

Frequently Asked Questions about Do-Not-Call Registry

As has been widely publicized, the Federal Communications Commission ("FCC") has changed its regulations ("Rules") enacted pursuant to the authority given it by Congress in the Telephone Consumer Protection Act of 1991. The Rules call for the creation of a national do-not-call registry for which consumers can register. The cold-calling activities of real estate professionals after October 1, 2003 will need to comply with the requirements of the new federal do-not-call registry.

NAR has received numerous questions about the Rules, and below is a collection of these questions and answers. Note that these are not intended to be definitive interpretations of the Rules, but rather are based on our best understanding of the FCC's actions. If you are unsure of how the Rules will impact your telemarketing activities, it is recommended that you consult with your attorney before taking any action.

What is the Do-Not-Call Registry and how did it come about?

In December of 2002, the Federal Trade Commission ("FTC") finalized amendments to the Telemarketing Sales Rule ("TSR"). Key among the changes was the development of a national "Do-Not-Call" registry directed at stopping most unwanted interstate telemarketing calls to consumers. The new FTC rules provide consumers with the ability to place their telephone number on the registry. Telemarketers will be prohibited from calling anyone whose name is on the registry unless they meet certain criteria.

In a separate but similar effort, on June 26, 2003, the FCC announced final amendments to its telemarketing rules that would, among other things, prohibit *intrastate* calls to any person on the National Do-Not-Call registry, in addition to the prohibition against interstate calls established under the FTC rule. This is a significant change and as a result, all real estate professionals making interstate as well as intrastate calls must comply with the requirements of the National Do-Not-Call registry, regardless of state law exemptions.

What if my state has a "do not call" rule that provides an exemption for real estate licensees or other real estate activity exemption? Does the FCC rule still apply to intrastate calls that are permitted under my state's law?

Yes. The FCC action preempts state law that is less restrictive. A state do not call law that provided an exemption for real estate licensees would be considered less restrictive and therefore preempted, prohibiting real estate professionals in that state from making intrastate calls to persons on the Federal list, notwithstanding the state exemption. It is also important that other exemptions in the state law such as those for existing business relationships be considered when determining compliance requirements.

How do I get the list and what does it cost?

Telemarketers will be able to access the registry on September 1, 2003. A telemarketer will receive access to the database by registering on the FTC's website. Following registration, the telemarketer will receive a unique account number that they may provide to any telemarketer or service provider that they employ on their behalf. In a real estate brokerage, real estate brokers can register and provide the account number to their agents. This will allow agents within the same brokerage the ability to access the registry under the same registration as the broker. The rules establish a bright line test under which corporate divisions, subsidiaries, and affiliates will be treated as separately for the purposes of gaining for access to the registry. Entities will be considered separate if: 1) they are separately incorporated or for a non-corporate entity such as a partnership, they are a distinct legal entity, and 2) they have different names or market their products under different names.

The list will be sorted by area code and telemarketers will be able to obtain the requested area codes from the FTC. It will be the responsibility of the telemarketer to update their lists quarterly. Five area codes will be provided at no charge and additional ones will cost \$25.00 per area code, up to a maximum annual fee of \$7,375 for access to the Entire List. These charges will give the telemarketer access to the area codes they select for one year. Following the conclusion of the year, the telemarketer will need to renew its subscription for registry, including paying additional subscription fees if it has elected to receive access to more than five (5) area codes.

The FTC will also maintain an Internet page where telemarketers can look up a single number at a time free of charge. Telemarketers can look up to ten (10) numbers at a time.

When will the "do-not-call" requirements go into effect?

Enforcement of the Do-Not-Call registry requirements will begin October 1, 2003.

Are there any exemptions to the rule? Yes. There are few exemptions to the new rules. A telemarketer may call the following:

- Consumers with whom the seller has an existing business relationship. This applies to existing clients and customers and extends for up to 18 months after the end of a transaction. If a consumer makes an inquiry, the telemarketer can call the person for up to three months after the inquiry.
- Persons who have granted prior express permission to call. This permission must be in writing.

In addition, the rules do not apply to the following entities

- Charities and tax-exempt nonprofit organizations

- Political campaigns
- Callers taking surveys or polls.

Do the new rules apply to calls made to FSBO's?

There are two instances when a real estate professional would call a FSBO seller. The first would be a real estate professional seeking a FSBO listing, and the second would be a buyer's representative who believes his/her client might be interested in a FSBO property. NAR does not see any problem with a buyer's representative contacting a FSBO owner whose number is listed in the Do -Not-Call registry about a client's potential interest in the property, as this call is not a telephone solicitation by the buyer's representative. Note that the buyer's representative can only discuss his/her client's interest in the property and not use a purported client's interest as a way to also discuss the possibility of the FSBO owner listing his/her property with the buyer's representative.

However, a real estate professional would be prohibited from initiating a telephone call to a FSBO seller whose number is listed in the Do -Not-Call registry in an attempt to obtain a listing. The rules prohibit anyone from making telephone solicitations to telephone numbers that are registered in the database, and a call initiated to obtain the listing falls within that definition. NAR is seeking clarification from the FCC for calls made to consumers in response to a yard sign or an advertisement in the newspaper that provides a telephone number. Until this clarification is provided, it is advisable to take a conservative approach and check the registry first for the telephone number, and refrain from calling if the number appears on the list.

A property that is listed on the MLS does not sell and expires. Do I have to check the Do-Not-Call registry before calling the seller to obtain this listing?

Yes, unless you were the Listing Broker on that listing, otherwise you would first need to check the Do Not Call registry before calling the seller.

Do the new rules apply to calls made to businesses?

No, the Do -Not-Call Registry is only for residential telephone numbers.

How will these new rules be enforced?

The FTC and FCC are working to develop a Memorandum of Understanding to achieve an efficient enforcement strategy.

The FCC provides for a private right of action. Aggrieved consumers can sue if they receive two calls in violation of the regulations by the same company within a twelve month period.

My state association would like to download the area codes for my state and post those on its website for use by the members. Is this permissible?

No, the Rules make it clear that the only permissible use of the registry is for compliance purposes. It is not permissible to download and distribute the lists to third parties, even if the purpose of the distribution is to help members comply with the Rules.

A consumer calls my office to inquire about a listing. Can I call this consumer to talk about other listings over the next three months, or I am limited to only discussing the property which prompted the consumer's call?

The Rules permit a company to call consumer following an inquiry for three months after the inquiry or until the consumer requests to be placed on the company's do-not-call list. There is no limit on what the company can discuss with the consumer during those three months. Thus, other listings could be discussed with the consumer over the next three months.

A former client calls and tells me a friend of hers would like me to call her to discuss the possibility of her listing her home with me. Do I have to check the Do-Not-Call registry before making this call?

Yes, you would need to check the Do-Not-Call registry because it is not clear whether this sort of indirect inquiry would qualify as a "customer inquiry" within the Rules. NAR is seeking clarification from the FCC on what exactly constitutes an "inquiry" which would give a telemarketer the ability to call someone, so perhaps following clarification from the FCC, we will be able to better address this question.

Can I call visitors to an open house who provide their phone numbers on a sign-in sheet?

Whether this would qualify as a customer inquiry is not clear from the Rules, and this is another area where NAR is seeking clarification from the FCC. The safest course would be to provide some kind of notice on the sign-in sheet alerting visitors that they are consenting to receive a follow-up call, such as providing space on the sign-in sheet for visitors to include their name, telephone number, and a box next to each line allowing the visitors to check "yes" if they would like to receive a follow-up call.

What are the fines and are there any safe harbors?

The fine for calling someone whose name appears on the Do-Not-Call Registry is up to \$11,000 per call. There is a "safe harbor" for inadvertent mistakes. To meet the safe harbor, the entity making the call must demonstrate that:

- It has written procedures to comply with the do not call requirements
- It trains its personnel in those procedures
- It monitors and enforces compliance with these procedures
- It maintain a company specific list of telephone numbers that it may not call
- It accesses the national registry no more than three months prior to calling any consumer and maintains records documenting this process
- Any call made in violation of the do not call rules was the result of an error

Source: Adapted from realtor.org - NAR