



Independent Insurance Agents



Brokers of America, Inc.



**THE FEDERAL COMMUNICATIONS COMMISSION'S AND
FEDERAL TRADE COMMISSION'S
DO NOT CALL RULES**

Updated as of September 1, 2009

This FAQ is not intended to provide specific advice about individual legal, business or other questions. It was prepared solely as a guide, and is not a recommendation that a particular course of action be followed. If specific legal or other expert advice is required or desired, the services of an appropriate, competent professional should be sought.

The Federal Communications Commission (FCC) published a Do Not Call (DNC) rule on July 25, 2003, amending its rules implementing the Telephone Consumer Protection Act of 1991. This rule has a potentially significant impact on insurance agency and brokerage firms as well as trade associations. The rule addresses two broad categories of activities: (1) telemarketing; and (2) fax solicitations. This memorandum provides an overview of the DNC rules governing telemarketing imposed by the FCC and the Federal Trade Commission (FTC). The FCC also changed its rules for faxing unsolicited commercial advertisements; those rules are addressed in a separate FAQ entitled: "The Federal Communications Commission's Do Not Call Rule: Application to Faxes as of January 1, 2005."

People using the telephone to solicit business have to purchase the national do-not-call ("DNC") list and use it to "scrub" their calling lists within 31 days of making telemarketing calls, and calling lists have to be scrubbed at least every 31 days. As has been the case since the early 1990s, companies have to maintain their own company specific DNC list, observe certain calling hours, and provide identifying information on telemarketing calls. The details of the rules regarding the national DNC list and policies needed are described below.

COVERED CALLS

1. Who is subject to the telemarketing rules?

The FCC's DNC rules apply to **all** calls – those made within the same state (*intrastate*) and those made across state lines (*interstate*). The FTC's rules apply only to *interstate* calls. The application of these rules to businesses in the insurance industry is as follows:

- **Insurance Agencies and Brokerages:** Telemarketing calls by insurance agencies and brokerage firms are subject to the DNC rules adopted by the FCC. The FTC rules do not apply to insurance agencies and brokerage firms relative to the business of insurance.
- **Insurance Companies:** The FCC believes that insurance companies are subject to its DNC rules. The FTC rules do not apply to insurance companies relative to the business of insurance.
- **Nonprofits:** Telemarketing calls by or on behalf of nonprofit entities are not subject to the FCC's DNC rules. For-profit subsidiaries of nonprofit entities are subject to the FCC's DNC rules. The FTC's jurisdiction is less clear. It has indicated that it will enforce its rules against: (i) trade associations in connection with for-profit telemarketing calls, whether made by the trade association itself, or by a third party on behalf of the trade association; and (ii) for-profit subsidiaries of nonprofit entities.

2. What kind of calls are covered by the rules?

In short, the rules cover all telemarketing sales calls.

Specifically, the FCC's DNC rules cover all "telephone solicitations," which are defined as any "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...." The FTC's rules apply to any "telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution."

The rules do not cover calls that are made to conduct surveys or provide information. However, mixed purpose calls, such as surveys or informational calls that also solicit the purchase of goods or services, are covered by the rules.

3. Do the rules apply to business-to-business telemarketing calls?

No. The FCC's DNC provisions apply only to calls to "residential telephone subscribers," and the FTC's rules exempt "[t]elephone calls between a telemarketer and any business." Thus, when calling businesses, you do not need to use the national DNC

list or refer to your company specific DNC list. (See FAQs 14 and 15 regarding company specific DNC lists.)

4. Do the rules apply to telemarketing calls to home-based businesses?

The answer to this question is less clear. Since home-based businesses may not have business telephone numbers, it is likely that in many instances, those phone numbers will be considered residential numbers. To determine if a telephone number is residential or business, the FCC has indicated that it will look to the amount of time a phone is used for business purposes. But, the opposite is true for the FTC, which looks to the purpose of the call rather than the nature of the use of the number.

Thus, the most prudent course for any numbers not obtained from a business directory is to scrub them against the national and your company specific DNC lists before making telemarketing calls.

5. What if a business number is on the national DNC list?

In general, you do not have to use the national DNC list when making calls to businesses, so it does not matter if a business number is on that list. Telemarketing calls to business numbers on the national DNC list are not in violation of the rules. The only exception to this is might be for home-based businesses, which are addressed above.

6. Are telemarketing calls to your current customers covered by the rules?

No, except prerecorded telemarketing calls are subject to a rule that became effective September 1, 2009.

Both the FCC and FTC exempt calls made by a person to those with whom you have an established business relationship (“EBR”). An EBR exists for the duration of a business relationship (e.g., during the life of an insurance policy) and for 18 months after the last payment or the last goods or services are provided. Thus, telemarketing calls made by a person to current insureds by insurance agencies, and telemarketing calls made by a person for a trade association to its members, are not covered by the rules.

The EBR exception also extends to your subsidiaries and corporate affiliates (but not marketing partners) if the person called “would reasonably expect [the affiliate] to be included [in the EBR] given the nature and type of goods and services offered by the affiliate and the identity of the affiliate.” Of course, your marketing partner can make telemarketing calls to people with whom it has an EBR.

As of September 1, 2009, prerecorded telemarketing calls (also called “robocalls”) no longer receive the EBR exception applicable to telemarketing calls made by a person. (See FAQ 24 regarding the FTC’s prerecorded call rules.)

7. Are telemarketing calls to your past customers covered by the rules?

No, not if you have an EBR with the past customer (except with respect to prerecorded telemarketing calls). In other words, if, within the 18 months preceding a telemarketing call made by a person there was a payment made or goods or services provided, that telemarketing call is not covered by the rules. As of September 1, 2009, prerecorded telemarketing calls no longer receive the EBR exception applicable to telemarketing calls made by a person. (See FAQ 24 regarding the FTC's prerecorded call rules.)

For example, for an insurance agency, if an insurance policy you wrote was in effect within the last 18 months, or if you provided risk management or other consulting services within that same period, a telemarketing call made by a person to that client would not be covered by the rule. And for a trade association, calls made by a person to a non-member would not be covered by the rule if, within the last 18 months, the person called took classes, attended a conference or bought books from the association.

8. Are telemarketing calls to people who contact you for information covered by the rules?

No, provided the calls from those people are within the last three months and relate to your business activities (except with respect to the FTC's rules on prerecorded telemarketing calls). This is because an EBR exists for three months after an inquiry. However, calls from people seeking directions to your office, asking about your hours of operation or with similar questions are covered by the rules. As of September 1, 2009, the FTC's rules no longer contain an EBR exception for prerecorded telemarketing calls. (See FAQ 24 regarding the FTC's prerecorded call rules.)

9. Are telemarketing calls to people you know covered by the rules?

No. The FCC exempts calls made by a person to people with whom you have a personal relationship. This exemption covers family members, friends and acquaintances. Again, this exception does not apply to prerecorded telemarketing calls. (See FAQ 24 regarding the FTC's prerecorded call rules.)

10. Are telemarketing calls to people who are referred to you covered by the rules?

Yes. The FCC was very clear that the personal relationship exemption applies only to people you actually know and not to people who are referred to you. **If the phone number of a person referred to you is on the national DNC list, you cannot initiate a call to the person unless you first meet the person, but you can return the person's call if he or she calls you.** And, prerecorded telemarketing calls to the person must comply with the rules for such calls. (See FAQ 24 regarding the FTC's prerecorded call rules.)

11. Can you get advance permission to make telemarketing calls to people on the national DNC list?

Yes. If a person gives you signed written consent to call, you may call. This includes people who give you a signed written consent to receive prerecorded telemarketing calls. This consent is good unless revoked, so it is a useful way to avoid the time limits of the EBR. If the consent is revoked, telemarketing calls made by a person or prerecorded message to that person are not permitted, even if the person continues to do business with you.

It is recommended that you retain the consent forms so that you can respond to complaints, if any. There are no specific regulations about retention of these records, but it is suggested that the forms either be filed in hard copy or digitally imaged for easy retrieval.

12. Are PAC solicitation calls covered by the rule?

No. Political calls are exempt from the rules.

DO NOT CALL REQUIREMENTS

13. What do the rules require?

In general, the rules require that telemarketing calls (including prerecorded telemarketing calls) not be made to people who have registered their residential and personal cell phone numbers on a national DNC list or your company specific list. The national DNC list **should be used to scrub your call lists for all covered telemarketing calls.** The rules also establish a safe harbor for telemarketing calls made in error to numbers registered on the DNC lists, require that businesses develop procedures to comply with the rules, and set parameters for automated telemarketing calls and for prerecorded telemarketing calls. In addition, the rules restrict permissible telemarketing calls (including prerecorded telemarketing calls) to 8 a.m. – 9 p.m., determined by the local time at the called person's location.

14. How do you comply with the rules?

The rules require that specific steps be taken before making telemarketing calls (including prerecorded telemarketing calls), as follows:

- 1.) Establish and implement a written DNC policy. The policy should be available upon request. (See sample policies in ATTACHMENT A);
- 2.) Train personnel on compliance procedures with your written DNC policy. The training also should include vendors making telemarketing calls on your behalf;

- 3.) Maintain a company specific DNC list. Names must be added to your company specific DNC list within a reasonable time and no more than 30 days after the request is made (if your system permits, names must be added immediately). The names on your list must be maintained for five years;
- 4.) Identify yourself. Callers must identify who they are, the name of the company they work for and either the address or telephone number of the company.

15. How do you maintain your company specific list?

You must keep a written list of all requests your company gets not to call people. You must retain these names on your company specific list for five years from the date of the request. You should remove the numbers on that list from the lists you use for telemarketing as soon as possible and not more than 30 days after the request to do so.

16. How do you access the national DNC list and how much will it cost?

The list, which consists only of phone numbers, is accessible online at <http://www.telemarketing.donotcall.gov> and is downloadable. There also is a way to check small batches of numbers free of charge at one time by entering them on the web site. The fees to purchase the national DNC list are described on www.ftc.gov.

17. How is the fee paid for the national DNC list if you use a telemarketing vendor?

Every business making telemarketing calls must register on the national registry web site and pay a fee (if applicable) to access numbers on the national DNC list. If you use a telemarketing vendor to make calls, you should negotiate if you or the telemarketing vendor will pay the fee and access the site, but your information must be registered on the site. Fee-splitting between users of the national DNC list is prohibited. For example, if a large telemarketer has 15 clients for which it makes calls, each client must register and pay the fee; the telemarketer cannot just register once and use the list for all 15 clients.

In addition, each separate corporation that will use the national DNC list must purchase it separately, including subsidiaries of a company that purchased it.

18. What if your lead-generator says that your list has been scrubbed?

You must still purchase access to the national DNC list if you are making telemarketing calls. It is illegal to sell a list that has been scrubbed without paying for each company that is using the scrubbed list. If your lead-generator does not indicate that it is paying separately for your access to the national DNC list or does not ask for your permission to register your company, your company should not use the list. Reputable list companies will require your company to register (or will register on its behalf).

19. How often do you need to check the national DNC list?

If you are making telemarketing calls, you must scrub your call list against the national DNC list no more than 31 days before making a call. The national DNC list is updated continuously, so the 31 days is a rolling period of time.

20. Can you use the national DNC list for other purposes?

No. The national DNC list may only be used by you to comply with the rules. You cannot sell it or allow any other parties to use your copy of the list (including subsidiaries), and you cannot use it for anything other than to comply with the rules.

21. Do you also have to get state do not call lists?

Many states have DNC lists or have enacted laws providing that the FTC's list will operate as their state list. It is important to check for each state where telemarketing calls will be made to determine if there is a state DNC list, and if so, to obtain and use it.

22. Do state laws on telemarketing still apply?

Some states have different rules, such as different EBR time limits or other exemptions. For *interstate* calls, the FCC rules preempt state law. Thus, the definition of EBR described above in FAQs 6-8 applies. Similarly, calls to businesses (which in some states may be covered by a state DNC list) are not covered by the FCC rules, so state laws will continue to apply.

For *intrastate* calls, the FCC preempted less restrictive state laws. Thus, any exemptions that may have existed previously under state law are no longer valid. The FCC was less clear about more restrictive state laws for *intrastate* calls. Although it did not specifically preempt such laws, it did indicate that they may be inconsistent with the national system and it may choose to preempt them on a case-by-case basis. Until the FCC acts to preempt more restrictive state laws, for *intrastate* calls you should follow more restrictive state laws.

23. Is there a way to prevent liability under the rules for calls made in violation of the rules?

Yes. Both the FTC and FCC have a safe harbor provision for the DNC rules (but the FTC's safe harbor provision does not apply to prerecorded telemarketing calls). In order to avoid liability for calls made in error to people on either the national DNC list or your company specific DNC list, you must:

- 1.) Establish and implement a written DNC policy;
- 2.) Train personnel on compliance procedures with your written DNC policy;
- 3.) Maintain a company specific DNC list;

- 4.) Use a process to access the national DNC list no more than three months before any call is made and maintain documentation of the process; and
- 5.) Not share the cost of the national DNC list with other entities or purchase it other than through the national registry, and not share the list with any other entities, including subsidiaries.

The FTC adds the further requirement that companies monitor and enforce compliance with the procedures. This requirement seems to be part of the implementation requirement, but the FTC has stated it separately.

24. Are the rules different for prerecorded telemarketing calls (so-called “robocalls”)

Prerecorded Call Rules Scope

Yes, under the FTC’s rules. As of September 1, 2009, with limited exceptions, the FTC has banned prerecorded telemarketing calls to consumers that are made without the recipient’s advance written and signed consent. This includes prerecorded calls to consumers even if they have not added their names to do-not-call lists or registries, and even if the calls are to existing customers. The rule does not apply to “live” telemarketing calls made by people. To the extent the rule conflicts with state telemarketing laws regulating the business of insurance, agents and brokers doing business in those states must comply with the state laws.

Opt-out Requirements

In addition, as of December 1, 2008, prerecorded calls from sellers (which include agents and brokers) or telemarketers must contain an opt-out mechanism to allow recipients to automatically place themselves on the seller’s do-not-call list. If the prerecorded call is answered by a person, an automated interactive voice and/or keypress-activated opt-out mechanism must be promptly available. If the prerecorded call is answered by an answering machine or voicemail service, a toll-free number must be provided that the consumer can call to be added to the seller’s do-not-call list. The calls must also allow the telephone to ring for at least 15 seconds or four rings before disconnecting an unanswered call.

Consent Requirements

In order to make a prerecorded sales call to a consumer, the rule requires that the seller, including an agent or broker, obtain prior written consent from the consumer that:

- 1.) The seller obtained after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the seller to place prerecorded calls to the person;
- 2.) Was not directly or indirectly required as a condition of purchasing any good or service;
- 3.) Evidences the willingness of the person to receive prerecorded calls by, or on behalf of, the specific seller; and

- 4.) Includes the person's telephone number, for which consent to call is given, and the person's signature. Electronic or digital signatures meet the requirement that the signatures be "written," and such signatures may be obtained by e-mail, a website form, or by a telephone key press or voice recording.

The rule requires that the consumer's consent be shown by an affirmative action, such as by checking a box – a box providing consent that is pre-checked does not comply with the rule. The request cannot be hidden, such as in small type, on the back of a document, or buried in unrelated material. In addition, consent must be obtained on a seller-specific basis, and it is not transferrable to other parties, including affiliates and marketing partners. Once obtained, there currently is no time limit or expiration period for such consent. The requirement that robocalls have an opt-out mechanism, however, applies to calls to consumers who previously provided written consent to sellers to receive such calls.

The consent requirement does not apply to prerecorded calls seeking charitable contributions, or to automated messages required when "predictive dialers" (which are machines that automatically call consumers and then connect answered calls to live agents) are used and a live agent is not available to take the call within two seconds.

Informational Calls and Mixed Message Prerecorded Calls

Purely "informational" prerecorded calls – that is, calls that do not try to interest consumers in the purchase of goods or services – are not covered by the rule. Examples of informational calls not covered by the rule include calls updating consumers on a prior sales transaction (such as when a policy already purchased is being sent out) and reminding consumers about an appointment previously scheduled by the consumer. If a prerecorded message provides information but also contains a sales component, it will be considered a "mixed message" call and is treated as a sales call subject to the rule. Examples of mixed message robocalls required to comply with the rule include prerecorded calls that provide information about the availability of any product or service (whether or not the message provides a way to purchase it), and for previous purchases, information about additional options, coverages/upgrades, alternative terms or conditions, and extended warranties.

Health Care and Other Prerecorded Calls

The rule does not apply to prerecorded health-care related messages subject to the Health Insurance Portability and Accountability Act ("HIPAA") and made by, or on behalf of, a covered entity or its business associate. In addition, the rule – like other FTC Telemarketing Sales Rule regulations – does not apply to calls from politicians (including PAC solicitation calls), banks, federal credit unions and savings and loan associations, non-profit organizations (including 501(c)(6) organizations) making calls on their own behalf, and telephone carriers, which are exempt from FTC jurisdiction.

No Existing Business Relationship Exception

As of September 1, 2009, the existing business relationship exception that previously applied to all sales calls is no longer applicable to robocalls. Having signed written consents is now the only way sellers are allowed to place prerecorded sales calls to consumers. Once consent is obtained, however, prerecorded calls may be made to the consenting consumer even if that consumer's name is on the national do-not-call registry, unless and until such consent is revoked by the consumer.

25. Who can enforce the rules?

These rules can be enforced by the FTC, the FCC, state attorneys general, and through private lawsuits.

26. What are the penalties for violating the rules?

The remedies include:

- FTC: each call made in violation of your company specific policy or the national DNC list rules is subject to a penalty of \$11,000.
- FCC: each call made in violation of your company specific policy or the national DNC list rules is subject to a penalty of \$11,000.
- State Attorneys General: can bring suit in federal court pursuant to the FCC's Telephone Consumer Protections Act of 1991 for \$500 per violation, pursuant to the FTC's Telemarketing Sales Rule for unspecified damages, and in state or federal court pursuant to state laws in varying amounts.
- Private suits: may be filed for the second call received in violation of your company specific or national DNC list rules for \$500, which can be trebled for knowing and willful violations.
- Legal action by authorized state officials or private lawsuits pursuant to applicable state laws.

OTHER REQUIREMENTS

27. Do you have to use caller-ID?

Yes, all businesses making telemarketing calls (including prerecorded telemarketing calls) have to generate caller identification. The number displayed must be a number that is answered during normal business hours and that can receive a DNC request. The number may be answered by an automated system, as long as it can receive a DNC request. When possible, you also should transmit your company name over the caller-ID.

28. What about telemarketing calls to cell phones using predictive dialers?

Telemarketing calls to all wireless numbers are prohibited when made with automatic dialing equipment. The Direct Marketing Association sells a subscription to a listing of wireless numbers for use in preventing such calls. Manually dialed calls to wireless numbers are permitted, although residential wireless numbers can be included on the national DNC list. Thus, any calls to wireless numbers must first be scrubbed against the national DNC list.

29. What rules apply if you (or a telemarketing vendor you hire) use predictive dialers to make telemarketing calls?

Both the FCC and FTC have created regulations for “abandoned calls.” This problem usually is the result of the use of predictive dialers, which are complex computer dialing systems often used by large-volume callers.

Any call that is answered by a live person but that is disconnected or not transferred to a live operator within two seconds of the completion of the called party’s greeting is considered an abandoned call. For all abandoned calls, the caller must play a recorded message with the name of the business and its telephone number (which must allow for DNC requests during normal business hours) and a statement that the call is for “telemarketing purposes.” Callers may not abandon more than three percent of calls answered by a live person. Busy signals, calls answered by answering machines or voice mail, and calls that are not answered are not counted toward the three percent limit.

The FCC rules provide for calculating the abandonment rate over a 30-day period, and the FTC requires calculating it over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.

The rules on abandoned calls will only impact large calling operations that call on behalf of a variety of companies. Because the FTC’s rules only reach calls across state lines, but the FCC’s rules reach all calls, people calling *intrastate* need not worry about the FTC’s rules on abandoned calls.

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ATTACHMENT A

Important Note: These sample policies are not the same as developing written compliance procedures, which, because they must reflect the unique operation of each company, do not lend themselves to a generic model.

Do Not Call Policy

(For companies in states that do not maintain DNC lists and states that maintain DNC lists and upload them to the national DNC List)

(Insert your company name) (Company) has adopted and adheres to the policies described below to comply with the Federal Trade Commission (FTC) and Federal Communications Commission (FCC) regulations regarding consumer requests not to receive future telephone solicitations from Company or who have placed their names on the National Do Not Call List (DNC List). Company has trained its employees engaged in telephone marketing on these policies and procedures and requires employees to follow them at all times. Company has a policy of disciplining and will discipline employees who fail to abide by these procedures.

Company utilizes two different do not call procedures: (1) it maintains a Company specific list, and removes all numbers appearing on it from Company's call lists; and (2) it accesses the national DNC List and removes all numbers appearing on it from Company's call lists.

Do Not Call Policy

(For companies in states that do maintain DNC lists but do not upload them to the national DNC List)

(Insert your company name) (Company) has adopted and adheres to the policies described below to comply with the Federal Trade Commission (FTC) and Federal Communications Commission (FCC) regulations regarding consumer requests not to receive future telephone solicitations from Company or who have placed their names on the National Do Not Call List (DNC List). Company has trained its employees engaged in telephone marketing on these policies and procedures and requires employees to follow them at all times. Company has a policy of disciplining and will discipline employees who fail to abide by these procedures.

Company utilizes three different do not call procedures: (1) it maintains a Company specific list and removes all numbers appearing on it from Company's call lists; (2) it accesses the *(insert state name)* DNC List and removes all numbers appearing on it from Company's call lists; and (3) it accesses the national DNC List and removes all numbers appearing on it from Company's call lists