



ISSUE PAPER

Subject: Do Not Call Registry and Fax Ban

Issue: Telemarketers are prohibited from calling consumers who have placed their names on the National Do Not Call (DNC) Registry. Moreover, telemarketers are prohibited by law from faxing commercial solicitations to consumers and businesses without prior consent.

Background: Through amendment to the Telemarketing Sales Rule, the FTC established a National Do Not Call Registry (DNC) that bans certain interstate telemarketing calling residential numbers on that list. The FTC's jurisdiction does not extend to national banks and intrastate calls. As a result, the FCC amended its Telephone Consumer Protection Act (TCPA) to impose almost identical DNC rules on these entities. Under the DNC rules, established business relationships (EBRs) are excluded from the calling prohibitions. An EBR exists when a telemarketer has transacted business with the consumer within the last 18 months or has received an application or inquiry from the consumer in the last 3 months. If the consumer has an EBR with the telemarketer, but specifically asks not to be called in the future, the telemarketer is not permitted to call with commercial solicitations. As originally amended, telemarketers were required to access the DNC every 90 days.

FCC's final rule announcing the DNC provisions also reversed a long-standing position that the "established business relationship" exemption applied to fax solicitations. The reversal was due to the FCC's position that it lacked statutory authority to offer such an exemption. The FCC's final rule states that fax solicitations both to consumers and businesses would require express written consent. As a result of broad business outcry, including a petition for reconsideration by the MBA, the FCC postponed elimination of the EBR exemption several times. FCC extension however is no longer necessary because the President signed the Junk Fax Prevention Act (JFPA) into law, which reestablishes the EBR for faxes.

Status: MBA commented on both the FTC and FCC DNC proposed rules. MBA was actively involved in the passage of the JFPA, which was signed into law on July 9, 2005. MBA submitted comments to the FCC on its proposed rules to implement the JFPA.

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1. Do Not Call

In January 2004, Congress increased the frequency with which telemarketers must check the DNC registry from every 90 days to monthly. The FTC issued a final rule stating that telemarketers must check the registry every 31 days. Despite MBA's comments requesting a 30-day grace period, the FTC did not grant a grace period, whereby telemarketers would have 30 days from the date the list was received to the date calls could no longer be made to those numbers on the list. In January 2005, MBA joined other industry participants on a comment letter supporting greater consistency between FCC and FTC regulations on measuring "abandonment rates" for telephone solicitations and applying the EBR to recorded solicitations.

2. Fax Ban

S. 714, the "Junk Fax Prevention Act," was signed into law on July 9, 2005 and was effective upon enactment. The legislation provides:

- a statutory EBR exception to the ban on unsolicited commercial faxes;
- no time-limit definition of that EBR;
- unsolicited commercial faxes must now include an opt-out provision on the first page of the fax, providing a cost-free, 24/7 means for the recipient to be removed from the distribution list;
- after enactment, fax numbers to which unsolicited advertising will be sent must be obtained either directly from the recipient or from a public source;
- fax numbers in the possession of the sender at the time of enactment are "grandfathered" as to the means by which the number was obtained;
- three months after enactment, the FCC is authorized to impose limitations on the EBR, if the agency determines that there are significant abuses of faxes sent under the EBR.

Despite adoption of this Federal law, state laws on the sending of unsolicited faxes are not preempted by the JFPA.

On April 6, 2006, the FCC issued final rules implementing the JFPA that:

- Permit businesses to send commercial faxes based on established business relationships without express permission.
- impose no time limit on the length of an established business relationship.
- Require senders to include opt-out notices in faxes, but provide flexibility in designing opt-out notices.

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- Define broadly the “cost-free mechanism” for opting out.
- Impose no specific recordkeeping requirements on businesses.
- Exclude many business communications from fax restrictions, including transactional communications.

Also positive for mortgage lenders is the decision of the U.S. District Court of the Eastern District of California in *Chamber vs. Lockyer*, whereby the court concluded that California’s Business and Professions Code SB 833 is “constitutionally infirm” to the extent that it seeks to govern the interstate transmission of unsolicited facsimile advertisements.

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