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Mortgage Advertising Practices Policy

MORTGAGE ADVERTISING PRACTICES COMPLIANCE POLICY

- **CFPB Regulation Z -- Federal Truth In Lending Act**
- **CFPB Regulation N – Mortgage Advertising Practices Rule**
- **CFPB Regulation H -- S.A.F.E. Mortgage Licensing Act**
- **Telemarketing -- Federal Trade Commission's (FTC) Rules and Do-Not-Call List**
- **Junk Fax Prevention Act and Federal Communication Commission's (FCC) Do-Not-Fax Rules**
- **Sending Commercial E-Mails – Federal CAN SPAM Act with FCC Rules**
- **Also See, BD Mortgage Group's Compliance Policy on Unfair, Deceptive and Abusive Acts and Practices (UDAAP)**

INTRODUCTION AND COMPANY POLICY

It is the policy of BD Mortgage Group to comply fully with all federal and state laws concerning mortgage advertising practices, mortgage solicitation, and marketing arrangements we formalize with third party vendors. BD Mortgage Group's Mortgage Advertising Practices Policy requires all forms of mortgage advertising, marketing arrangements with counter-parties, and mortgage business solicitation to **be approved in advance** by both Marketing Department and by the Chief Legal & Risk Officer by emailing to **MarketingApproval@BDMortgageGroup.com**. The reason behind this policy is that mortgage advertising is regulated by a series of federal and state consumer protection and mortgage licensing laws, as well as federal and state unfair business practices acts. Those laws include:

- Federal Truth In Lending Act/Regulation Z;
- Regulation N - Federal Mortgage Advertising Practices Rules;
- Federal S.A.F.E. Mortgage Licensing Act/Regulation G
- Federal and State Telemarketing Sales Laws
- CFPB Rules on Unfair, Deceptive and Abusive Acts and Practices (covered in a separate BD Mortgage Group UDAAP Compliance Policy) and State Unfair and Deceptive Acts and Practices (UDAP) Laws (ie, California Business & Professions Code Sections 17200 and 17500)

Mortgage advertising that is placed in the public domain is closely scrutinized by federal Consumer Financial Protection Bureau examiners, state regulatory agencies administering mortgage licensing laws, and consumer protection advocates, among others. Further, BD Mortgage Group is required to maintain a copy of all mortgage advertising and mortgage business solicitations used in the public domain by all its licensed locations at its corporate headquarters for federal and state regulatory examiners to review and scrutinize further (covered in a separate BD Mortgage Group Records Retention Compliance Policy)



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Similarly, corporate headquarters is required to maintain a copy of vendor contracts you have entered into for advertising, marketing services, lead generation and recruitment (covered in separate BD Mortgage Group Compliance Policies – RESPA Section 8 covering Marketing Services Agreements; Vendor Management).

Mortgage advertising and mortgage business solicitations subject to these laws and regulations cover any conceivable type of commercial communication that is placed in the public domain, whether intentionally or unintentionally. The most recent definition of “commercial communication” is found in Regulation N – Mortgage Advertising Practices [12 CFR Section 1014.2] –

Commercial communication means any written or oral statement, illustration, or depiction, whether in English or any other language, that is designed to effect a sale or create interest in purchasing goods or services, whether it appears on or in a label, package, package insert, radio, television, cable television, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, free insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, film, slide, audio program transmitted over a telephone system, telemarketing script, on-hold script, upsell script, training materials provided to telemarketing firms, program-length commercial (“infomercial”), the internet, cellular network, or any other medium. Promotional materials and items and Web pages are included in the term *commercial communication*.

UDAP laws are particularly problematic. Those federal and state laws prohibit the use of false and/or material misleading facts and statements in advertising – *as interpreted by the reader* – that is placed in the public domain.

So whether BD Mortgage Group staff wish to generate direct mail pieces and newsletters, send out emails soliciting business (including your “out of office” email), place a YouTube video on the Internet, set up a website or join a social media outlet, sponsor a community or charity event, or generate any other type of “commercial communication”, do be sure that BD Mortgage Group Compliance Admin has approved it in advance. Moreover, when you present your proposed Marketing Piece by emailing it to **MarketingApproval@bdmortgagegroup.com**, be sure that it contains the following disclosures:

- Official BD Mortgage Group Logo (“Turning Dreams into Reality”)
- Equal Housing Opportunity Logo (House)
- Corporate NMLS #
- Branch NMLS # and address
- Mortgage Consultant’s Individual NMLS #
- Marketing approved signature block for Mortgage Consultant containing title, mailing address, email address, phone/fax/cell.
- Caption “Offer of credit subject to credit approval. BD Mortgage Group [or if using another state-approved DBA, state here] NMLS #1636013 is an equal opportunity lender. “
- Identify state licensing authority for BD Mortgage Group and for the branch. Example: “Licensed by California Department of Corporations under the Residential Mortgage Lending Act #4150025; CA Finance Lender #60DBO73318; CA Branch #_____.”



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We encourage your questions and feedback as you formulate specific marketing pieces and arrangements.

1. REGULATION Z – FEDERAL TRUTH IN LENDING ACT ADVERTISING RULES

Regulation Z prescribes advertising rules for both closed-end mortgage products as well as for home equity loan plans. For both, Regulation Z advertising rules require that only actually available credit terms be disclosed in any form of mortgage advertising. Credit terms that are not available and are not contemplated as being available in the future cannot be included in mortgage advertising. Promotional credit terms that are or may be available for only a limited period of time can be advertised with a disclosure of the date(s) of availability.

In addition, all required disclosures prescribed under Regulation Z must appear in a *clear and conspicuous* format. For mortgage products, any of the Regulation Z required information and disclosures that correspond to an advertised rate or payments “trigger term” must appear in the advertisement in equal prominence, type size and in close proximity thereto, with the exception of tax and insurance impounding requirements that need only be of equal prominence to the triggered term.

- The *clear and conspicuous* standard for Internet and television advertising are different. Required disclosures must not be obscured by techniques such as graphical displays, shading, coloration, or other devices, and are displayed in a manner that allows a consumer to read the required disclosures.
- Fine print disclosures on television advertising must be able to be **seen and read** by a consumer in order to meet the *clear and conspicuous* standard. Also, there can be no typos or missing mortgage licensing information to meet this standard.
- The *clear and conspicuous* standard for oral advertisements, whether by radio, television or other medium, means that the required disclosures are given at a speed and volume sufficient for a consumer to **hear and comprehend** them.

a. Advertisements for Closed-End Mortgage Products and Services (12 CFR §1026.24(d)).

When advertising a rate of finance charge, the Annual Percentage Rate or APR must be disclosed on its own or next to a disclosed interest rate. Interest rates can never be disclosed on their own in mortgage advertising.

The following advertised rate or payment terms (“trigger terms”) require additional disclosures:

- The amount or percentage of any down payment;
- The number of payments or period of repayment;
- The amount of any payment;
- The amount of any finance charge (see BD Mortgage Group's TILA Compliance Policy for a list of charges treated as “finance charges”).

Here are the additional disclosures that, when applicable, must appear with the advertised trigger term:

- The amount or percentage of the down payment;
- The terms of repayment, which reflect the repayment obligations over the full term of the loan, including any balloon payment;



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- The Annual Percentage Rate or APR.

If working with a multiple page advertisement, such as a catalog format, or an electronic advertisement such as a banner ad appearing on an Internet website, include in a *clear and conspicuous* format a table or schedule containing all of the above applicable advertising disclosures somewhere in the advertisement and cross-reference the page number or link to where the table or schedule is located for the reader to find elsewhere in the advertisement.

When advertising mortgage loan products containing more than one simple interest rate over the term of the loan, the advertisement must disclose:

- Each simple interest rate that will apply. For adjustable rate mortgage loans, disclose a rate determined by adding a reasonably current and applicable index and margin;
- The period of time during which each simple interest rate will apply; and
- The Annual Percentage Rate or APR.

When advertising a projected payment amount (trigger term), in addition to the additional disclosure rule above, the advertisement must disclose:

- The amount of each payment that will apply over the loan term, including any balloon payment. For adjustable rate loans, disclose the estimated payment amount based on the application of the sum of a reasonably current and applicable index and margin;
- The period of time during which each payment will apply; and
- For first lien, closed-end mortgage loan products, the fact that the payments do not include impounding for taxes and insurance premiums, if applicable, and that the actual payment obligation will be greater.

b. Advertisements for Open-End Home Equity Loan Plans (12 CFR §1026.16(d)).

See discussion above on multi-page and electronic advertisements. The same rules apply to open-end, and home equity plans.

Here are the required advertising disclosures for home equity plans:

- *Finance charges.* Include a statement of when finance charges begin to accrue, including an explanation of whether or not any time period exists within which any credit extended may be repaid without incurring a finance charge. Also disclose each periodic rate that may be used to compute the finance charge, the range of balances to which it is applicable, and the corresponding APR.
 - (i) *More on Periodic Rates.* For adjustable rate lines, disclose the circumstances by which the periodic rate may increase, any limitations on the increase, and the effect(s) of an increase. Disclose whether different periodic rates apply to different types of transactions.
 - (ii) *More on computing balances.* Give explanation of the method used to determine the balance on which the finance charge may be computed.
 - (iii) *More on computing finance charges.* Give explanation of how the amount of any finance charge will be determined.

Other charges. Disclose the amount of any other non-finance charge that may be imposed under the plan, or an explanation of how the charge will be determined.



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- *Home equity plan information.* The following disclosures, as applicable:
 - (i) Conditions under which the creditor may take certain action, such as terminating the plan or changing the terms;
 - (ii) Payment information for both the draw period and repayment period(s);
 - (iii) A statement that negative amortization may occur;
 - (iv) Any transaction requirements;
 - (v) A statement that the APR imposed on the plan does not include non-finance charge costs;
 - (vi) Variable interest rate disclosures.



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REGULATION N – MORTGAGE ADVERTISING PRACTICES RULES

CFPB's Regulation N, found at 12 CFR Part 1014, addresses commercial advertising of any consumer purpose, residential mortgage loan product. This rule is designed as an adjunct to the CFPB's Abusive, Deceptive and Abusive Acts and Practices Rule covered in a separate BD Mortgage Group Compliance Policy.

Whereas Regulation Z describes the disclosures that must be included in mortgage advertising, this rule provides a list of prohibited advertising practices. Specifically, Regulation N Section 1014.3 prohibits the practice of making any material misrepresentation, expressly or by implication, in any commercial communication, regarding any term of any mortgage credit product, including but not limited to misrepresentations about:

(a) The interest charged for the mortgage credit product, including but not limited to misrepresentations concerning (1) the amount of interest that the consumer owes each month that is included in the consumer's payments, loan amount, or total amount due, or (2) whether the difference between the interest owed and the interest paid is added to the total amount due from the consumer;

(b) The annual percentage rate, simple annual rate, periodic rate, or any other rate;

(c) The existence, nature, or amount of fees or costs to the consumer associated with the mortgage credit product, including but not limited to misrepresentations that no fees are charged;

(d) The existence, cost, payment terms, or other terms associated with any additional product or feature that is or may be sold in conjunction with the mortgage credit product, including but not limited to credit insurance or credit disability insurance;

(e) The terms, amounts, payments, or other requirements relating to taxes or insurance associated with the mortgage credit product, including but not limited to misrepresentations about:

- Whether separate payment of taxes or insurance is required; or
- The extent to which payment for taxes or insurance is included in the loan payments, loan amount, or total amount due from the consumer;

(f) Any prepayment penalty associated with the mortgage credit product, including but not limited to misrepresentations concerning the existence, nature, amount, or terms of such penalty;

(g) The variability of interest, payments, or other terms of the mortgage credit product, including but not limited to misrepresentations using the word "fixed";

(h) Any comparison between:



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- Any rate or payment that will be available for a period less than the full length of the mortgage credit product; and
- Any actual or hypothetical rate or payment;

(i) The type of mortgage credit product, including but not limited to misrepresentations that the product is or involves a fully amortizing mortgage;

(j) The amount of the obligation, or the existence, nature, or amount of cash or credit available to the consumer in connection with the mortgage credit product, including but not limited to misrepresentations that the consumer will receive a certain amount of cash or credit as part of a mortgage credit transaction;

(k) The existence, number, amount, or timing of any minimum or required payments, including but not limited to misrepresentations about any payments or that no payments are required in a reverse mortgage or other mortgage credit product;

(l) The potential for default under the mortgage credit product, including but not limited to misrepresentations concerning the circumstances under which the consumer could default for nonpayment of taxes, insurance, or maintenance, or for failure to meet other obligations;

(m) The effectiveness of the mortgage credit product in helping the consumer resolve difficulties in paying debts, including but not limited to misrepresentations that any mortgage credit product can reduce, eliminate, or restructure debt or result in a waiver or forgiveness, in whole or in part, of the consumer's existing obligation with any person;

(n) The association of the mortgage credit product or any provider of such product with any other person or program, including but not limited to misrepresentations that:

- The provider is, or is affiliated with, any governmental entity or other organization; or
- The product is or relates to a government benefit, or is endorsed, sponsored by, or affiliated with any government or other program, including but not limited to through the use of formats, symbols, or logos that resemble those of such entity, organization, or program;

(o) The source of any commercial communication, including but not limited to misrepresentations that a commercial communication is made by or on behalf of the consumer's current mortgage lender or servicer;

(p) The right of the consumer to reside in the dwelling that is the subject of the mortgage credit product, or the duration of such right, including but not limited to misrepresentations concerning how long or under what conditions a consumer with a reverse mortgage can stay in the dwelling;



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(q) The consumer's ability or likelihood to obtain any mortgage credit product or term, including but not limited to misrepresentations concerning whether the consumer has been preapproved or guaranteed for any such product or term;

(r) The consumer's ability or likelihood to obtain a refinancing or modification of any mortgage credit product or term, including but not limited to misrepresentations concerning whether the consumer has been preapproved or guaranteed for any such refinancing or modification; and

(s) The availability, nature, or substance of counseling services or any other expert advice offered to the consumer regarding any mortgage credit product or term, including but not limited to the qualifications of those offering the services or advice.

3. REGULATION H – S.A.F.E. MORTGAGE LICENSING ACT

All states have adopted and implemented the federal SAFE Mortgage Licensing Act that is now administered by CFPB under its Regulation H. A component of that act covers mortgage advertising and the need for disclosing both the mortgage entity and the individual mortgage loan originator's respective Nationwide Mortgage Licensing System and Registry unique identifier number on all advertising material, including websites, business cards, letterhead, take-aways, and the printed/electronic/oral media advertising discussed in previous sections.

For more information, see BD Mortgage Group's Compliance Policy on S.A.F.E. Mortgage Licensing Act.

4. FEDERAL TRADE COMMISSION'S DO-NOT-CALL LIST

The National Do-Not-Call Registry (DNC) was established by the Federal Trade Commission (FTC) in 2008 as part of the FTC's Telemarketing Sales Rule (16 CFR Part 310) and its 2003 added Section 310.4(b) – "Abusive Telemarketing Acts or Practices; Pattern of Calls." Consumers that opt into the national do-not-call list may not be contacted with telephone solicitations unless they fall under one of the exemptions stated in the law. Telemarketers that call individuals in violation of the law may be fined up to \$1,000 per call. Consumers can register online for free at www.donotcall.gov.

Telemarketers may continue to call consumers with whom they have an **"established business relationship,"** if the consumer has purchased, leased, or rented goods or services from the company **within 18 months preceding the call**, or if the consumer has submitted an application or made an inquiry to the company **within three months preceding the call** even if the consumer's name is on the National DNC Registry.

However, in the event that a consumer specifically requests to be placed on BD Mortgage Group's own do-not-call list (an election that is incorporated into our company's Privacy Policy Statement), then BD Mortgage Group cannot contact the consumer again — in other words, the three-month period can be cut short by the consumer with respect to any particular party. In other words, even if BD Mortgage Group enjoys an established business relationship with a consumer borrower, that borrower can make an election to not receive marketing or mortgage solicitation calls from BD Mortgage Group. That request will trump an established business relationship.



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Conversely, if the consumer is on the national registry but does wish to receive calls from a particular telemarketing company, the consumer can give that company written permission to call. This would apply for prospective but not pre-existing BD Mortgage Group customers. This prior written permission exemption allows companies to contact consumers that have given a signed, written consent to be contacted. However, this exemption requires a digital or electronic signature that is valid under law; BD Mortgage Group cannot accept as authorization a general online inquiry through our public website.

The Rule also requires telemarketers to transmit caller-ID information, so that consumers who subscribe to caller- ID services will know who is calling. [16 CFR § 310.4(a)(7).] In every telemarketing call, the caller must transmit the telephone number and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call. In substitution for the telemarketer's caller-identification information, one can provide the name of the seller or charitable organization on behalf of which a telemarketing call is placed, and the seller's or charitable organization's customer or donor service telephone number, which is answered during regular business hours.

Do-Not-Call Checklist

The following procedures can help you to comply with the do-not-call rules:

- Disclosure.** Although the law does not require any particular form of disclosure, as an abundance of caution, BD Mortgage Group will include on its public website a notice to consumers advising that submitting a loan inquiry to the company may result in follow-up contact from a BD Mortgage Group Consultant regarding the inquiry. The recommended form of this notice reads,

"In response to this online inquiry, you may be contacted by an authorized loan representative of our company at the phone number you have provided."

By placing this text at the point of submission, BD Mortgage Group can notify consumers that they are initiating a process that leads to further contact by one of our Mortgage Consultants. To further reduce risk of violation, the BD Mortgage Group Mortgage Consultant when calling a consumer in follow-up to a loan inquiry indicate that the purpose of the call is to follow up on the consumer's loan inquiry with BD Mortgage Group.
- Timing of lead delivery.** To reduce the possibility of violations of the do-not-call list, BD Mortgage Group and its Mortgage Consultant will not make telephone contact with consumers after ninety (90) days from the date of inquiry.
- Subsequent request not to call.** Should the mortgage company receive a request not to contact a particular consumer, it should remove that consumer's contact information from its marketing database and ensure that the consumer's contact information is not released to any affiliates or marketing partners following the date of the request.



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5. JUNK FAX PREVENTION ACT AND FINAL FEDERAL COMMUNICATION COMMISSION'S (FCC) RULE

The Junk Fax Prevention Act of 2005 (JFPA),¹ incorporated into the Telephone Communications Protection Act, creates a statutory established-business-relationship exception to the prohibition on unsolicited fax advertising. The law grafts some additional requirements onto that exception, such as the need to include an opt-out notice on the faxed advertisements. The FCC is the lead agency for implementing rules to carry out JFPA provisions.

The JFPA creates a statutory EBR exception. Under the JFPA, it is unlawful for any person to send an unsolicited advertisement via facsimile *unless* (1) the sender has an EBR with the recipient; (2) the sender obtained the fax number through (a) a voluntary communication of the number, within the context of the EBR, from the recipient, or (b) a directory, advertisement, or Internet site to which the recipient voluntarily agreed to make available its fax number for public distribution; and (3) the advertisement contains a notice required by the legislation. The EBR exception does not apply if the sender sends the fax to a recipient who has opted out of future unsolicited advertisements.

Under FCC rules, companies that wish to engage in facsimile advertising may do so, as long as they meet the JFPA requirements. A company may send an advertisement via facsimile if the advertisement is not “unsolicited” — that is, the company has obtained the recipient’s prior express invitation or permission. Perhaps the least burdensome means of obtaining such permission is by requesting an applicant’s fax number on an application, which includes a statement that, by providing the fax number, the applicant is agreeing to receive faxed advertisements from the company.

Alternatively, if a company wishes to send an unsolicited fax advertisement (i.e., it does not have prior permission from the recipient), it may do so if it has an EBR with the recipient and has obtained the recipient’s fax number voluntarily from the recipient in the context of that relationship or from a public listing where the recipient voluntarily agreed to make the number available.

In *both circumstances*, any faxed advertisement must include an appropriate opt-out notice. And, if the sender receives an opt-out request from a recipient, the sender must cease sending fax advertisements to that recipient, regardless of whether an EBR exists.

(a) The EBR Exemption

Under the rule, it is unlawful to fax an *unsolicited advertisement*, unless (1) the sender has an established business relationship (EBR) with the recipient; (2) the advertisement contains the required opt-out notice (described below); and (3) the sender obtained the recipient’s fax number through (a) a voluntary communication of the number by the recipient directly to the sender within the context of the EBR, or (b) a directory, advertisement, or Internet site to which the recipient voluntarily agreed to make available the fax number for public distribution. [47 CFR 64.1200(a)(3)(i)-(iii).]

The rule includes a new definition of “established business relationship” specific to the unsolicited-fax provisions of the FCC’s rule. That term is now defined as follows:

¹ 47 USC § 609; 47 CFR § 64.1200.



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[A] prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

[47 CFR 64.1200(f)(5).] Of note, with respect to the new definition is the inclusion of relationships between senders and *business recipients* (in contrast to the previous definition, which included only “residential subscribers”), in accordance with the new JFPA provision. The FCC commentary to the rule emphasizes that, although a consumer’s inquiry *about products or services* may form the basis of an EBR, an inquiry about store location or the sender’s identity or something similar will not, by itself, create an EBR.

The FCC has made clear that, in order to ensure that this exemption is not exploited, it is holding fax senders responsible for demonstrating that an EBR exists. In this regard, the FCC noted that the senders are in the best position to have records that show the existence of such a relationship, although the FCC is not requiring that senders maintain any *specific* records. Nonetheless, when questions arise, the sender has the burden of showing that the relationship existed with the recipient.

Recipient Voluntarily Provides Fax Number

With respect to the third requirement outlined above — that the recipient have voluntarily provided his or her fax number — the FCC has explained that, if a recipient provides his or her fax number to the sender on an application, information request, contact information form, or membership renewal form, the sender may fax an advertisement. Also, if the recipient provides the sender with a business card that includes a fax number or provides the fax number orally, the sender will be permitted to fax an advertisement. In these situations, the FCC considers the consumer as having provided his or her fax number in the context of an EBR. If, however, a recipient claims that he or she did not provide the fax number to the sender, the sender will have the burden of demonstrating that the number was provided in the context of an EBR.

In addition to the recipient providing a fax number in the context of an EBR, the rule provides for obtaining fax numbers via a public distribution. Under the rule, if the sender obtains the fax number from the recipient’s *own* directory, advertisement, or Internet site, there is a presumption that the number was voluntarily made available for public distribution, unless the materials explicitly state that unsolicited advertisements are not accepted at the fax number. If, however, the sender obtains the number from some other source, it must take *reasonable steps* to verify that the recipient agreed to make it available for public distribution. [47 CFR 64.1200(a)(3)(ii)(B).] Such “reasonable steps” might include calling or e-mailing the recipient.

Exemption Only Necessary for Unsolicited Advertisements

A fax sender need only show an EBR, of course, if it is sending an *unsolicited* advertisement. The amended rules define that term as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise.” [47 CFR 64.1200(f)(13).] Although the FCC previously attempted to limit the “express invitation or permission” to *written* invitations or permission, the new



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amendments, in accordance with the JFPA, include no such restriction, and a recipient's permission may be given orally as well as in writing.

The FCC has made clear, however, that, in order for an advertisement not to be considered unsolicited, this prior permission or invitation must be express, be given before any advertisements are sent, and must include the recipient's fax number. A "negative option" — for example, a fax advertisement that contains a phone number and an instruction to call if the recipient does not wish to receive such faxes — will not satisfy these requirements. A sender may, however, request a fax number on an application form and include a clear statement that, by providing the number, the applicant is agreeing to the receipt of fax advertisements from the sender.

Additionally, the FCC has expressed concern about permitting senders to obtain permission orally. Thus, the FCC expects such senders to "take reasonable steps to ensure that such permission can be verified." The sender will have the burden to prove that permission was given if a complaint arises, and the FCC "strongly suggests" that such senders promptly document the receipt of oral permission (e.g., by recording the oral authorization or the use of contact forms by the sender's personnel).

If no EBR exists, a sender may not use a faxed request to obtain permission to transmit fax advertisements.

Although an EBR is not necessary when an advertisement is not "unsolicited" — that is, the recipient has given prior express permission — any faxed advertisement must still include the opt-out notice.

(b) Opt-Out Notice

Form and Contents of Notice

As noted above, one of the requirements for sending an advertisement via facsimile (whether pursuant to express permission of the recipient or an EBR) is that the advertisement include an opt-out notice. That notice must inform the recipient of the ability and means to avoid receiving future unsolicited advertisements.[47 CFR 64.1200(a)(3)(iii).]

The notice must be clear and conspicuous and appear on the first page of the advertisement. [47 CFR 64.1200(a)(3)(iii)(A).] For purposes of this requirement, a "clear and conspicuous" notice is one that would be apparent to a reasonable consumer, that is separate and distinguishable from the advertising copy or other disclosures included in the fax, and that is located at the top or bottom of the fax. [47 CFR 64.1200(f)(2).] The FCC specifically opted not to include precise font type, size, and wording requirements for the opt-out notice. The FCC has noted, however, that the notice must be distinguishable from the advertising material and suggests using bolding, italics, different font, or something similar. Additionally, the FCC encourages fax senders who include cover pages to include the notice on the cover page as well as the first page of the fax.

The notice must state that the recipient may request that the sender not send any future advertisements and that failure of the sender to comply with that request within 30 days is unlawful. It must also set forth the requirements for making a proper opt-out request (described below). [47 CFR 64.1200(a)(3)(iii)(B)-(C).]



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The notice must include a domestic contact telephone number and fax number for the recipient to use in sending an opt-out request; if neither of those numbers is toll-free, the notice must also include a separate cost-free means, such as a web site address or e-mail address, for the recipient to make the request. The phone and fax numbers and the cost-free mechanism provided in the notice must permit recipients to make opt-out requests 24 hours a day, seven days a week. [47 CFR 64.1200(a)(3)(iii)(D)-(E).]

Requirements to Opt Out

In order for a recipient to exercise his or her right to opt out of receiving future fax advertisements pursuant to the opt-out notice, he or she must (1) make a request that identifies the phone number(s) or fax number(s) to which the request relates; (2) direct the request to the phone number, fax number, or other toll-free mechanism identified in the sender's opt-out notice; and (3) not have provided express invitation or permission to send fax advertisements after making the opt-out request. [47 CFR 64.1200(a)(3)(v).] Although recipients who wish to opt out must meet these requirements, the FCC encourages senders that are on actual notice of a recipient's request to opt out to honor that request even if the recipient has not complied with the methods identified in the sender's opt-out notice.

When a sender receives a request that complies with the above requirements, that sender must honor the request within the shortest reasonable time, which may not exceed 30 days from the date of the request. The sender is then prohibited from sending any fax advertisements to the recipient unless and until the recipient later provides express invitation or permission to do so. [47 CFR 64.1200(a)(3)(vi).] Despite the 30-day rule for honoring an opt-out request, the FCC has stated that those senders with the capability to honor requests in less than 30 days must do so.

A recipient's request to opt out will terminate any EBR exemption with respect to the sending of unsolicited fax advertisements. [47 CFR 64.1200(a)(3)(vi).] Of course, if the recipient later provides express invitation or permission to the sender, the sender may resume sending fax advertisements to that recipient. The sender bears the burden of demonstrating that the recipient subsequently gave express permission (either in writing or orally) and must do so by clear and convincing evidence.

A sender that chooses to have a third party record and maintain recipients' opt-out requests will remain liable for any failure to honor such a request. [47 CFR 64.1200(a)(3)(vi).]

(c) Faxes Regarding Free Goods or Services or Informational Messages

The FCC has determined that faxes promoting free goods or services (e.g., free magazine subscriptions, catalogs, or consultations or seminars) are unsolicited advertisements for purposes of the foregoing requirements. [71 Fed. Reg. 25973.]

Faxes containing only information (e.g., industry news articles, legislative updates, employee benefit information), however, do not fall within the "unsolicited advertisement" category. [71 Fed. Reg. 25973.]

6. RESTRICTIONS ON SENDING COMMERCIAL E-MAILS

The CAN SPAM Act of 2003 (also referred to as Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003) significantly changed the nation's landscape relating to spam e-mail



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regulation. [15 USC § 7701 et seq.] CAN SPAM became effective January 1, 2004, and the FCC published implementing rules.

The CAN SPAM Act places numerous restrictions on marketing e-mail messages companies may send to users, levies fines and jail terms for offenders, and instructs the FTC to report to Congress on a plan to create a do-not-spam list similar to the one recently put into place by the FTC relating to telemarketing. CAN SPAM creates tough penalties, such as criminal sanctions with up to five-year jail sentences and fines including statutory damages of up to \$2 million per incident (trebled to \$6 million for knowing violations).

The Act allows a business to send clearly identifiable commercial e-mail until a recipient requests that the business refrain from doing so. It supersedes any statute, regulation, or rule of a state that expressly regulates the use of e-mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial e-mail message or information. Further, the federal government must be notified by any state that initiates a spam-related lawsuit and the federal government retains the right to join and move the case to a regional US District Court. CAN SPAM is not industry specific. It applies to any person or entity that initiates commercial e-mail advertisements as well as any recipient, without consideration of whether the recipient is an individual or business entity.

(a) Requirements and Prohibitions

Under CAN SPAM, marketers are required to label e-mails containing advertisements by including a clear and conspicuous identification that the message is an advertisement or solicitation. Marketers must also include a clear and conspicuous notice that allows the recipient to opt out. The opt-out mechanism must include a functioning return address or an automated method to opt out. Further, the opt-out mechanism must work for at least 30 days after the e-mail was sent. The sender has 10 days to remove someone who asks to be removed. The law also requires that an advertisement must contain a valid physical postal address.

Prohibitions under this law are directed toward deceptive practices that mislead consumers. Advertisements must not utilize subject lines that are likely to mislead a recipient. CAN SPAM expressly prohibits masking of a marketer's identity in the reply address, use of materially false or misleading header information, or falsifying registration information. Further, CAN SPAM prohibits the harvesting of e-mail addresses on the Internet or randomly generating e-mail addresses by computer. In fact, these harvesting activities are considered aggravated violations, which may result in trebled fines. Use of a commercial e-mail advertisement containing certain sexually oriented material without requisite warning labels is also prohibited.

(b) Exemptions

The following exemptions apply:

- *Affirmative consent.* The law specifically exempts from its prohibitions advertisements sent following receipt of a recipient's affirmative consent. Affirmative consent exists if the recipient has expressly consented to receive e-mail advertisements from the advertiser, either in response to a clear and conspicuous request for the consent or at the recipient's own initiative. If the message



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is from a party other than the party to which the recipient communicated such consent, the recipient must have been given clear and conspicuous notice at the time the consent was communicated that the recipient's e-mail address could be transferred to such other party for the purpose of initiating commercial e-mail messages.

- *Transactional or relationship message.* The law also exempts from its provisions e-mail messages that are sent to facilitate, complete, or confirm a commercial transaction. The definition of a transactional or relationship message includes messages that reflect account statements, change of status or terms, product updates and upgrades, warranty information, safety or security information, subscriptions, memberships, and other similar commercial relationships.

(c) Do-Not-E-Mail Registry

The Act does not mandate creation of a federal do-not-e-mail registry. However, the FCC was directed to issue a report that sets forth a plan and timetable for establishing a nationwide marketing do-not-e-mail registry with implementation no sooner than nine months after the date of enactment. The FCC did just that in 2004, with recommendation of NOT to create such a registry as it would prove to be ineffective. Today, there is no national do-not-e-mail registry.

(d) Key Definitions

Here are some key definitions that will be helpful toward understanding CAN SPAM's provisions.

Commercial electronic mail message. In general, the term "commercial electronic mail message" means any electronic mail (e-mail) message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an internet web site operated for a commercial purpose). The term "commercial electronic mail message" does not include a transactional or relationship message. The inclusion of a reference to a commercial entity or a link to the web site of a commercial entity in an e-mail message does not, by itself, cause such message to be treated as a commercial electronic message for purposes of CAN SPAM if the contents or circumstances of the message indicate a primary purpose other than commercial advertisement or promotion of a commercial product or service.

Electronic mail address. The term "electronic mail address" means a destination, commonly expressed as a string of characters, consisting of a unique user name or mailbox (commonly referred to as the "local part") and a reference to an internet domain (commonly referred to as the "domain part"), whether or not displayed, to which an electronic mail message can be sent or delivered.

Header information. The term "header information" means the source, destination, and routing information attached to an electronic mail message, including the originating domain name and originating electronic mail address, and any other information that appears in the line identifying, or purporting to identify, a person initiating the message.

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. For purposes of this paragraph, more than one person may be considered to have initiated a message.



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Procure. The term “procure,” when used with respect to the initiation of a commercial electronic mail message, means intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one’s behalf.

Recipient. The term “recipient,” when used with respect to a commercial electronic mail message, means an authorized user of the electronic mail address to which the message was sent or delivered. If a recipient of a commercial electronic mail message has one or more electronic mail addresses in addition to the address to which the message was sent or delivered, the recipient shall be treated as a separate recipient with respect to each such address. If an electronic mail address is reassigned to a new user, the new user shall not be treated as a recipient of any commercial electronic mail message sent or delivered to that address before it was reassigned.

Sender. In general, 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. Exception for separate lines of business or divisions: If an entity operates through separate lines of business or divisions and holds itself out to the recipient throughout the message as that particular line of business or division rather than as the entity of which such line of business or division is a part, then the line of business or the division shall be treated as the sender of such message for purposes of CAN SPAM.

(e) Final FCC Rules on Unwanted Mobile Service Commercial Messages

The FCC also adopted rules [47 CFR Part 64 subpart BB, 47 CFR § 64.3100] pursuant to the authority conferred by the CAN SPAM Act and by the Communications Act of 1934, as amended. [47 USC 151.] Section 14 of the CAN SPAM Act gives consumers the right to avoid mobile service commercial messages (MSCMs), as long as the address they seek to shield includes a reference to the internet and is for a wireless device. The FCC’s new rules address Congress’s concern that there are real costs, such as wear on the batteries of mobile devices and interference with consumers’ ability to access their own wireless devices in emergency situations, associated with the delivery and receipt of unwanted MSCMs.

Prohibition on MSCMs

In discussion of the proposed rules with industry and related agencies, the FCC considered implementation of a national registry containing mobile addresses of those who had opted not to receive MSCMs, but rejected the creation of such a do-not-call list, citing many of the same privacy concerns that were discussed in relation to the proposed do-not-e-mail registry. Notably, the FCC recognized that no national database of mobile service numbers now exists in part because currently, security risks arising from creation of such lists severely limit their overall benefits. Creation of a decentralized opt-out mechanism was also considered but was rejected as insufficient to provide the level of protection Congress intended for consumers. In sum, the FCC determined that the public interest will be best served by a rule generally prohibiting transmission of commercial messages to any internet domain names associated with wireless subscriber messaging services and a separate mechanism whereby willing consumers can affirmatively elect to receive MSCMs.



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Publication of Wireless Domain Addresses

To help senders of MSCMs identify domain addresses associated with wireless subscriber messaging services, the rule requires that mobile service providers submit the domain names used by their services to the FCC (in a manner and timeframe that will be released at a later date) for inclusion in a list that will be made publicly available (at an even later date). After the FCC publishes the list of domain names used by mobile service providers, an MSCM sender will be required to regularly scrub their call lists against the list of those subscribers to whom they would send MSCMs, to remove any numbers for which the sender has not obtained express prior authorization to send MSCMs. A person who receives commission or is otherwise paid to forward a message to a wireless device other than their own is subject to the rules and will be required to scrub against the domain name registry.

Exemption for Subscriber-Forwarded Messages

The rules are specifically not applicable to messages forwarded by the subscriber to his or her own mobile device. [47 CFR § 64.3100(a)(2).] This exemption recognizes that if a sender of an MSCM does not know that his or her electronic message will end up delivering to a subscriber through a wireless device, he or she cannot be held liable for not having obtained the affirmative consent, or provided the disclosures required by the CAN SPAM Act. The FCC reasoned that the sender must have fair warning and may not be sanctioned for assuming that a commercial message sent to a number not associated with wireless service will be heard, live or recorded, on the telephone or will be displayed on a computer. The less stringent CAN SPAM rules regulating computer transmissions, or the analogous rules related to the Telephone Consumer Protection Act, will apply in these circumstances.

Exemption for Express Authorization

For purposes of Section 14, the FCC established a stringent description of “express prior authorization.” [47 CFR §64.31(d).] In every instance, the authorization must: be specific as to the number that may be solicited; allow the subscriber to choose the type of MSCMs they receive from a sender; be unequivocal, easily revocable, and available at no cost to the consumer. The authorization must allow subscribers to choose the type of MSCMs they will receive and will not entitle a sender to send MSCMs on behalf of third parties, even if the third parties are affiliated with or related to the sender.

Additional restrictions address other areas of general concern. Senders must also use best efforts to protect subscribers’ privacy interests. Senders may not send a request asking for authorization to solicit by MSCMs to a mobile number. No other offer may be combined with an offer to solicit by MSCMs. There may not be a negative option associated with a request to send MSCMs. The most detailed restrictions address senders’ responsibility to provide several disclosures to subscribers, obtain authorization from subscribers, and maintain a record of the authorizations acquired from subscribers.

Required Disclosures

Senders must disclose to subscribers that the subscribers may be charged by their wireless provider for costs associated with the transmission of the messages, retrieval of messages, or deletion of messages. Senders must unequivocally and clearly inform each subscriber that they affirmatively requested MSCMs and may receive MSCMs in the future. Senders must also remind subscribers that they may revoke the sender’s authorization to send MSCMs at any time if they do not affirmatively revoke the authorization.



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Further, the rules require every message a sender sends to include a mechanism of at least the same level of sophistication as the message, allowing the subscriber to elect not to get additional MSCMs. [47 CFR § 64.31(d)(5).]

Sufficiency of Authorization

The rule provides authority for a variety of ways for a sender to obtain the necessary express prior authorization. Written authorization may be in paper form signed by the subscriber, or via electronic means, if the e-message includes the electronic signature of and e-mail address of the subscriber to whom the sender is being authorized to send MSCMs. Senders do not always need to get the authorization in writing. Senders may also accept oral authorization, if they take reasonable steps to ensure that the authorization is verifiable. Reasonable steps might include a follow-up confirmation in writing, or audio recording of the identification and authorization process. Verification of oral authorization does not need to be completed prior to the sending of MSCMs to the customers.

Recordkeeping Requirements

The FCC is determined that in the event that a complaint is filed “the burden of proof rests squarely on the sender,” to establish that authorization has been obtained in written or oral or electronic form. Upon receipt of a complaint, the FCC will require the sender to provide clear and convincing evidence to support any defense that an MSCM was authorized and that the form of the authorization was compliant.

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