

CAN SPAM and Do Not Call Questions and Answers

by
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Question 1. In regard to the rules pertaining to Do Not Call lists, is a financial institution required to place a person's name and phone number on their list if they do not have a business relationship with or have never contacted the individual?

Answer: Yes. Any person may make such a request and the fact that you haven't tried to call them, or have plans to is moot.

Question 2. Is CAN SPAM limited to consumer accounts?

Answer: No. "Recipients" of these commercial messages could be an individual, a business or an organization.

Question 3. We like to send out interest rate sheets to brokers/dealers and Realtors for various products. Is this spam?

Answer: Commercial rate sheets may be covered or exempt, depending on the relationship with the receiver. If there is no formal relationship and the bank has done no business with them, these email communications are best treated as promotions. In cases where the financial institution has engaged in business transactions of the type covered in the rate sheet, then these messages probably fit within the definition of a "transactional or relationship message" and are exempt from CAN SPAM rules.

Question 4. Does CAN SPAM apply to those emails sent by platform employees to let their preferred customers know of new rates, products, etc?

Answer: Probably. If the primary purpose of the messages is to announce a change in terms or available upgrade to a product the customer already owns, then the message is exempt. Otherwise, if the message is sent to stimulate interest in a product the customer does not currently own, it is covered.

Question 5. Are emails to commercial customers exempt?

Answer: Yes and No. CAN SPAM coverage does not depend on the type of customer, but rather the type of message. A “transactional or relationship message” to a commercial customer is exempt. This would include e-statements, lists of returns, notice of change in the prime rate and any other message that relates to an existing account. On the other hand, messages promoting the bank’s services to potential commercial customers and additional services to existing commercial customers are covered.

Question 6. If we email a Truth in Savings disclosure to a prospective depositor is that covered?

Answer: Probably not. Legal disclosures to prospective customers do not fall under any specific CAN SPAM exemption. Nevertheless, the general definition of “commercial email message” covers only those messages “the primary purpose of which is the commercial advertisement or promotion of a commercial product or service.” If your TIS disclosure is embedded within a promotional flyer, then it may be covered. If the disclosure sticks to regulated content, then it’s much easier to argue that it is not a “commercial advertisement or promotion.”

Question 7. Does the law apply to email announcements of weather-related branch closings or other information about office hours?

Answer: A. Generally, no. Deviations from normal service schedules can be characterized as either safety/security information or a change in terms. These are clearly “transactional or relationship messages” and are therefore exempt.

Question 8. Who enforces the CAN SPAM rules?

Answer: The FTC has authority but your regulators should also examine for this.

Question 9. Has there really been any enforcement proceedings for spam?

Answer: Yes. Daniel J. Lin of West Bloomfield, Mich., pleaded guilty in the U.S. District Court for the Eastern District of Michigan to three felony counts under the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act. The settlement bars the defendants from violating CAN-SPAM. It also bars them from making false or misleading claims for their products or services and bars unsubstantiated health, efficacy, or safety claims. It also provides for a suspended judgment of \$230,000, the total amount of diet patch sales.

These are not going to court so much with jail terms as they "settle" prior to that stage. We have a story in the BOL Geek Blog <http://www.bankersonline.com/geek/> from June 13m 2006 about Ryan Pitylak who, with his former partners, settled for a \$10Million penalty. Pitylak also had \$1Million in civil penalties with the State of Texas and agreed to pay Microsoft \$1Million. Just a few months before Pitylak graduated from the University of Texas.

Question 10. Can you provide any guidance on how large the opt-out notice should be at the bottom of the page and if it should be at the bottom or at the top of the email in order to be conspicuous? I realize that there is no specific answer, but even a minimum standard would assist. We have been going with no less than 8 pt font. (A recent attorney opinion indicated that the font can not be significantly smaller than the font in the advertisement. Any guidance on what you would consider significantly smaller?)

Answer: My opinion wouldn't be binding, but I would agree with the comparison to the other textual content as this is a sound test to determine if it is clear and conspicuous. And so long as it is clear and conspicuous, placement should not be an issue unless there is a separate placement requirement.

Question 11. Where should the statement "This email is an advertisement" be placed, at the top or the bottom of the email? Some people would argue it is not conspicuous at the bottom of the email. Would you agree with that opinion? Again any minimum font size to have this statement?

Answer: See Q10. The clear and conspicuous requirement exists but email has no placement requirement. The Junk Fax rule is specific that the opt-out notice be on the first page.

Question 12. When a customer applies for a credit card over the internet a statement is made that providing your email address you consent to receive correspondence from us. Would this statement be adequate to cover email advertisements as well and be considered affirmative consent? Or does the fact

that the word "correspondence" was utilized indicate that this should not be considered an opt-in to email offers/advertisements?

Answer: An opt-in and initial permission to send an advertisement isn't what is important in these rules (less Junk Fax rules). More so, the ability to opt-out is the key. Your email messages must include the opt-out procedure and you need to know that what you have established, works. If the person opts-out, get them off the mailing list.

Question 13. We received an opinion that if a customer gives affirmative consent to receive solicitations on a sub marketers website/email, but another sub marketer will be sending the emails, it needs to be very conspicuous at the time of the affirmative consent that the recipients email address could be transferred to another party for the purpose of initiating and electronic mail message. (Have you seen this done and can you provide any examples? We would like to have some wording to utilize as a guide.)

Answer: This isn't a part of the CAN SPAM law but I would agree with it from a practical standpoint. If that sub-marketer is sending your message, you want the recipient to understand this and to accept the message. You also want to ensure that any Gramm Leach Bliley and associated privacy rules and marketing agreements are in place. It is possible this recommendation was based on a general desire of acceptance of the message, an industry practice or some other law. I would suggest you have counsel approve whatever text you select, especially if this is to comply with another law as it may state specific requirements there.

Question 14. Since FTC exempts banks from its requirements and FCC rules are geared toward those banks who are soliciting via interstate phone calls, must we still have a "Do Not Call" policy if we do not solicit bank services over state lines?

Answer: The National Do Not Call Registry covers intrastate telemarketing calls under the FCC's rules. You can find information on the FCC's regulations at www.fcc.gov/cgb/donotcall/.
(<http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt129.htm>)

Question 15. If we make calls only to existing customers, do we need a DNC list?

Answer: Yes. Using the EBR exception to make calls and solicit products or services is telemarketing and you need an internal DNC list and a policy. The policy must be made available on demand.

Question 16. Is there a cost for the national DNC list?

Answer: Yes. You can get 5 area codes for free. After that there is a cost. In the few years I have watched it the cost can change so you'd need to see what that is when you subscribe. Costs can increase if area codes split as well. Also see Q31.

Question 17. How often should the DNC list be downloaded?

Answer: Not less than every 31 days. Download it and scrub your files against it and your internal list, removing those positive hits.

Question 18. Are there exceptions to the national DNC list where calls can be made to those on the list?

Answer: If you have a personal relationship with them yes, as opposed to a business relationship. Also, Existing Business Relationships are exempted. Non-profits and political campaigns can ignore the lists.

Question 19. I am confused over when we can call a customer who is on the national DNC list.

Answer: If your existing customer is on the national DNC list, you may still contact them under the EBR exception. However, if they ask to be placed on your internal DNC list, you cannot call them.

Question 20. Why do you recommend enterprise wide training on this when it is the call center that is affected?

Answer: Each employee needs to understand the spirit and intent. In addition, each employee needs to understand how to process a request to be put on your DNC list and to react to a request for a copy of your policy.

Question 21. Slide 12 provides that the sender's address is ambiguous. Does CAN-SPAM contain a restriction against ambiguous sender addresses? Could this address be improved by adding the company's name? For example <BANK NAME>Sales@post.com?

Answer: That slide is meant to convey an idea as that could be one test, but is not conclusive as to being spam. Clearly reflecting the bank's name or domain should be sufficient to pass that test and not be considered ambiguous.

Question 22. If an email address is provide by a customer, must any email messages be handled the same as if the email address were acquired by other means? (relative to CAN SPAM rules)

Answer: Yes. CAN SPAM is not concerned so much with the origin of the email address unless it is created in an attempt by the sender to reach someone it doesn't know exists. The focus is on the message content including the header information, subject, that it contains an opt-out, is identified as an advertisement (this is not necessary in the case of an affirmative consent, but it would be easiest to include it. (CAN SPAM 5.(a)(5)) and include a physical address.

Question 23. Is it permissible for bank employees to use the bank logo after their signature on emails without the FDIC logo? Also, if it refers to a mortgage product, should it have the HUD logo?

Answer: These logos are required when you advertise deposit or home related products. If the email is a response to an inquiry they are generally not required. If the message is an advertisement, they should be. There are more particulars than these general guidelines, but details on those requirements are better suited for an advertising webinar. 12 CFR 328 (FDIC) and the Fair Housing Act are references for these requirements.

Question 24. If a financial institution posts its Do Not Call policy on its website, would this satisfy the 'available upon demand' requirement of 47 CFR 64.1200(d)(1)? Would there be any downside to posting the policy online?

Answer: I see no downside to making it available this way. But I would not consider that available on demand unless the person requesting it agrees to access it in this manner. While internet connectivity is common, I would not rest a legal requirement on it that is so easily met with a stamp.

Question 25. Do you know of a good source for policy language for do not call policies?

Answer: <http://www.bankersonline.com/policycentral/> BOL has a template available for free at this time.

Question 26. On an outbound call, do you have to disclose to the gatekeeper (secretary screening a call) that this is a sales call or can you wait and disclose to the actual person you're calling that it's a sales call?

Answer: I am not aware of a definitive answer for this and it may depend on the circumstances of what is being sold and what questions are asked of you by the "gatekeeper." You could not be secretive or misleading if asked about the purpose of the call and I would also be clear when you eventually reach the person you are calling. In some cases this would be doubling the disclosure.

Question 27. Does the DNC list have names and phone numbers only, or does it include NPPI or SMI?

Answer: I believe it is telephone numbers only and am not aware of why it would require more. This is based on my own enrollment in the national DNC list. While there is additional (minimal) information provided, much of that is for confirmation purposes. It is the number that is entered into the DNC list, not the user(s). Regardless, when you subscribe to the list you would see all the fields to confirm this and program your software fields for comparing the lists against yours.

Question 28. Do the Can Spam rules apply to advertisements sent via cell phone text messaging?

Answer: Yes. There was a special section (Sect. 14) in CAN SPAM addressing wireless. The FCC has provisions against this which were effective March 2005. Senders are prohibited from sending commercial e-mail messages to any Internet domain name on a list provided by cell phone carriers (it lists their domain addresses such as ***@cingularME.com) without the recipient's express prior authorization.

Question 29. What are the penalties for junk faxes?

Answer: Junk Faxes fall under the Telephone Consumer Protection Act. The TCPA can be enforced in at least three different ways:

- The individual who receives a call after a name removal request has been given to the caller is granted a private right of action in a local court and may sue for \$500 in damages for each violation. In some cases, the courts can levy triple damages. Similar suits may be filed for violations of the TCPA's provisions regarding faxes, autodialers, and artificial or prerecorded messages.
- States may initiate civil action against offending companies on behalf of their citizens.

- Complaints may be filed with the Federal Communications Commission, which has the power to assess penalties against parties in violation of the TCPA.

Also, the FCC can and will impose penalties under different sections when applicable. As an example, the \$10,000 per violation penalty per call (47 U.S.C. § 503(b)(1)) has been used several times for DNC violations. See my blog entry of July 18, 2006 -<http://www.bankersonline.com/blog/>.

Question 30. Is the Opt Out required if the person falls under the EBR? Part 2 - Even if you are not required to have Opt Out and someone wants to opt out, my assumption is we must have a mechanism to comply, from a best practice, not necessarily a requirement to comply?

Answer: If a person is on the national DNC list and you have an EBR with them, you may call. If they request to be put on your internal DNC list, you must do this and it superseded the EBR exemption. You are required to have an internal DNC list if you're making sales calls.

Question 31. Does the \$11,000 fee apply for each download, or annually?

Answer: Data for up to five area codes is free. The annual fee is \$56 per area code of data (after five), with a maximum annual fee of \$15,400 for the entire U.S. database. (<http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt129.htm>)

Question 32. Where to we get the Federal DNC List?

Answer: Start at <https://telemarketing.donotcall.gov/Profile/Create.aspx> as it will answer a lot of your questions. Once registered, a username and password will allow entry and access to download the necessary files you will screen against. And FAQ is here, <https://www.donotcall.gov/FAQ/FAQBusiness.aspx> that will also assist you.

Question 33. Our realtors will call us and ask us to contact people moving into the area. Is this telemarketing?

Answer: Yes, if you are soliciting products or services to them.

Question 34. Could you please clarify the 'inbound call' issue? Does this mean that if we receive a call from a customer about an overdraft on his account, we can't try to sell him overdraft protection if he is on a DNC list?'

Answer: One difference in the FTC and FCC rules seems to be inbound calls. Many institutions follow the lowest common denominator and that means inbound calls apply. Yes, as I understand the rules an up-sell/cross-sell inbound call is subject to the Telemarketing Sales Rules rules.

Question 35. Consumer whom we do not have an existing relationship with has given us verbal permission to call them regarding our products and services. Do we have to document their approval and how do we document this information?

Answer: As was mentioned above, an opt-in isn't required. But once they opt-out and either tell you not to call again (adding them to your internal DNC list) or they put themselves on a state or national DNC list which you subscribe to, take them off your list.

Question 36. Our bank has ancillary divisions and subsidiaries that offer services such as investments, insurance, and mortgages. Can these ancillary businesses call our existing bank customers under the EBR (existing business relationship) rules?

Answer: Reverting to 47 CFR 64.1200(f)(ii): *The subscriber's established business relationship with a particular business entity does not extend to affiliated entities unless the subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.*

Notes:

- 1) For sample audit workpapers, the OTS has published RB 37-13
 - Fair Credit Reporting Act, Controlling the Assault
 - Non-Solicited Pornography and Marketing Act, the
 - Telephone Consumer Protection Act

You may find these helpful whether or not you are an OTS regulated institution, if you do not have workpapers available from your regulator or another vendor.

- 2) The Junk Fax rules were published in the Federal Register May 3, 2006. <http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/06-4169.htm> An implementation date of August 1, 2006 is stated but there are exceptions to these rules triggered by OMB publishing some clarifications. To my knowledge the OMB has not approved the requirements in question. The new rules delay implementation of 47 CFR 64.100(a)(3)(i), (ii), (iii), (iv) and (vi). This leaves (v) with an Aug. 1 implementation date. It is bolded below.

47 CFR 64.1200(a) No person or entity may:

(3) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless—

(i) The unsolicited advertisement is from a sender with an established business relationship, as defined in paragraph (f)(5) of this section, with the recipient; and

(ii) The sender obtained the number of the telephone facsimile machine through—

(A) The voluntary communication of such number by the recipient directly to the sender, within the context of such established business relationship; or

(B) A directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution. If a sender obtains the facsimile number from the recipient's own directory, advertisement, or Internet site, it will be presumed that the number was voluntarily made available for public distribution, unless such materials explicitly note that unsolicited advertisements are not accepted at the specified facsimile number. If a sender obtains the facsimile number from other sources, the sender must take reasonable steps to verify that the recipient agreed to make the number available for public distribution.

(C) This clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005 if the sender also possessed the facsimile machine number of the recipient before July 9, 2005. There shall be a rebuttable presumption that if a valid established business relationship was formed prior to July 9, 2005, the sender possessed the facsimile number prior to such date as well; and

(iii) The advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements. A notice contained in an advertisement complies with the requirements under this paragraph only if—

(A) The notice is clear and conspicuous and on the first page of the advertisement;

(B) The notice states that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within

30 days, with such a request meeting the requirements under paragraph (a)(2)(v) of this section is unlawful;

(C) The notice sets forth the requirements for an opt-out request under paragraph (a)(2)(v) of this section;

(D) The notice includes—

(1) A domestic contact telephone number and facsimile machine number for the recipient to transmit such a request to the sender; and

(2) If neither the required telephone number nor facsimile machine number is a toll-free number, a separate cost-free mechanism including a Web site address or e-mail address, for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. A local telephone number also shall constitute a cost-free mechanism so long as recipients are local and will not incur any long distance or other separate charges for calls made to such number; and

(E) The telephone and facsimile numbers and cost-free mechanism identified in the notice must permit an individual or business to make an opt-out request 24 hours a day, 7 days a week.

(iv) A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(3)(iii) of this section.

(v) A request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(A) The request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(B) The request is made to the telephone number, facsimile number, Web site address or e-mail address identified in the sender's facsimile advertisement; and

(C) The person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine.

(vi) A sender that receives a request not to send future unsolicited advertisements that complies with paragraph (a)(3)(v) of this section must honor that request within the shortest reasonable time from the date of such request, not to exceed 30 days, and is prohibited from sending unsolicited advertisements to the recipient unless the recipient subsequently provides prior express invitation or permission to the sender. The recipient's opt-out request terminates the established business relationship exemption for purposes of sending future unsolicited advertisements. If such requests are recorded or maintained by a party other than the sender on whose behalf the unsolicited advertisement is sent, the sender will be liable for any failures to honor the opt-out request.

(vii) A facsimile broadcaster will be liable for violations of paragraph (a)(3) of this section, including the inclusion of opt-out notices on unsolicited advertisements, if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.