

Do-Not-Call, Do-Not-Fax, Do-Not-Email Laws Affecting REALTORS®

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I. INTRODUCTION

Telephone solicitations are a mainstay of a REALTOR®'s business. However, whether it's calling an individual who was referred to you or soliciting a list of homeowners by cold calling, REALTORS® must be mindful of any applicable do-not-call rules. This legal article provides REALTORS® with a general overview of the legal and practical issues concerning the do-not-call rules. It also discusses a do-not-call scheme that has been targeted at real estate companies and provides a sample written policy for maintaining a company-specific do-not-call list to help REALTORS® fight against this scheme.

Q 1. *What, in a nutshell, are the do-not-call rules?*

A This law generally prohibits telephone solicitations (as defined in Question 8) to people who have registered their residential or cell phone numbers on a national do-not-call registry implementing the federal Telephone Consumer Protection Act of 1991 ("TCPA") (47 C.F.R. § 64.1200(c)(2).) The law also regulates other telephone-related activities as discussed below.

Q 2. *What is the purpose of the do-not-call rules?*

A According to the federal government, American consumers strongly object to unwanted and uninvited telemarketing calls to their homes. In response to this public pressure, the government created a national do-not-call registry in 2003. The do-not-call registry gives consumers the opportunity to decide whether they want to receive telephone solicitations at their home or cell phones. As of 2005, more than 107 million telephone numbers have been placed in the do-not-call registry.

Q 3. *When did the do-not-call rules take effect?*

A The do-not-call rules went into effect on October 1, 2003.

Q 4. Are there different do-not-call laws?

A Yes. There are three different do-not-call laws that potentially affect California REALTORS®: (1) California law; (2) the Federal Trade Commission (FTC) rules; and (3) the Federal Communications Commission (FCC) rules. Unlike the first two laws, the sweeping FCC rules do generally apply to REALTORS® engaged in telephone solicitations as defined.

Here's some background on the different do-not-call rules. First, in October 2001, the California legislature enacted a law requiring the establishment of a statewide do-not-call list. REALTORS®, however, are generally exempt from this law under the C.A.R.-sponsored "small business" exception. In particular, the small business exception applies to calls made within a 50-mile radius by either individual businesspersons or small businesses with no more than five full time or part time employees or independent contractors. Those employees or independent contractors that work for that businessperson pursuant to a regulatory scheme (e.g., the California Department of Real Estate (DRE) regulations) are not counted against the total referenced. (Cal. Bus. & Prof. Code § 17592(e)(5).)

For example, a real estate salesperson that personally employs no more than five assistants is exempt, even if there are 100 other salespersons working at that real estate company. Even the broker for that real estate company may be personally exempt because those salespersons working for that broker under a "Broker-Salesman Relationship Agreement" (pursuant to section 2726 of Title 10 of the California Code of Regulations) are not counted as part of the five employees or independent contractors under the small business exception. For REALTORS® who do not fall within this small business exception, the state do-not-call requirements, including other exemptions, are fully set forth at California Business and Professions Code Section 17590.95.

Second, in December 2002, the FTC ordered the implementation of a national do-not-call registry. REALTORS® are also generally exempt from the FTC rules primarily because the rules only apply to interstate telephone calls (i.e., calls made across state lines) (16 C.F.R. § 310.2(cc)). These FTC rules for interstate calls are discussed in Question 31 below.

Third, in July 2003, the FCC enacted new do-not-call requirements for both interstate and intrastate telemarketing calls. There are certain exemptions to the FCC rules as discussed below. These exemptions, however, are generally inapplicable to REALTORS® who make telephone solicitations, including what is commonly understood as cold calling. More importantly, certain rules are likely to apply to REALTORS® even if they do not engage in cold calling.

II. APPLICABILITY

Q 5. Are REALTORS® exempt from the do-not-call rules?

A No. Real estate agents are not specifically exempt from the do-not-call rules (70 Federal Register 19330 at 19331 (2005)).

Q 6. If, as a REALTOR®, I am exempt from California's do-not-call requirements, why do I have to comply with the federal do-not-call rules?

A According to the FCC, the federal rules set a minimum standard "by operation of general conflict preemption law," and therefore "supersede all less restrictive state do-not-call rules" (68 Federal Register 44144 at 44155 (2003)). Using this analysis, the California do-not-call rules generally exempting REALTORS® would arguably be less restrictive than the federal rules which do not have a REALTOR®

exemption, and thus, under the FCC's rationale, California's REALTORS® would be required to comply with the more stringent federal rules.

Q 7. Under what circumstances must I refrain from calling a telephone number listed on the national do-not-call registry?

A The do-not-call rules prohibit, among other things, any person or entity from initiating a telephone solicitation (as defined in Question 8) to a residential or cell phone registered on the national do-not-call registry, unless an exemption applies (47 C.F.R. § 64.1200(c)(2)).

Q 8. What is a telephone solicitation for purposes of the do-not-call rules?

A A "telephone solicitation" is a telephone call that acts as an advertisement. It is very broadly defined by the FCC as the initiation of any telephone call or message, unless exempt, "for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person" (47 C.F.R. § 64.1200(f)(9)). Hence, REALTORS® making telephone solicitations, such as those engaging in cold calling or other telephone activities must generally refrain from calling phone numbers on the do-not-call registry.

Q 9. What about a call made to a place of business?

A A telephone call made to a place of business does not fall within the scope of the do-not-call rules. The do-not-call rules only pertain to calls made to residential and wireless telephone numbers to the extent described by the rules. (47 C.F.R. § 64.1200(c), (d), and (e).)

Q 10. What if I call a place of business, but that business phone number has been inadvertently registered on the do-not-call registry?

A A telephone call made to a place of business listed on the do-not-call registry does not violate the do-not-call rules, according to the FCC (70 Federal Register 19330 at 19331 (2005)).

Q 11. What about a call made to a home-based business?

A A telephone solicitation made to a home-based business is not expressly exempt from the do-not-call rules, according to the FCC. Instead, the FCC has indicated that it will review such calls on a case-by-case basis to determine whether the call was placed to a residential subscriber. (70 Federal Register 19330 at 19331 (2005).)

Q 12. What are the exemptions to the FCC do-not-call rules?

A Certain types of calls are exempt from the requirement to check the do-not-call registry, including calls that are made by or made based on:

- Written permission (see Question 13).
- Established business relationships (see Questions 14-15).

- Personal relationships (see Question 16).
- Tax-exempt nonprofit organizations.

(47 C.F.R. §§ 64.1200(c)(2)(ii) and 64.1200(f)(9).)

This legal article does not cover the treatment of tax-exempt nonprofit and political organizations under the do-not-call laws.

Q 13. *What is the written permission exception to checking the do-not-call registry?*

A Checking the do-not-call registry is not required for a telephone call made to someone who has given prior express invitation or permission to call. This permission must be evidenced by a signed, written agreement to be contacted by this caller at a specified telephone number. (47 C.F.R. § 64.1200(c)(2)(ii).) To fall under this exception, REALTORS® may have their customers sign C.A.R.'s Standard Form "Consent For Communications" (C.A.R. Form CFC).

Q 14. *What is the established business relationship exception to checking the do-not-call registry?*

A The FCC defines an "established business relationship" as "a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of" one of the following:

- The consumer's purchase or business transaction with the entity within the last 18 months; or
- The consumer's inquiry or application regarding the entity's products or services within the last three months.

(47 C.F.R. § 64.1200(f)(3).)

An established business relationship with a particular company does not extend to affiliated companies unless the consumer 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 (47 C.F.R. § 64.1200(f)(3)(ii)). There is no established business relationship if either party previously terminated the relationship (47 C.F.R. § 64.1200(f)(3)). Furthermore, a caller must honor the consumer's request to be placed on the caller's company-specific do-not-call list (discussed below), even if the parties continue to do business together (47 C.F.R. § 64.1200(f)(3)(i)).

Q 15. *As a mortgage broker, does my established business relationship with the borrower exist throughout the term of the loan we originated?*

A No. According to the FCC, you may call a customer for whom you have arranged a mortgage loan for a period of 18 months following the original transaction. The FCC explains that, for mortgage brokers and insurance agents, allowing "a broker to make a telephone solicitation to a consumer for the duration of the loan or term of the policy would conflict with the do-not-call rules' purpose in protecting consumer privacy rights." (70 Federal Register 19330 at 19333 (2005).)

Q 16. *What is the personal relationship exception to checking the do-not-call registry?*

A A “personal relationship” means any family member, friend, or acquaintance of the telemarketer making the call (47 C.F.R. § 64.1200(f)(11)).

Q 17. *What if, as a real estate agent, I want to call a For Sale By Owner (FSBO) in response to the seller’s yard sign or classified ad?*

A According to the FCC, whether a call from a real estate agent to a FSBO falls within the scope of the do-not-call rules depends on the purpose of the call. If the purpose of your call is to discuss a potential sale of the property to a buyer you represent, then your call is not a telephone solicitation because you are not encouraging the called party to purchase, rent or invest in property. In this case, you do not have to check the do-not-call registry before placing your call. (70 Federal Register 19330 at 19331 (2005).)

On the other hand, if the purpose of your call is to offer your services to the FSBO owner, then, according to the FCC, your call is a telephone solicitation and you must comply with the do-not-call requirements (70 Federal Register 19330 at 19331 (2005)). See Question 20 for suggestions for possible alternatives.

To be prudent, REALTORS® should check the Do-Not-Call registry before placing a call to the home or cell phone of a FSBO seller for the purpose of offering your services. However, the FCC’s position is not controlling authority for a court of law that determines “it is plainly erroneous or inconsistent with the regulation.” (*Stinson v. United States*, 508 U.S. 36, 45 (1993).) One possible counterargument to the FCC’s position is that, among other things, calls placed to a FSBO are not telephone solicitation because the real estate agent has not “initiated the telephone solicitation.” Arguably, it is the FSBO seller who initiates the chain of events by advertising for people to call the phone number provided.

Q 18. *What if, as a real estate agent, I want to call the seller of an expired or cancelled listing posted on the MLS?*

A Unless an exemption applies, you cannot call the seller of an expired or cancelled listing at their home or cell phone number to solicit real estate business if that number is listed on the do-not-call registry (70 Federal Register 19330 at 19331 (2005)). See Question 20 for suggestions for possible alternatives.

Aside from the do-not-call rules, real estate agents cannot use information from the Multiple Listing Service (MLS) to solicit expired listings according to the model California MLS Rules. Under paragraph 12.11, “participants and subscribers are expressly prohibited from using MLS information for any purpose other than to market property to bonafide prospective purchasers or to support market evaluations or appraisals.” This rule stems from a recognition “that the purpose of the MLS is to market properties and offer compensation to other broker participants and r.e. subscribers for the sole purpose of selling the property, and that sellers of properties filed with the service have not given permission to disseminate the information for any other purpose.” Check your local MLS rules to determine whether your local MLS has adopted this model MLS rule.

Q 19. *What if, as a real estate agent, I want to call someone referred to me?*

A Unless otherwise exempt, you cannot call someone referred to you at that person’s home or cell phone number to solicit real estate business if that number is on the do-not-call registry (70 Federal Register 19330 at 19332 (2005)). See Question 20 for suggestions for possible alternatives.

Q 20. *What should I do if I want to solicit business from someone listed on the do-not-call registry, but I don’t fall within any of the exemptions to the do-not-call rules?*

A Even though you cannot call someone listed on the do-not-call registry (or you do not intend to check the do-not-call registry), there are many other acceptable ways for you to contact that person to solicit business. Here are some suggestions for possible alternatives:

- **Call Work:** You may call someone at their place of business without checking the do-not-call registry. Of course, you should be mindful of the possibility that the person (or that person's employer) does not want to be disturbed by you at work.
- **Go to Someone's Home:** You may go to someone's home for a face-to-face meeting without regard to the do-not-call rules. Consider bringing along a letter to drop off in the event that person is not home or not available. Face-to-face meetings are probably the most effective way for REALTORS® to market their services.
- **Send a Letter:** You may send a letter to a person you are trying to contact by regular mail, UPS, FedEx, or hand-delivery. You can, for example, enclose a C.A.R. standard-form Consent for Communications (CFC) and a stamped, self-addressed return envelope for that person to sign and return. A properly completed and signed CFC allows you to call that person in the future without checking the do-not-call registry.
- **Send a Fax or E-Mail:** You may send a fax or e-mail, but you must comply with applicable laws if any (see Questions 33 and 34).
- **Have Someone Call You:** You can always have someone contact you. For example, if your client, Mr. X, gives you the name and home phone of a referral, Ms. Y, you may simply ask Mr. X to please have Ms. Y call you anytime, day or night, at her convenience.
- **More Effective Cold Calling:** Cold calling a farm area with many of the owners listed on the do-not-call registry can be disheartening, but it may also be a blessing in disguise. Your advertising efforts may ultimately be more effective if you don't call people who have indicated they dislike receiving telemarketing calls. Ultimately, what matters the most is not how many people you have to call, but how well you handle each call.
- **Change Marketing Practices:** REALTORS® may be able to alter some of their current marketing practices to fall within one of the do-not-call exemptions (see Question 21).

Q 21. What should I do if I don't want to check the do-not-call registry and my telephone solicitations don't fall within any of the exemptions?

A See Question 20 for some suggestions for possible alternatives to checking the do-not-call registry (or contacting people listed on the do-not-call registry). REALTORS® may also be able to alter some of their current marketing practices to fall within one of the do-not-call exemptions. Let's say, for example, you send out a mass mailer offering a free Comparative Market Analysis (CMA). Given the do-not-call rules, you may want to consider asking homeowners to send you a response card providing their telephone numbers and a signed written consent for you to call them. If they respond accordingly, your subsequent calls to them will fall under the written permission exemption with no expiration date. Alternatively, if you don't get a signed written consent, you may want to date stamp any response cards you receive to ensure that you call within three months to fall under the established business exemption for inquiries.

As another example, you may want to consider using your Open House registry to inform those who sign in that, by providing you with their telephone numbers and signatures, they are giving you permission to call them. There may be other aspects of your real estate practice that may be changed to fall within one of the do-not-call exemptions.

If, however, your practice cannot be altered to fall within an exemption, you may be required to comply with the do-not-call requirements. Although cross-checking your call list with the do-not-call registry may be cumbersome and time-consuming, your advertising efforts may ultimately be more effective if you no longer call people who have chosen to go on the do-not-call registry. Whether your call list gets shorter or not, the important thing is to make every call count.

Q 22. What about my unlicensed assistant who does telephone prospecting for me?

A An unlicensed assistant who makes telephone solicitations on a REALTOR®'s behalf is subject to the same do-not-call rules (see 47 C.F.R. § 64.1200(c)(2)). Furthermore, under California Department of Real Estate guidelines, an unlicensed assistant may canvass for general interest in using the services of a real estate broker, but cannot attempt to induce a prospective client to use the services of the broker for a specific property, transaction, or product. For further details, please refer to C.A.R.'s legal article, **Unlicensed Assistants**, available for members only at <http://qa.car.org>.

III. DO-NOT-CALL RULES AND PROCEDURES

Q 23. *If I make telephone solicitations, how do I check the do-not-call registry?*

A No person or company shall initiate any telephone solicitation to residential consumers whose telephone numbers are on the do-not-call registry (47 C.F.R. § 64.1200(c)(2)). Calls that are made based on or by written permission, established business relationships, or personal relationships are excluded from the definition of "telephone solicitation" (47 C.F.R. § 64.1200(f)(9)).

For covered calls, you must access the do-not-call database at <https://telemarketing.donotcall.gov>. Salespersons should check with their brokers or managers before accessing the do-not-call registry to determine whether the real estate brokerage intends to access the registry on a company-wide basis or a salesperson-by-salesperson basis.

The do-not-call database only provides the telephone numbers of registrants, sorted by area codes. Upon accessing the do-not-call database, you must "scrub" your call list periodically. "Scrubbing" means cross-checking the do-not-call registry with your own call list, and dropping from your call list the telephone numbers of people who have registered. You must scrub your call list at least once every 31 days and maintain records documenting this process. This 31-day rule came into effect on January 1, 2005. (47 C.F.R. § 64.1200(c)(2)(i)(D).)

On subsequent visits to the FTC's website, you will be able to download either a complete updated list of telephone numbers from the area codes you have selected or a more limited list showing additions and deletions from when you last downloaded. For more information, go to <https://telemarketing.donotcall.gov/FAQ/FAQBusiness.aspx>.

Q 24. *What is the basic cost of accessing the do-not-call registry?*

A There is no charge for the first five area codes of data accessed by any person. For more than five area codes, the annual fee charged to any person accessing the data is \$56 per area code, up to a maximum of \$15,400 for the entire registry (effective September 1, 2005). (16 C.F.R. § 310.8(c).) Payment for accessing the registry is unnecessary for people initiating calls solely under the written permission or established business relationship exceptions of the FTC rules. (16 C.F.R. § 310.8(a).)

A person accessing the registry may not participate in any arrangement to share the cost of accessing the registry. (16 C.F.R. § 310.8(c).) Separate divisions, subsidiaries, or affiliates of an entity must pay a separate access fee if: (1) the entity is separately incorporated or, for a non-corporate entity, is a similarly distinct legal entity; and (2) the entity has or markets under a different name. (68 Federal Register 45134 at 45139 (2003).)

Q 25. *What if I sign up, but a few months later I want to access more area codes?*

A When you access the do-not-call registry, you will be given a unique account number allowing you to continue accessing the area codes you have selected for a period of 12 months. As an illustration, if you

subscribe on September 16, 2006, the annual period will be from September 1, 2006 to August 31, 2007. During that annual period, if you want to access more area codes than what you originally selected, each additional area code (after the first five) will cost \$56 during the first six months of the annual period, and \$28 during the second six months of the annual period. Payment of the additional fee will give you access to the additional area codes for the remainder of the annual period only. (16 C.F.R. § 310.8(d).)

Q 26. How does a consumer get on the national do-not-call registry?

A Consumers can register online at www.donotcall.gov or by calling (888) 382-1222 or TTY (866) 290-4236 from the phone number to be registered. Consumers may register both their residential telephone numbers and cellular phone numbers (47 C.F.R. § 64.1200(e)). There is no cost for registration. The do-not-call database is administered by the FTC.

Q 27. How long does a phone number stay on the do-not-call registry?

A A consumer's phone number will remain on the do-not-call registry for five years (unless the consumer decides to take it off the registry). A consumer may re-register every five years. (47 C.F.R. § 64.1200(c)(2).)

Q 28. What will happen if I call someone on the do-not-call registry by mistake?

A You will not be held liable for calling someone on the do-not-call registry by mistake if certain conditions are met. These conditions are often referred to as the "safe harbor" provisions. More specifically, no person or company will be held liable for making a telephone solicitation to a telephone number registered on the do-not-call registry if the person or company can demonstrate that the violation is a result of error and that, as a part of routine business practices, all of the following standards have been met:

- **Written policy:** You have established and implemented written procedures for complying with the do-not-call rules.
- **Recording:** You have maintained and recorded a list of telephone numbers that cannot be contacted.
- **Accessing:** You use a process to prevent telephone solicitations to any telephone number on your do-not-call list, which employs a version of the national do-not-call registry obtained from the administrator of the registry no more than 31 days before the date any call is made and you maintain records documenting this process.
- **Purchasing:** You use a process to ensure that you do not use the do-not-call database for any purpose other than compliance with state and federal laws. You also do not share the cost of accessing the do-not-call database with other companies.
- **Training:** You have trained your personnel in the procedures established pursuant to the do-not-call rules.

(47 C.F.R. § 64.1200(c)(2)(i).)

Q 29. What are the rules for calling to solicit business from consumers who are not listed on the do-not-call registry?

A You may call a telephone number that is not listed on the do-not-call registry as long as you comply with other telemarketing requirements. "Telemarketing" is very broadly defined as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person" (47 C.F.R. § 64.1200(f)(7)). Furthermore, there is no

exception from the definition of “telemarketing” for calls made based upon written permission, established business relationship, or personal relationship.

The general telemarketing requirements are as follows:

- **Hours:** Do not initiate any telephone solicitation before the hour of 8 a.m. or after 9 p.m. (local time at the called party’s location) (47 C.F.R. § 64.1200(c)(1)).
- **Stay on Line:** Do not disconnect an unanswered telemarketing call before at least 15 seconds or four rings (47 C.F.R. § 64.1200(a)(5)).
- **Identify Yourself:** When you call, you must give: (1) your name; (2) your company’s name; and (3) your telephone number or address where you may be contacted. The telephone number cannot be a 900 number or any other number for which charges exceed local or long distance charges. (47 C.F.R. § 64.1200(d)(4).)
- **Company-Specific Procedures:** You must maintain company-specific do-not-call procedures (47 C.F.R. § 64.1200(d)) (See Question 30).
- **Caller I.D.:** Do not block caller I.D. (47 C.F.R. § 64.1601(e)(ii)). Your caller I.D. information must include your name (when made available by your carrier) and number (or acceptable alternative) (47 C.F.R. § 64.1601(e)(i)).

Although the first requirement regarding calling between 8 a.m. and 9 p.m. does not technically apply to calls made based upon with written permission or established business relationship, it is still good practice not to call clients very early in the morning or very late at night. See Question 31 for additional requirements for interstate calls.

Q 30. What are the parameters of the company-specific do-not-call procedures?

A As mentioned above, no person or company shall initiate any call for telemarketing purposes to a residential or cell phone without established procedures for maintaining a list of persons who ask not to be called. “Telemarketing” is very broadly defined as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person” (47 C.F.R. § 64.1200(f)(7)). It includes calls made based upon written permission, established business relationship, or personal relationship.

A company’s established do-not-call procedures must meet the following minimum standards:

- **Written Policy:** You must have a written policy, available on demand, for maintaining a do-not-call list (see Question 44 for a sample policy).
- **Identification:** When you call someone who is not on the do-not-call registry, you must provide the called party with: (1) your individual name; (2) your company’s name; and (3) your telephone number or address where you may be contacted. The telephone number provided cannot be a 900 number or any other number for which charges exceed local or long distance transmission charges.
- **Recording:** For any residential telephone subscriber who requests not to be called, that person’s name, if provided, and telephone number must be placed on a company-specific do-not-call list at the time the request is made. You must honor this do-not-call request within a reasonable time, not to exceed 30 days.
- **Maintenance:** You must maintain a record of any do-not-call request and honor it for five years from the time the request is made.
- **Training:** Your personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the do-not-call list.
- **Affiliates:** Absent a contrary request, a consumer’s do-not-call request applies to the particular business entity making the call, and not affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.

(47 C.F.R. § 64.1200(d).)

Based on the above language, it would be prudent in most situations for the do-not-call list to be maintained by a real estate company as a whole, not just the individual salesperson working for that company, even if the salesperson engaging in telemarketing activities is an independent contractor.

Q 31. What about interstate calls?

A REALTORS® engaged in interstate telemarketing must not only comply with the FCC rules outlined above, but also the FTC rules. However, even if a REALTOR® makes interstate calls, he or she is likely to fall under a limited exemption to the FTC rules for “Telephone calls in which the sale of goods or services . . . is not completed, and payment or authorization of payment is not required, until after a face-to-face [sales] presentation” by the REALTOR® (16 C.F.R. § 310.6(b)(3)).

Under this **limited** face-to-face exemption, you are exempt from the bulk of the FTC rules, but you are nevertheless **prohibited** from doing the following when engaged in interstate telemarketing:

- **Misuse:** You are prohibited from using threats, intimidation, or profane or obscene language (16 C.F.R. § 310.4(a)(1)). You are also prohibited from calling to annoy, abuse, or harass (16 C.F.R. § 310.4(b)(1)(i)).
- **Interference:** You cannot interfere with someone’s right to place his or her name on a do-not-call list (16 C.F.R. § 310.4(b)(1)(ii)).
- **Caller I.D.:** You cannot block caller I.D. (16 C.F.R. § 310.4(a)(7)).
- **Other:** The remaining applicable FTC requirements are substantially similar to the FCC rules outlined above (see 16 C.F.R. §§ 310.4(b) and (c)).

For purposes of the FTC rules, “telemarketing” is defined as “a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call” (16 C.F.R. 310.2(cc)). For REALTORS® who engage in interstate telemarketing, but do not conduct face-to-face sales presentations, the FTC requirements are fully set forth at sections 310.1 to 310.9 of Title 16 of the Code of Federal Regulations.

Q 32. What about automated telephone equipment, such as autodialers or prerecorded messages?

A An autodialer (or “automatic telephone dialing system”) refers to equipment that can generate and dial telephone numbers randomly or sequentially (47 C.F.R. § 64.1200(f)(1)). Autodialers are generally used for placing artificial (computerized) or prerecorded messages. There are various laws governing the use of autodialers and artificial or prerecorded messages, as set forth at section 227 of Title 47 of the United States Code and section 64.1200 of Title 47 of the Code of Federal Regulation Section (federal law), and at California Public Utilities Code Sections 2871 to 2875.5 and California Civil Code Section 1770(a)(22)(A) (state law).

For example, under California law, using autodialers to place calls is generally prohibited before 9 a.m. and after 9 p.m. (Cal. Pub. Util. Code § 2872(c)). Furthermore, under the FCC rules, telemarketers using predictive dialers must ensure that they do not abandon more than 3% of all calls made over a 30-day period. A call is considered “abandoned” if it is not connected to a live sales representative within two seconds of the called person’s completed greeting. (47 C.F.R. § 64.1200(a)(6); see also 16 C.F.R. § 310.4(b)(1)(iv).) This rule should reduce the instances when a consumer answers the phone, only to hear dead air or a hang-up.

IV. ENFORCEMENT OF DO-NOT-CALL RULES

Q 33. What happens if someone violates the do-not-call rules?

A Violations may be enforced by the issuance of citations or fines by the FTC, the FCC, or state law enforcement agencies (see Question 36), and by court order in a civil lawsuit brought by the consumer whose rights have been violated (see Question 37).

Q 34. What does governmental enforcement entail?

A A REALTOR®'s violations of the FCC rules could result in, among other things, citations or fines up to \$11,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$97,500 for any single act or failure to act (47 U.S.C. § 503; 47 C.F.R. § 1.80(b)(3)). For the FTC rules, the civil penalty is \$11,000 for each violation (15 U.S.C. § 45; 16 C.F.R. § 1.98).

A complaint to the FCC must include the following:

- Consumer's name, address, and daytime phone number;
- Telephone number involved in the complaint;
- Type of resolution complainant is seeking; and
- As much specific information about the complaint as possible, including the identity of the telemarketer or company that called.

A complaint to the FTC must provide the following information:

- Name or telephone number of the company that called.
- Date of call.
- Consumer's registered telephone number.
- Optional: Consumer's name and address.

The FCC and FTC may issue citations or fines, but they will not resolve individual consumer problems. The FTC may enter complaints into Consumer Sentinel, an online database accessible by civil and criminal law enforcement agencies, including the California Attorney General.

Q 35. What is a consumer's private right of action?

A Aside from governmental enforcement (discussed above), a consumer may file a civil lawsuit in state court for a violation of the FCC or FTC rules. A consumer may seek to recover actual monetary loss or \$500 in damages for each violation, whichever is greater, and an injunction prohibiting further violations. (47 U.S.C. §§ 227(b)(3) and (c)(5).) For violations of the automated telephone equipment provisions, the court may also award treble damages if the violator willfully or knowingly violated these rules (47 U.S.C. § 227(b)(3)).

The law specifically provides for a private right of action for anyone who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the do-not-call rules (47 U.S.C. § 227(c)(5)) or for violations of certain autodialer, artificial or prerecorded voice messages, and fax rules (47 U.S.C. § 227(b)(3)). However, the FCC's position is that consumers have a private right of action for any violation of the guidelines for telephone solicitations. See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 FCC Rcd 8752, 8765 (1992); see also Letter from Daniel M. Armstrong of the FCC to Barry K. Roberts, Esq., dated June 25, 1999 (pertaining to a violation of the 8 a.m. to 9 p.m. time-of-day rule).

V. DO-NOT-CALL SCHEME

Q 36. *Is there a scheme being perpetrated involving the do-not-call rules?*

A Yes. C.A.R. has received reports about a do-not-call scheme targeted at real estate brokerages, banks, and other businesses in California and other states. In this scheme, an individual contacts a real estate brokerage (or other business) by telephone or fax. Despite no prior dealings with each other, the individual asks to be placed on the company's do-not-call list. He also asks the company to, within five days, mail him a copy of the company's policy for maintaining a do-not-call list. If the individual does not receive the policy in about five days, he threatens to sue the company in a court in Minnesota, but offers to settle the matter for about \$5,000.

Businesses that have been targeted by this do-not-call scheme do not necessarily engage in telemarketing or phone sales, or conduct business in the state of Minnesota. Of course, over time, there may be variations to this basic scheme.

The man who has gained a certain level of notoriety perpetrating this do-not-call scheme is Ryan Swanberg. He holds himself out as a consumer rights advocate and self-proclaimed "career plaintiff."

Q 37. *Are the tactics used in this do-not-call scheme legally justified?*

A Probably not (as further discussed in Question 43), but certain aspects of the do-not-call scheme outlined above are grounded in law. The underlying legal issues involved in this do-not-call scheme will be discussed as follows:

- Having a written policy for maintaining a do-not-call list available upon demand (see Question 40).
- Providing the written do-not-call policy (see Questions 41 to 44).
- Time frame for providing the do-not call policy (see Question 42).
- Do-not-call scheme as a whole (see Question 43).

Q 38. *Is our real estate brokerage required to have a written policy for maintaining a do-not-call list?*

A Yes for most REALTORS®. The law requires anyone who initiates a telemarketing call to a residential or cell phone to have, among other things, a written policy, available upon demand, for maintaining the company's do-not-call list (47 C.F.R. § 64.1200(d)(1)). Most real estate brokerages must comply with this requirement because "telemarketing" is very broadly defined as any calls or messages made "for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person" (47 C.F.R. § 64.1200(f)(7)). Moreover, there is no exception to this requirement for calls made based upon written permission, established business relationship, or personal relationship.

Q 39. *Is our real estate brokerage required to provide our company's written policy for maintaining a do-not-call list to anyone who demands it?*

A Yes, according to the FCC. In an opinion letter, the FCC stated as follows: "We find nothing in our rules that would limit disclosure of the do-not-call policy to any person or circumstance. . . . Thus, even where a company does not solicit a particular consumer, we find nothing in our rules that limits a company's duty to disclose its policy if it does engage in telephone solicitation. Additionally, we believe that failure to provide a do not call policy is a prohibited act under the TCPA." (Letter from Geraldine Matise of the FCC to Janice M. Parker of the Consumer Fraud Bureau (dated June 11, 1996).)

To be prudent, REALTORS® should, upon anyone's request, provide its written policy for maintaining a do not call list within a reasonable time. However, the FCC's opinion letter is merely persuasive authority, not controlling authority, for a court of law (see *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); see also *Udell v. Kansas Counselors, Inc.*, 313 F.Supp.2d 1135, 1142 (2004) (ruling that an informal staff letter that does not represent the administrative agency's official views has "very limited precedential value"). One possible counterargument to the FCC's position is that, among other things, a person or entity making a telemarketing call should only be required to provide the company's do not call policy at the request of someone who has been called by that company.

Q 40. *Is there a five-day time frame for providing the do-not-call policy?*

A No. Nothing in the rules specifically require delivery of the written policy within five days, although a prudent broker should, upon anyone's request, provide the written policy within a reasonable time. The FCC states, "Although the term 'available upon demand' is not defined in statutory language or legislative history, section 64.1200(d)(2)(i) establishes that a telemarketing company or entity must make a copy of its written do-not-call policy available to consumers in a reasonable amount of time following the consumer's request." (Letter from Geraldine Matisse of the FCC to Mr. Biggerstaff (dated December 1997).) The FCC also states, "Because the reasonableness of how and when the policy is provided would have to be determined on a case by case basis, we decline to endorse specific time frames, procedures, or policy statements." (Letter from Geraldine Matisse of the FCC to Koerner, Silberberg & Weiner, LLP (dated November 4, 1997).)

Q 41. *What is our best course of action if we are targeted by a perpetrator of this do-not-call scheme?*

A Your best course of action in response to anyone's request is likely to be providing within a reasonable time a copy of your company's written policy for maintaining a do-not-call list (see sample policy in Question 44). One reason for this course of action is that diffusing this situation by sending someone your written policy is so simple to do. In the do-not-call scheme outlined above, the perpetrator apparently only threatens to sue a company that fails to provide the written policy within about a week's time. Another reason to provide the written do-not-call policy is that, at the time someone requests a copy of your written policy, it may not be easy for you to distinguish between a legitimate request and a scam.

One alternative course of action is not to give in to the perpetrator's demands. Although certain aspects of the do-not-call scheme described above are legally justifiable, the scheme as a whole is unlikely to withstand legal challenge. Aside from legal issues raised by the do-not-call rules, other possible civil and criminal claims that may be raised against this do-not-call scheme depending on the circumstances include, but are not limited to, lack of jurisdiction, unlawful and unfair business practices, fraud, extortion, malicious prosecution, and unlawful practice of law. However, before you decide to challenge the perpetrator's legal position, you should consider seeking the advice and representation of an attorney for your particular situation.

Q 42. *Do you have a sample policy for maintaining a do-not-call list that our brokerage can use?*

A Yes. We've set forth below a sample policy for maintaining a do-not-call list for REALTORS® to use. This sample policy is very basic, and it may not fulfill your specific needs. You must carefully review both the law and the sample policy. You must add, delete, or otherwise change any language in the sample policy to accurately reflect your own business practices.

This sample policy pertains only to maintaining a do-not-call list. It does not address the written policy under the safe harbor provision for checking the do-not-call registry (see Question 28) or other do-not-call rules (see, for example, Question 29). Suggestions for implementing the sample do-not-call policy are set forth in Question 45.

NOTICE: *The following is a sample policy for maintaining a do-not-call list strictly for C.A.R. members only. You are responsible for determining whether it comports with your business practices and legal requirements. You are strongly encouraged to seek the advice of an attorney or other professional for your particular situation.*

* * * * *

OUR COMPANY'S DO-NOT-CALL POLICY

(As of November 21, 2006)

Our company has established and implemented the following written policy and procedures for maintaining a do-not-call list. It is our company's intent to honor anyone's do-not-call request in a systematic and timely manner. It is also our intent to fully comply with any and all applicable do-not-call rules as a matter of course in our routine business practices. These rules are generally set forth at sections 64.1200 *et seq.* of Title 47 of the Code of Federal Regulations pertaining to the Telephone Consumer Protection Act of 1991.

Our company requires our sales staff and other personnel to read, understand, and strictly adhere to the following rules and procedures:

- **Checking Company-Specific Do-Not-Call List:** Do not initiate any call to any home or cell phone number for the purpose of soliciting business unless you first check our company-specific do-not-call list if any. There is no exception to this rule for calls made based on written permission, established business relationship, or personal relationship. Our company will provide you with a copy of, or instructions for accessing, our company-specific do-not-call list if any. If you do not have a copy of or access to our company-specific do-not-call list, inform your broker or manager immediately.
- **Honoring Do-Not-Call Requests:** If the purpose of your call is to solicit business, you must refrain from calling anyone's home or cell phone number listed on our company-specific do-not-call list if any. Honor any do-not-call request for five years, unless the person asks to be removed. Do not share our company's do-not-call list with anyone outside our company.
- **Verbal Do-Not-Call Requests:** If anyone you speak with over the telephone or in person requests for our company to refrain from calling that person, you must immediately write down or otherwise record the following information: (1) the person's name, if provided; (2) the person's home and/or cell phone number(s) to be placed on our company-specific do-not-call list; (3) the date and time of the do-not-call request; and (4) any other information deemed necessary. Immediately place this information on our company-specific do-not-call list and inform your broker or manager accordingly. Your immediate attention in this matter is essential because our company must honor the do-not-call request within a reasonable time, not to exceed 30 days from the date of the request.
- **Written Do-Not-Call Requests:** If you receive a do-not-call request by mail, fax, e-mail, or any other method, you should date and time stamp the do-not-call request. Immediately place the information on our company-specific do-not-call list and inform your broker or manager accordingly.
- **Requests for Our Do-Not-Call Policy:** If you receive any request for our company's written policy for maintaining a do-not-call list, you must immediately bring this to the attention of your broker or manager for proper handling.
- **Our Affiliated Entities:** Absent a contrary request from a customer, a do-not-call request applies to our company and not our affiliated entities, if any, unless the customer reasonably expects them to be included given the identification of the caller and the product being advertised.
- **Any Questions?** If you have any questions or concerns about the do-not-call rules, bring it immediately to the attention of your broker or manager.

* * * * *

Q 43. How does our real estate brokerage implement the written policy for maintaining a do-not-call list?

A Upon finalizing your written policy for maintaining a do-not-call list (see sample policy in Question 44), you must inform and train your personnel engaged in any aspect of telemarketing in the existence and use of the do-not-call list (47 C.F.R. § 64.1200(d)(2)). If you use third-party telemarketers to solicit business, you are still responsible for any failure to honor a do-not-call request (47 C.F.R. § 64.1200(d)(3)).

Consider the following suggestions for implementation:

- Implement a systematic method for distributing to your personnel your company's do-not-call policy, as well as your company-specific do-not-call list if any and periodic updates if any. For most real estate brokerages, making copies to distribute to your personnel should work well. For other brokerages, a viable alternative is to post the information on a shared drive in your company's computer network.
- Arrange an office meeting to announce and go over your company's policy for maintaining a do-not-call list.
- After the initial announcement, periodically remind your personnel of the do-not-call requirements at subsequent office meetings.
- Take attendance at your office meeting to document your training efforts.
- Also to document your training efforts, add a line at the bottom of the sample do-not-call policy for your personnel to sign and date, and return to you, certifying that they have received, read, and understood what is required of them.
- Post your do-not-call policy on your company's website.
- Make sure you provide information and training on the do-not-call rules to any new personnel you hire and document your efforts accordingly.
- Consider appointing an office manager or other appropriate person in your company to administer the do-not-call list if any, coordinate your training efforts, and oversee your company's compliance with the do-not-call rules.

VI. DO-NOT-FAX RULES

Q 44. What about advertising by fax?

A Along with the do-not-call rules, the FCC has also established rules generally prohibiting the faxing of advertising materials absent the fax recipient's prior permission. Moreover, any advertising fax must include an opt-out notice as defined. The FCC rules, which are set forth at section 64.1200 of Title 47 of the Code of Federal Regulations, are available at <http://www.gpoaccess.gov/fr/index.html>. The FCC also has a publication "Fax Advertising: What You Need to Know," available at <http://www.fcc.gov/cgb/consumerfacts/unwantedfaxes.html>.

VII. DO-NOT-EMAIL RULES

Q 45. What about advertising by e-mail?

A The federal CAN-SPAM Act of 2003 generally regulates commercial e-mail messages as defined. A commercial e-mail message must contain, among other things, a clear and conspicuous identification that the message is an advertisement, an opt-out notice and method for opting out, and a valid physical postal address of the sender. The law also prohibits certain deceptive acts and practices involving e-mails. This law, also known as the **Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003** (S. 877), is available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:s877enr.txt.pdf.

VIII. ADDITIONAL INFORMATION

Q 46. *Where can I get more information?*

A For more information about the FCC's do-not-call rules, go to its website at www.fcc.gov/cgb/donotcall or call (888) CALL-FCC or (888) 225-5322 (TTY: (888) TELL-FCC). For the FTC rules, go to its website at www.ftc.gov/donotcall or call (877) FTC-HELP or (877) 382-4357 (TTY: (866) 653-4261). For California laws, go to www.leginfo.ca.gov.

C.A.R. offers for sale a "Safe-Calling Compliance Kit for Real Estate Professionals." This is a comprehensive instructional kit that provides you with various tools for compliance with the do-not-call requirements including office policies and procedures, training materials, tracking logs and other forms, and much more.

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