



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

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Re: Request for Informal Advisory Opinion Concerning the Application of the Telemarketing Sales Rule's "Established Business Relationship" Exemption to an Internet-based Lead Generation Mechanism

Dear Mr. Goodman:

This staff advisory opinion responds to your letter of April 3, 2006, seeking an informal opinion letter regarding the application of the Telemarketing Sales Rule's ("TSR's" or the "Rule's") established business relationship ("EBR") exemption to an Internet-based lead generation mechanism. The central issue your letter presents is whether the exemption applies to a lender that initiates a telephone call to a consumer based on contact information the lender obtains from a lead generator.

Our conclusion is that, under a strict reading of the language of the Rule, the lender does not have an EBR with a consumer who responds to a lead generator's solicitation, and therefore would not normally be entitled to claim the EBR exemption. However, FTC staff would not recommend a Do Not Call enforcement action against a lender that calls consumers who have responded to a lead generator's solicitation if, as described more fully below, the lead generator makes full and adequate prior disclosure of certain material facts about the consequences of responding to such solicitations. The opinions expressed in the following discussion of the basis for this conclusion are those of Commission staff only and are not attributable to, nor binding on, the Commission itself or any individual Commissioner.

Rule Provisions

Section 310.4(b)(1)(iii) of the TSR provides, among other things, that it is a violation of the Rule to initiate any outbound telemarketing call to a person when that person's telephone number is on the National Do Not Call Registry unless the seller has an EBR with such person. *See* 16 C.F.R. § 310.4(b)(1)(iii). The Rule defines an EBR as:

a relationship between a seller and a consumer based on:

- (1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within eighteen (18) months immediately preceding the date of a telemarketing call; or
- (2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

16 C.F.R. § 310.2(n).

Discussion

Your letter discusses an Internet-based mechanism that generates leads for lenders. It describes the mechanism in the following way:

[The] consumer visits a website that offers to arrange for several lenders to compete for the consumer's business. Before the consumer submits an inquiry, the website may disclose approximately how many lenders are likely to respond. The names of those lenders are not disclosed at that point, however, because they have not yet been determined. The website may have a network of dozens or even hundreds of lenders who may be asked to respond to a consumer's inquiry with proposed lending terms. . . . The lenders' names are disclosed to the consumer when the lenders contact the consumer to present lending terms.

The consumer is asked to submit contact information with her inquiry. Typically, this includes an email address and telephone number. Some websites may expressly disclose that contact information is collected so that lenders can respond to the consumer.

FTC staff's opinion is that a lender who receives a consumer's contact information from such a lead generation mechanism generally does not have an EBR with the consumer.¹ The

¹ For the purposes of this advisory opinion, we presume that the lenders described in your letter are "persons, partnerships, or corporations" under Sections 5(a)(2) and 19(a) of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a)(2) and 57b(a), and meet the definition of a "seller" under Section 310.2(z) of the TSR, 16 C.F.R. § 310.2(z).

Rule provides that, for the EBR exemption to apply, the seller must itself have a relationship with the consumer. *See* 16 C.F.R. §§ 310.4(b)(1)(iii)(B)(ii) and 310.2(n). In the scenario your letter describes, it is the lead generator, not the seller, that has an inquiry-based established business relationship with the consumer.

However, we agree with your letter's assertion that the consumer's reasonable expectations regarding the lender must be considered. In the Statement of Basis and Purpose ("SBP") accompanying the Rule, the Commission states: "The consumer's expectations of receiving the call are the measure against which the breadth of the [EBR] exemption must be judged." SBP, 68 Fed. Reg. 4594, Jan. 29, 2003. The SBP does not discuss consumer expectations specifically in the context of lender-clients of a lead generator. However, it does discuss them in a related context, *i.e.*, with regard to the affiliates of a corporate seller:

If consumers received a call from a company that is an affiliate or subsidiary of a company with whom they have a relationship, would consumers likely be surprised by that call and find it inconsistent with having placed their telephone number on the national "do-not-call" registry?

Id.

Thus, the question is whether the consumer in the scenario your letter describes has a reasonable expectation of receiving calls from lenders who receive her name and telephone number from a lead generator. We believe that the consumer's expectation of privacy is such that, if she receives (1) calls from lenders when she does not expect to receive such calls, (2) calls from an infinite number of lenders when she only expects to receive calls from a few, or (3) calls from lenders whose identities are not linked in her mind to her online inquiry, she will be surprised, and find these calls invasive of her privacy and contrary to the promised protection of the National Do Not Call Registry. However, we also agree with your letter's basic assertion that the consumer expects to receive some calls as a result of her visit to the website. In addition, we believe the lead generation mechanism your letter describes offers the consumer a true benefit, *i.e.*, the ability to quickly and easily obtain multiple credit offers based on her unique financial situation.

In view of these considerations, FTC staff believes that the Commission should exercise discretion in evaluating the use of lead generators by lenders, as described in your letter. As long as the lead generator provides the consumer with certain material disclosures, staff likely would not recommend filing a Do Not Call enforcement action against the lender. Specifically, staff likely would not recommend taking such action if the lead generator clearly and conspicuously discloses to the consumer, before the consumer divulges her telephone number, *both* that the consumer may receive telemarketing calls as a consequence of submitting her telephone number, *and* the maximum number of entities from which the consumer may receive these calls.

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In addition, FTC staff's opinion is that the consumer should, if possible, be informed of the identities of the lenders who may call the consumer before the consumer receives any such calls.² This disclosure should be made in a manner likely to be seen and understood by the consumer, in light of the medium used to induce the consumer to submit her information to the lead generator.³ We note that, as a practical matter, notifying the consumer in this way about which specific lenders may be calling makes good business sense. The consumer is more likely to accept a telemarketing call from a lender when she is expecting that particular lender to call. She may reject a call from a lender she does not recognize and instruct the lender not to make further telemarketing calls to her, thereby asserting her rights under the TSR's entity specific Do Not Call provision. *See* 16 C.F.R. § 310.4(b)(1)(iii)(A). Of course, consistent with Section 310.2(n)(2) of the TSR, 16 C.F.R. § 310.2(n)(2), the lender may only initiate an outbound call to the consumer within three months of the date of the consumer's inquiry to the lead generator. In the staff's opinion, fulfilling the above conditions ensures that the use of lead generators is consistent with the privacy expectations of a consumer who has placed her number on the Registry.

I hope this discussion is helpful to you. If you have any further questions, please do not hesitate to contact me.

Sincerely,

Thomas P. Rowan

² The lead generator should not refer the consumer to a lengthy list of hundreds or thousands of lenders that may contact the consumer. Rather, it should inform the consumer of the identities of the lenders with which it has "matched" the consumer.

³ If contact between the lead generator and the consumer occurred online, these disclosures appropriately could be made via email. Conventional mail disclosures likely would not be adequate where the initial exchange took place online. Nothing in this letter should be construed to mean that such electronic message need not comply with the CAN-SPAM Act, 15 U.S.C. §§ 7701 - 7713. Note, however, that the email likely would constitute a "transactional or relationship message," and would therefore not be subject to many of the CAN-SPAM Act's requirements. *See* 15 U.S.C. § 7702(17).