

Post, Tweet or Chat!

Managing Risk in Communication & Advertising



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Do Not Call Registry

OVERVIEW

The general rule is that you are free to make telephone calls soliciting your services or a property, unless the telephone number that you are calling appears on the Do Not Call list. In addition, you are free to continue calling persons on your “sphere of influence” list, i.e., “acquaintances”, even if their telephone numbers do appear on the National Do Not Call list. Also, keep in mind that the Do Not Call laws do not apply to calls to a consumer’s business telephone number.

Internal list. If the telephone number appears on our internal Do Not Call list, you must first obtain the recipient’s written permission before you can call that number (we expect that there will be very few numbers on our internal list).

National list. If the telephone number does not appear on our internal Do Not Call list, but does appear on the National Do Not Call list, you may still call that number, if (1) the recipient is an “acquaintance”, or (2) you have an “existing business relationship” (as defined below) with the recipient, or (3) you have received written permission from the recipient. Persons on your “sphere of influence” list should qualify as “acquaintances”, i.e., persons who, based on prior contact with you, would know who you are when you introduce yourself on the call.

SPECIFICS (NATIONAL AND INTERNAL)

A telephone number appearing with a “Do Not Call” message means that you may call that number **ONLY** under the following circumstances:

you have an **existing business relationship** with the individual whose telephone number appears with a Do Not Call message (meaning you have completed a transaction with the individual within the past 18 months or you have received an application or inquiry from that individual within the past 3 months) **and** that individual has **not** placed their name on the internal.

OR

you have received that individual’s **express, signed, written permission** to call them for telemarketing purposes.

The Registry is available here: <https://telemarketing.donotcall.gov/>.

SAFE HARBOR

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 31 days 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

FINES AND PENALTIES

The fine for calling someone whose name appears on the Do-Not-Call Registry is up to \$11,000 per call by the federal government, \$500 for a lawsuit by a state attorney general or a consumer.

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 and collect \$500 for each violation.

OFFICE POLICY

See appendix

Do Not Fax Policy

OVERVIEW

1. Sender must have an “established business relationship” with recipient or written consent from recipient prior to sending unsolicited advertising faxes.
2. Sender must have “voluntarily” received recipient’s fax number.
3. Sender must provide recipient right to opt-out of receiving future unsolicited advertising faxes.
4. Sender must honor opt-outs received from recipients within 30 days of receipt.

These rules require all messages sent via facsimile machines clearly contain the date and time that the message was sent as well as the identification of the business entity or individual sending the message and the telephone number of the machine sending the message or of the business entity or individual sending the message. This information must be contained in a margin either at the top or the bottom of each page transmitted or on the first page of the transmission. Following the issuing of the rules, an FCC order clarified that the rules also apply to the sending of faxes to personal computers equipped with, or attached to, modems and to computerized fax servers.

Opt-out Requirement

All faxes containing unsolicited advertisements must contain an opt-out mechanism to allow the recipient the ability to opt-out of receiving future advertising faxes from the business. The opt-out must also be included in advertising faxes even when the sender has the recipient’s written consent to send the fax. The opt-out requirements are:

- (1) Opt-out must be clear and conspicuous in its terms and on the first page of the fax (cover sheet if using one).
- (2) Opt-out must state that the recipient has the right to opt-out of future unsolicited advertisements, and that the sender’s failure to comply with opt-outs within 30 days is unlawful.
- (3) Opt-out must provide a domestic telephone and fax number where the recipient can send opt-out request as well as provide a cost-free mechanism for opting-out, if neither of the first two methods qualifies as a cost-free mechanism. The opt-out mechanism must be available 24 hours a day, 7 days a week.

SAMPLE OPT OUT

Opt-Out Request: The recipient of this facsimile may make a request to the sender not to send any further facsimiles. All such opt-out requests should be faxed to 555-123-4567 and the request must identify the telephone number(s) of the facsimile machine(s) to which the opt-out request applies. Opt-out requests may be faxed any time, 24 hours a day and 7 days a week. The failure by the sender to comply with an opt-out request within the time frame to be determined by the FCC is unlawful.

Opt-Out Request: The recipient of this facsimile may make a request to the sender not to send any further facsimiles. All such opt-out requests should call 1-800-555-1234 or email me @myrealestatecompany.com and the request must identify the telephone number(s) of the facsimile

machine(s) to which the opt-out request applies. The failure by the sender to comply with an opt-out request within the time frame to be determined by the FCC is unlawful

SAMPLE CONSENT

See Appendix

PENALTIES

The penalties for violating the TCPA are \$500/fax, with treble damages for willful violations. Consumers have a private right of action under the law, so the law can be enforced by consumers, state attorney generals, or the FCC.

Do Not Email/CAN SPAM Act

OVERVIEW

Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM)

Congress created the Act to give recipients the ability to limit the number of unsolicited commercial electronic mail messages (otherwise known as "spam") they receive. The Act does not prohibit the sending of these messages, unless the recipient has "opted out" of receiving future electronic mail messages from the sender. Rather, the Act imposes certain requirements on senders who send commercial electronic mail messages.

For real estate professionals and REALTOR® associations, the relevant provisions of the Act require that all commercial electronic mail messages contain the following: (1) a legitimate return e-mail and physical postal address; (2) a clear and conspicuous notice of the recipient's opportunity to "opt-out," or decline to receive any future messages; (3) opt out mechanism active for at least 30 days after message transmission; and (4) clear and conspicuous notice that the message is an advertisement or solicitation.

OPT-OUT PROCESS

The new requirements specify that senders cannot complicate the opt-out process. You can only require an e-mail address on the opt-out page that visitors get to when they click the "unsubscribe" link in your e-mail, and you can't require a user to visit more than one Web page to opt out.

If you require users to log in to an account with a username and/or password to "manage their e-mail preferences" when all they want to do is unsubscribe, you're out of compliance. If you have an opt-out survey or a five-page opt-out process designed to make your customers think twice before opting out, you are not in compliance with the law. Charging a fee or requiring any information beyond their e-mail address is now strictly prohibited.

The single-page, single e-mail address form, Web-based opt-out has always been considered a best practice, and now that level of simplicity is a requirement by the law. Keep in mind that you can, however, ask for more information on the opt-out page — you just can't require it.

One thing that did not change is the 10-day opt-out rule. The reality is that spammers do not honor opt-outs at all while legitimate marketers have not been opportunistic with the 10-business-day window, so the FTC saw no reason to shorten the time frame.

OFFICE POLICY

Running an effective and ethical bulk-mail list takes a lot of work. You could put together the tools to do this work for yourself (and such tools are often free or of very low cost), but you might find that you'd be spending too much time running your list and not enough running your business.

There are several companies that specialize in helping small businesses and institutions run mailing lists or vendors that can handle not only your marketing electronically but the CAN SPAM requirements as well.

PENALTIES

Each violation of the above provisions is subject to fines of up to \$11,000. Deceptive commercial email also is subject to laws banning false or misleading advertising.

Calling on Expired Listings

ETHICS

Article 16 is intended to recognize as unethical two basic types of solicitations:

telephone or personal solicitations of property owners who have been identified by a real estate sign, multiple listing compilation, or other information service as having exclusively listed their property with another REALTOR®; and mail or other forms of written solicitations of prospects whose properties are exclusively listed with another REALTOR® when such solicitations are not part of a general mailing but are directed specifically to property owners identified through compilations of current listings, “for sale” or “for rent” signs, or other sources of information required by Article 3 and Multiple Listing Service rules to be made available to other REALTORS® under offers of subagency or cooperation.

Standard of Practice 16-4

REALTORS® shall not solicit a listing which is currently listed exclusively with another broker. However, if the listing broker, when asked by the REALTOR®, refuses to disclose the expiration date and nature of such listing; i.e., an exclusive right to sell, an exclusive agency, open listing, or other form of contractual agreement between the listing broker and the client, the REALTOR® may contact the owner to secure such information and may discuss the terms upon which the REALTOR® might take a future listing or, alternatively, may take a listing to become effective upon expiration of any existing exclusive listing.

“DO NOT CALL” LIMITATIONS

The general rule is that you are free to make telephone calls soliciting your services or a property, unless the telephone number that you are calling appears on the Do Not Call list. In addition, you are free to continue calling persons on your “sphere of influence” list, i.e., “acquaintances”, even if their telephone numbers do appear on the National Do Not Call list. Also, keep in mind that the Do Not Call laws do not apply to calls to a consumer’s business telephone number.

Advertising

Advertising laws, regulations, Code of Ethics and practices apply to all forms of advertising. In 2018 we can consider the following as forms of real estate advertising:

Print ads,
Web,
Direct mail,
Target marketing,
E-mail and
Social Media

New York

§175.25 Advertising

Pennsylvania

§ 35.305. Business name on advertisements.

New Jersey

SUBCHAP ILR 6. CONDUCT OF BUSINESS

11:5-6.1 Advertising rules

RESPONSIBLE PARTY

New York

§175.25 Advertising

Pennsylvania

§ 35.305. Business name on advertisements.

New Jersey

SUBCHAP ILR 6. CONDUCT OF BUSINESS

11:5-6.1 Advertising rules

FAIR HOUSING

New York

Article 15 Human Rights Law §296 Unlawful discriminatory practices

Pennsylvania

Human Relations Act 43 P.S. § 951 - 963

New Jersey

Fair Housing Act N.J.S.A. 52:27D-301

Discriminatory advertising – no one can make, print or publish discriminatory ads including those who are exempt.

1. Ads that contain words, phrases, symbols or visuals that indicate a discriminatory preference or limitation.
2. Ads that selectively use media, human models, logos and locations to indicate an illegal preference or limitation.
3. Refusal to publish ads because of protected class.

Steering - the illegal practice of directing a member of a protected class towards or away from a particular area or neighborhood. This practice makes certain homes unavailable to people based on such things as race, national origin, familial status or any of the federal or state protected classes.

Steering is often subtle and difficult to detect, homeseekers can be unaware that their choices have been limited. Words, phrases or actions that are intended to influence the choices of a prospective buyer are discriminatory actions.

Preference implicit or implied.

False denial of availability – indicated through words or conduct limiting information.

Risk Management

- Adherence to standard policy and procedures
- Monitor your action for appearance and effect
- Avoid any false representations
- Good communication
- Never relate ethnic jokes, never use ethnic, racial or other stereotypes, whether the intent is positive or negative
- Maintain accurate records

Gifts or Inducements

Although not per se unethical, the offering of premiums, prizes, merchandise discounts or other inducements to list, sell, purchase or lease are subject to the limitations and restrictions of state law and the ethical obligations established by any applicable Standard of Practice.

Agents

All monies received for the performance of an agent's duties described by law must come from their employing broker. All monies paid as a referral fee allowed by law must be paid from a broker to a broker.

Consumers

The offering of prizes or merchandise discounts is not unethical or illegal even if it requires a person to list or purchase a home. However, law and the NAR Code of Ethics does require that all advertisements clearly state what the customer must do in order to receive the gift (e.g. Must he/she buy a home that is one of the REALTORS' ® listings? Must he/she purchase a home when you are acting as a co-broker on another firm's listing?).

Third Party

A former client or an unlicensed third party who assists a broker in the procuring of prospects by referring customer may not receive some type of valuable consideration (e.g. - gift certificate), since they are neither a licensee nor a principal to the transaction.

Compliance with Marketing Regulations in Web Sites

Disclosures

Many disclosures required under state and federal law to be made to the consumer by the Brokerage or agents in their “bricks and mortar” world such as their office should be made in their “virtual world” such as their websites. Such disclosures are:

Fair Housing

Agency

Information Disclaimer

These disclosures can often be in a conspicuous place to the public as links contained in the footer of the website. In some instances, such as information disclaimers they should be more closely attached to a page on a website such as the property search page and the property data page.

Agent Website/Broker Identification

Reference state advertising laws above.

Standard of Practice 12-5 Realtors® shall not advertise nor permit any person employed by or affiliated with them to advertise real estate services or listed property in any medium (e.g., electronically, print, radio, television, etc.) without disclosing the name of that Realtor's® in a reasonable and readily apparent manner either in the advertisement or in electronic advertising via a link to a display with all required disclosures.

(Adopted 11/86, Amended 1/16)

Privacy Policy

Internet Privacy: Before anyone submits personal information to anyone, on the Internet or elsewhere, they should be certain that the information will be held in trust and used only in ways that they have authorized. They should also confirm that their personal information will not be transferred or sold to any third party without their consent.

If you publish an electronic newsletter (ezine), your subscribers will feel more secure if they know that you will not forward their names or email addresses to any third party without consent.

Standard of Practice 12-11 Realtors® intending to share or sell consumer information gathered via the Internet shall disclose that possibility in a reasonable and readily apparent manner. (Adopted 1/07)

On-Line Classifieds

Advertising by any other name is still advertising. On-line classifieds although easy to access, submit data and at little to no costs are no different than the print advertising the industry has been using for years. Things to consider when placing an on-line classified.

- Who is on the site?
- What information can you post?
- Is it text only, or is there a multimedia capability?
- How easy is it to find the site?
- Are you addressing the needs of the seller or buyer?

It is also important to remember that all laws and regulation regarding real estate advertising apply.

Compliance with Marketing and Disclosure Regulations in Email

SIGNATURE FILE

Signature files should be created for all emails. Identification of Broker which includes name, address and phone number must be included.

Agency Disclosure

Pennsylvania - § 455.608. Information to be given at initial interview.

For the purposes of this section, the initial interview is the first contact between a licensee and a consumer of real estate-related services where a substantive discussion about real estate needs occurs.

NEW JERSEY - 11:5-6.9 CONSUMER INFORMATION STATEMENT

No later than Buyer agreement or Listing agreement

New York - §443. Disclosure regarding real estate agency relationship; form

No later than Buyer agreement or Listing agreement

STATUTE OF FRAUD

Can online communication be considered a contract in writing? The answer appears to be an overwhelming yes, coming from the courts. In cases all across the country we are seeing decisions being handed down that enforce contracts created in writing by the use of emails and texts.

Appendix

Creating an Office Policy for DNC Rules

Implementation of an office policy to comply with the federal Do Not Call rules ("Rules") and regulations is necessary for companies to qualify for the rules. Qualifying for the "safe harbor" protects a company from a lawsuit if the company inadvertently calls a number on the national DNC registry ("Registry"). A company should create an office policy even if it plans to hire an outside service to assure its compliance with the Rules, since the safe harbor could still protect your company from lawsuits resulting from a failure of a DNC compliance service.

Creating a policy will require careful thought by the company and will require more than simply printing out a form. Consultation with your company's legal counsel during the creation of your company policy is recommended. Management should consider how it wants to structure a policy that will ensure its firm is in compliance with the rules as well as create a system which works with the company's business model. This article will describe each step of the process, and offers suggestions on what issues should be considered.

Please be aware that this entire article addresses the federal Telemarketing rules only. These Rules only preempt less restrictive state rules, so a company in a state which has rules more restrictive than the federal rules will need to be aware of those rules because those rules will not be preempted. Compliance with non-preempted state rules should be included in the brokerage's policy.

A. Strategize DNC Compliance Plan

The first step for your company is to consider your options and develop a policy that best fits your company's needs. Before embarking on this step, you should be familiar with the Rules and their requirements. Initial issues to consider:

- Who will have responsibility for accessing the Registry? Is your company going to hire a third party for Registry access or for other compliance services?
 - In which area codes does your company make telemarketing calls?
- What process for compliance best suits your company's business model? How do you want to involve the salespeople/employees in the compliance process?
- Who will train salespeople/employees about how to comply with the Rules and the company's policies?
 - Who will be in charge of administering the company-specific do not call list?
- What would be the best communication mechanism between the company and its salespeople/employees for compliance information with the Rules? Are the company's salespeople/employees centrally located or do they work from a variety of different locations? If the salespeople/employees do not work in a central location, then your policy will need to make sure the salespeople/employees can access this information from other locations.

Once your company has developed its basic compliance strategy, it can begin the process of drafting its written Do Not Call Compliance policy ("Policy"). The five elements of a Rules compliance plan that satisfies the safe harbor requirements are the following:

- (A) Written procedures to comply with the Rules;
- (B) Training personnel to comply with the procedures established to comply with the Rules;
- (C) Maintaining a list of telephone numbers the firm may not call (the "company-specific list");
- (D) Use of a process to prevent telephone solicitations of numbers on the DNC list, using a version of the list not more than 31 days old and maintaining records documenting the process;
- (E) Use of a process to ensure that the firm does not sell, rent, lease, purchase or use the DNC list for any purpose other than compliance with the Rules, including acquiring the list from the FTC and not participating in any effort to share the costs of obtaining the list with others.

What follows are the various elements that a Policy which satisfies these requirements must contain.

B. Registry Access

The Policy should describe how the company will purchase access to the Registry and comply with the Rules. Registration is required even if your company uses a DNC compliance service.

The Policy should state your company has access to the Registry for the appropriate area codes. The Registry is organized in a way that is designed to provide flexibility to users. The phone numbers in the Registry are organized by area code, and they can be either downloaded from the Registry site or obtained through an interactive search feature on the Registry site. When a company creates a Registry account, it receives two passwords: one for the "Authorized Representative", one for the "Downloader". The Downloader password only allows access to the area codes which the "Authorized Representative" has selected.

The policy should describe how the company will provide Registry access to its salespeople/employees. Here are three options available:

- 1. Distribute the Downloader password to all individuals who make telemarketing calls, and require them to check the numbers against the Registry via the interactive search.*
- 2. Designate one individual or group as responsible ("DNC Compliance Specialist") for providing a clean list to all who make telemarketing calls.*
- 3. Designate a DNC Compliance Specialist to periodically download all area codes to which the company subscribes from the Registry and to make those area codes available to everyone who makes telemarketing calls. A company selecting this option could accomplish this in a number of different ways, from downloading the area code lists in Word Pad and distributing them electronically (i.e., via email) to creating its own interactive search feature on its company intranet site for its salespeople/employees to use for searching numbers.*

Your plan should also set forth how often the Registry will be accessed. This will depend on your company's compliance strategy. If, for example, you determine that agents must check every number to be called against the Registry via the interactive Registry search, your policy should state "All numbers not otherwise qualifying for one of the specific exceptions shall be checked via the Registry's Interactive search feature no more than 24 hours prior to making the call." Or, if you intend to provide a list or searchable database for use by agents, your policy must provide that you update the database at least every three months, as required by the Rules.

D. Company Specific Do Not Call List

A company needs to have a process in place for creating and monitoring a list of numbers of individuals who requested not to receive any further phone calls from your company. A request to be placed on such a "company-specific do not call list" must be honored for up to five years and supercedes any exception that would otherwise allow a company to call a consumer. The Policy must address the process for creating the company-specific do not call list, such as by one individual being assigned the responsibility for maintaining the list, and implementing a centralized system where the DNC numbers will be available for access. Regardless of the company's Policy, it must make sure all of its salespeople/employees know what to do when they receive a consumer request to be placed on the company-specific do not call list and also that all salespeople/employees have access to and know to check the company-specific do not call list prior to making any telemarketing phone calls.

E. Company Policy for Telephone Conduct & Training

A company is also required to provide training to its salespeople/employees on how to comply with the Rules. The Policy should describe the training process. Training should take place prior to any telemarketing. As part of the training, it is recommended that brokers obtain a signed acknowledgement that the employee has taken the training and received a copy of the company's procedures for appropriate telephone conduct. The procedures the company gives to its salespeople/employees should include the following:

- Information on what the Rules require. NAR's "Do Not Call/Do Not Fax Toolkit" collects a variety of resources on this topic.
- Procedures agents must follow prior to making telemarketing calls. These steps will depend on how your company requires salespeople/employees to comply with the Rules. Some firms may provide them with "clean" numbers (that is numbers which are not on the Registry or qualify for one of the exceptions). Other firms may require salespeople to check the numbers on their own, in which case the policy needs to list the steps that must be followed to check phone numbers before calling. These might include checking the number to see if any exceptions (written permission, "Existing Business Relationship", personal relationship with recipient, response to an inquiry) allow calls to consumer; if not, then check the Registry
- The times of day/night when calls can be made. The Rules permit calls to be made only from 8am-9pm (local time where call is going to be received) although some state laws shorten this time frame (it is permissible in every state to allow solicitations between 10 am- 8 pm, Monday-Saturday, local time)
 - Allow phone to ring for the longer of four rings or fifteen seconds before hanging up
- Compliance with the Rules' provisions on facsimile transmissions. While the FCC is currently reconsidering its proposed ban on commercial facsimile transmissions without prior written permission, note that unsolicited commercial facsimile transmissions remain illegal.
 - Prohibiting use of autodialers or prerecorded messages
 - Prohibiting the blocking of caller identification services
 - Maintaining a company specific "do not call" list (see above)
- What telemarketers need to say during every call (name, company name, and have contact information available)
 - Maintaining confidentiality of any lists downloaded from the Registry
- Specifying unacceptable conduct during a call (examples: repeatedly calling the same number; allowing phone to ring numerous times; abusive tactics such as threats or obscene language; or hanging up when consumer begins to request placement on company's do-not-call list).

F. Conclusion

Creating an office policy is a necessary step for a company to qualify for the safe harbor provision contained in the Rules, which will allow the company to avoid liability for inadvertent calls made to numbers listed in the Registry. Since there are many different ways a company could choose to create its policy, there is no simple "one size fits all" policy. Rather, a company first needs to think through each step of the compliance process and then create its own policy to meet its company's needs and business model.

SAMPLE
XYZ Brokerage Firm
Do Not Call Compliance Policy

(Note: These procedures must be tailored to the specific policies, methods and practices that a real estate firm intends to implement to insure that all personnel comply with the Federal Do Not Call telemarketing rules. Other provisions may be added, as necessary to insure compliance with other do not call requirements of state law.)

In order to comply with the requirements of the Federal Do Not Call telemarketing rules (“Rules”), all telemarketing by brokers and agents of XYZ Brokerage shall comply with the following:

1. Written procedures to comply with the DNC Rules:

.....

2. Training XYZ Brokerage Personnel:

.....

3. Establishing and maintaining the “company-specific” Do Not Call list:

a. If an agent telephones an individual who requests not to receive future telephone calls, the agent will record the name of the person called, the telephone number called, and the date and time of the call. The agent will report that information via written memorandum or email, to _____

b. _____ has the responsibility to maintain the “XYZ Brokerage–specific” do not call list. Within _____ hours or receiving a new name/telephone number, he/she will add such individual’s name and telephone number to the list.

c. The XYZ Brokerage–specific do not call list will be maintained (location) and accessible by (how)

4. Processes to prevent telephone solicitations of numbers on the DNC list:

.....

5. Process to ensure that the firm use the DNC Registry for purpose of compliance with the Rules only:

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DC Office: 500 New Jersey Avenue, NW, Washington, DC 20001-2020
1-800-874-6500

Facsimile Consent Form

Name: _____ Fax Number: ()

I hereby consent to receive fax transmissions sent from [insert local/state/National Association of REALTORS® or real estate firm name] to my fax number(s) set forth above.

Signature: _____

Date: _____

Web Sites

Fair Housing

www.hud.gov/offices/fheo/index.cfm

Environmental

<http://vnrc.org/>

www.epa.gov

Policy

www.realtor.org/eomag.nsf/pages/legalsp09

www.realtor.org

Laws

New Jersey

https://www.njrealtor.com/uploads/legal/REC_Statute_Rules.pdf

Pennsylvania

https://www.njrealtor.com/uploads/legal/REC_Statute_Rules.pdf

New York

<https://www.dos.ny.gov/licensing/lawbooks/RE-Law.pdf>