this Agreement becomes a legally binding and enforceable document. Any changes must be made by written amendment and agreed on by the other party/s to this Agreement.

Company (the Participant)		
Street Address		
City	State	Zip Code
Email Address	Participant's URL	
Name of Company Officer	Title	
Signature	Date	

For The DMA's Use Only:

Signature for the DMA	Date
Email Address safeharbor@the-dma.org	ID #

Attachment A— The DMA Safe Harbor Mark



Attachment B – Safe Harbor Privacy Principles, FAQs, and Other Relevant Information

1. Safe Harbor Privacy Principles are set forth and made available by the USDOC and on the World Wide Web at the USDOC Export Portal at:
<http://www.export.gov/safeharbor/SHPRINCIPLESFINAL.htm>
2. FAQs and other relevant Safe Harbor documents are set forth and made available by the USDOC and on the World Wide Web at USDOC Export Portal at:
<http://www.export.gov/safeharbor/SafeHarborDocuments.htm>
3. The above documents can be found together with commentary on implementing and understanding the Safe Harbor principles in *The DMA's Direct Marketer's Guide to Compliance with the Safe Harbor Program for European Data*, which is available in two different versions at:
http://www.the-dma.org/bookstore/cgi/displaybook?product_id=000003

**Attachment C – The DMA Safe Harbor Program
European Consumer Contact Information**

- email: safeharbor@the-dma.org
- mail: Safe Harbor Line
Direct Marketing Association
1615 L Street, NW - Suite 1100
Washington, DC 20036
- web: <http://www.dmaresponsibility.org/SafeHarbor/consumers.shtml>
- fax: 202.955.0085

The DMA Safe Harbor Program Mark



Once your application has been reviewed and approved by DMA staff, you will be contacted regarding the process for downloading and using the mark in your promotional materials.