

# Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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## Federal "Do Not Call" and "Do Not Fax" Regulations

Spurred on by increasing public annoyance with telephone solicitation calls invading the privacy of the home, the Federal Trade Commission (FTC) announced the creation of the national "do not call" registry and revisions to the FTC interstate telemarketing rules in January 2003. On March 11, 2003, President Bush signed the Do Not Call Implementation Act, which provided funding for the implementation and enforcement of the national "do not call" registry and required the Federal Communications Commission (FCC) to issue additional updated telephone solicitation rules. It was expected that the FCC would announce telemarketing rules that essentially mirrored the FTC interstate rules, but on June 26, 2003, the FCC unexpectedly announced federal "do not call" rules that will apply to both intrastate (within the state) as well as interstate (between states) calls beginning October 1, 2003. The FCC rules also extend the scope of the national "do not call" registry to include both residential and wireless telephone numbers and create new requirements for unsolicited faxed advertisements.

Despite the enactment of the new federal rules, Wisconsin's "do not call" law and regulations remain in effect. Under the new federal rules, the FCC preempts or supersedes any state telemarketing laws that are less restrictive than the FCC rules, but the Wisconsin rules are essentially

more restrictive than the FCC rules. If Wisconsin REALTORS® are in compliance with Wisconsin law, they will be in substantial compliance with FCC and FTC regulations as well.

This *Legal Update* reviews the highlights of the revised FTC and FCC telemarketing regulations, and explains the mechanics of the national "do not call" registry. The *Update* explains how to stay in compliance with all applicable laws and rules when making telephone solicitation calls within Wisconsin and to locations outside of the state. The *Update* then discusses the regulations applicable to unsolicited facsimile transmissions, both under the FCC rules and the Wisconsin statutes, and includes compliance pointers. The *Update* concludes with a second look at Legal Hotline questions regarding telephone practices for Wisconsin REALTORS® and the revised answers resulting from the application of the new federal rules.

REALTORS® should be cautioned that although the information in this *Update* represents the best information currently available on the new federal regulations for telephone solicitations and fax transmissions, many questions remain unresolved and many details have yet to be provided. As the federal agencies provide clarifications, brokers will be updated in Wisconsin REALTORS® Association publications and hot tips.

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## FTC And FCC Revised Telemarketing Regulations

The new federal regulations recently enacted by the FTC and the FCC were created under the authority given to them by Congress in the Telephone Consumer Protection Act of 1991 (TCPA). The TCPA gives both the FTC and the FCC jurisdiction over telemarketing practices, and both are responsible to enact implementation regulations.

### Telephone Consumer Protection Act of 1991

Congress enacted the TCPA on December 20, 1991, to protect the public from the growing number of telephone marketing calls. The TCPA restricts automatic telephone dialing systems, artificial and prerecorded messages, and unsolicited facsimile advertisements. Specifically, the TCPA makes it illegal to use any automatic telephone dialing system or an artificial or prerecorded voice to call: any emergency telephone line; any guest or patient room in a hospital, health care facility, nursing home, or similar establishment; or a paging service, cellular telephone service, or any service where the party called is charged for the call. It is also illegal to call any residential telephone line using an artificial or prerecorded voice message without the prior express consent of the called party, to send unsolicited facsimile advertisements, or to use an automatic telephone dialing system to tie up two or more telephone lines of a business. The TCPA specifically authorizes the “establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations.”

### FTC–Interstate Calls

The FTC’s Telemarketing Sales Rule (TSR) requires telemarketers to pay the applicable fees, search the national “do not call” registry every three months and remove phone numbers

that are on the registry from their call lists. If an interstate solicitation call is made to a home or cell phone telephone number on the national registry, the consumer may file a complaint with the FTC. In addition to establishing the national “do not call” registry, amendments to the TSR restrict call abandonment, crack down on unauthorized billing, and require telemarketers to transmit caller ID information.

### Coverage of the FTC’s amended TSR

The TSR applies to any plan, program or campaign to sell goods or services through interstate phone calls. This includes telemarketers and sellers, like REALTORS®, who provide services and goods to consumers in exchange for payment.

### Exceptions to the TSR

The general rule is that it is illegal for telemarketers and sellers to call a number on the national registry. There are, however, a few exceptions:

- Established business relationship. A telemarketer or seller may call a consumer with whom it has an established business relationship for up to 18 months after the consumer’s last purchase, delivery, or payment, even if the consumer’s number is on the national registry.
- Inquiry or application. A company may call a consumer for up to three months after the consumer makes an inquiry or submits an application to the company, even if the consumer’s number is on the national registry.
- Written permission. If a consumer has given a company written permission, the company may call the consumer even if the consumer’s number is on the national registry.
- Company “do not call” lists. A company may not call a consumer—regardless of whether the consumer’s number is on the registry—if the consumer has asked to be put on the company’s “do not

call” list. If the consumer makes a specific request to a company not to call, the company may not call, even if it has an established business relationship with the consumer. If the company calls again, it may be subject to a fine of up to \$11,000.

- **Charitable contributions.** Telemarketers soliciting charitable contributions do not have to access the national “do not call” registry, but they must honor “do not call” requests from individual consumers.
- **Politics and surveys.** Calls from political organizations and telephone surveyors are exempt. However, callers purporting to take a survey, but also offering to sell goods or services must comply with the “do not call” provisions.
- **Exempt industries.** Long-distance phone companies and airlines, and insurance companies operating under state regulations remain exempt from the TSR.

#### **Rules for Interstate Solicitations of Charitable Contributions**

Telemarketers soliciting on behalf of a charitable organization must promptly identify both the organization and the fact that the call is being made to solicit a charitable contribution. If a third-party telemarketer is calling on behalf of a charity, a consumer may ask not to receive any more calls from or on behalf of that specific charity. If a third-party telemarketer calls again on behalf of that charity, the telemarketer may be subject to a fine of up to \$11,000.

#### **Call Abandonment Procedure to Protect a Company from Liability**

The business or telemarketer must:

- Ensure that no more than three percent of calls that are answered by a person are abandoned, measured each day per calling campaign;
- Allow each called consumer’s telephone to ring for at least 15 sec-

onds or four rings before disconnecting;

- Connect each call to a sales representative within two seconds of the consumer’s greeting, or, if a sales representative is not available to speak with the consumer within two seconds of the call being answered, you must play a recorded message stating the name and telephone number of the seller.
- Maintain records showing compliance with the requirements for abandonment rate, ring time and recorded message.

#### **New Provision to Require Caller ID Transmission**

Telemarketers must transmit their telephone number, and if possible, their name, to consumers’ caller ID services. This provision will take effect one year after the release of the TSR.

#### **Other TSR Provisions That Impact Telephone Solicitation Calls**

- Telemarketers and sellers may call consumers only between 8:00 a.m. and 9:00 p.m.
- Telemarketers must promptly identify themselves as a seller and explain that they’re making a sales call before pitching a product or service.
- Telemarketers must disclose all material information about the goods or services they are offering and the terms of the sale. Misrepresenting any terms or conditions of the sale is prohibited.
- New provisions were enacted to restrict unauthorized billing.

For more information on the TSR, visit <http://www.ftc.gov/bcp/conline/edcams/donotcall/index.html>.

#### **FCC–Interstate & Intrastate Calls**

On June 26, 2003, the FCC revised its rules implementing the TCPA and

joined efforts with the FTC in establishing the national “do not call” registry. The two sets of federal regulations have many similarities, but there also are some significant differences:

1. **Intrastate Calls.** The FCC regulations apply to intrastate calls when the applicable state law is not more restrictive, as well as to interstate calls.
2. **Fax Rules.** The FCC regulations create new requirements requiring companies to obtain express permission in writing before sending unsolicited faxed advertisements to its customers. The FCC revised its earlier determination that an established business relationship constitutes express invitation or permission to send an unsolicited fax. The regulations are discussed at length in the “Unsolicited Facsimile Advertisements” section beginning on page 8 of this *Update*.

#### **Calls Covered by the FCC’s Amended Rules**

Telemarketers are prohibited from making telephone solicitation calls to the numbers consumers place on the national “do not call” registry (subject to certain exceptions). The national registry will cover both interstate and intrastate telemarketing calls made to residential and wireless telephone numbers.

The FCC rules specifically provide that, “No person or entity shall initiate any telephone solicitation ... to

... a residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government. Such do-not-call registrations must be honored for a period of five years.”

“The term telephone solicitation means 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, but such term does not include a call or message:

- (i) To any person with that person's prior express invitation or permission.
- (ii) To any person with whom the caller has an established business relationship; or
- (iii) By or on behalf of a tax-exempt nonprofit organization."

### **Exceptions to the FCC "Do Not Call" Rules**

Under both the FTC and FCC regulations, a telemarketer or seller may call a consumer with whom there is an established business relationship for up to 18 months after the consumer's last purchase, delivery or payment. The consumer may also be called for up to three months after the consumer makes an inquiry or submits an application to the company, or the consumer may be called if he or she has given express permission in a signed written agreement containing the consumer's consent to be called and the telephone number that may be called.

Under each set of rules, companies and telemarketers relying upon the prior express permission exemption must obtain the consumer's signed, written agreement to be contacted by the seller at telephone number listed in the consent. However, any time a consumer asks a company not to call, this trumps any prior written consent or established business relationship.

Tax-exempt non-profit organizations (including charitable organizations) and political and religious calls are exempt and not subject to the national "do not call" requirements. Long-distance phone companies and airlines, and insurance companies operating under state regulations are exempt under the FTC rules, but not

under the FCC rules.

The FCC rules do, however, allow for a personal relationship, which is not found under FTC rules. This exemption allows telemarketers to call friends, family members and acquaintances.

### **Accidental Calls to a Number on the National "Do Not Call" Registry.**

Prudent brokers who are subject to the FCC rules and who allow or require cold calling may want to take advantage of the safe harbor provisions under the FCC rules that protect a seller from liability for FCC rules violations if the broker can demonstrate that under its routine business practice: (1) it has established and implemented written procedures to comply with the national "do not call" rules; (2) it has trained its personnel in the procedures established pursuant to the national "do not call" rules; (3) it has maintained and recorded a list of telephone numbers it may not contact; (4) the broker uses a process to prevent telemarketing to any telephone number on any list established pursuant to the national "do not call" rules employing a version of the "do not call" registry obtained from the national registry no more than three months prior to the date any call is made, and maintains records documenting this process; and (5) any subsequent call otherwise violating the "do not call" rules is the result of error.

### **Internal "Do Not Call" Lists**

A long-standing provision under the FCC rules is the requirement to maintain a list of persons who request not to receive telemarketing calls. The procedures instituted must meet the following minimum standards:

1. Written policy. Persons or entities making calls for telemarketing purposes must have a written policy, available upon demand, for maintaining a do-not-call list.

2. Training of personnel engaged in telemarketing. Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the do-not-call list.

3. Recording, disclosure of "do not call" requests. If a person or entity making a call for telemarketing purposes receives a request from a consumer not to receive calls from that person or entity, the person or entity must record the request and place the consumer's name, if provided, and telephone number on the "do not call" list at the time the request is made. A consumer's request to not be called must be honored within a reasonable time from the date the request is made, not exceeding 30 days from the date of the request.

4. Identification of sellers and telemarketers. A person or entity making a call for telemarketing purposes must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted.

5. Maintenance of "do not call" lists. A person or entity making calls for telemarketing purposes must maintain a record of a caller's request not to receive further telemarketing calls and honor the request for five years from the time the request is made.

### **Impact of the FCC Rules on State Telephone Solicitation Law and "Do Not Call" Lists**

The FCC rules constitute minimum standards and therefore supersede or preempt all less restrictive state "do not call" rules. States may continue to enforce state regulations governing intrastate telemarketing that are consistent with or more restrictive



than the TCPA and the FCC rules.

The FCC will not require states to discontinue the use of their own “do not call” lists once the national “do not call” registry goes into effect on October 1, 2003. However, the TCPA prohibits a state from using any “do not call” list that does not include the part of the national “do not call” registry that relates to that state. Thus, state “do not call” lists must include all the registrants on the national database for that state beginning October 1.

### **FCC Rules Regarding Automated and Predictive Dialers**

There are restrictions on the use of automatic dialing machines designed to reduce the annoying “hang-up” and “dead air” calls that consumers often receive. The FCC rules provide that a telemarketer may abandon no more than three percent of calls answered by a person and must deliver a prerecorded message when abandoning a call. In addition, automatic dialing systems or an artificial or prerecorded voice cannot be used to make calls to: (1) emergency lines; (2) private rooms at health care facilities; or (3) paging services, cellular services, specialized mobile radio service or other radio common carriers, or any services for which the party is charged for the call. Automatic telephone dialing systems cannot tie up two or more phone lines of a multi-line business are engaged simultaneously.

### **FCC Rules for Abandoned Calls**

Abandoned calls cannot account for more than three percent of all telemarketing calls answered by a live person during a 30-day period. “Abandoned calls” are telephone calls placed by an automated dialer where the recipient is not connected to a live sales representative within two seconds of the recipient’s completed greeting. If a live sales representative is not available, the recipient must receive, within two seconds of

answering the call, a prerecorded message stating the name and telephone number of the caller and stating that the call was for telemarketing purposes. Records must be maintained on “abandoned calls” that can establish a company’s compliance. An unanswered telemarketing call cannot be disconnected prior to at least 15 seconds or four rings

### **FCC Rules for Caller Identification**

The FCC rules prohibit telemarketers from blocking caller ID information, and require all telemarketers to transmit caller identification information, when available. Entities making telephone solicitations must provide an address or phone number for the entity during the call.

All artificial or prerecorded phone messages must: (1) identify the business responsible for the call at the beginning of the message; and (2) provide a phone number for the company during or after the message that the recipient can use to add his or her name to the company’s “do not call” list.

### **Consumer Remedies for a Telemarketer or Seller in Violation of the Federal “Do Not Call” Rules**

A consumer can file a complaint on the national registry’s Web site using the “File a Complaint” page at <http://donotcall.gov/Complain/ComplainDefault.aspx>, which will be active starting October 1, 2003, or by calling (888) 382-1222 or TTY (866) 290-4236. The consumer must know either the name or the phone number of the company that called them. The FTC or FCC will then investigate, possibly leading to government enforcement action.

Instead of filing a complaint with the federal agency and allowing the agency to investigate, consumers have the opportunity to directly sue a telemarketer or seller for damages. The FCC rules also establish a private cause of action for the prohibited use of automatic dialing systems, artificial

or prerecorded messages, unsolicited facsimile advertisements, and for violations of the “do not call” regulations. This private lawsuit, however, is to be filed in state court, provided the suit is otherwise allowed by state law. It is not clear if this will apply in Wisconsin under FCC pre-emption and a solid answer will have to wait for FCC interpretive guidance.

For more information, see the FCC Do-Not-Call Regulations White Paper for Wisconsin REALTORS® from LaFollette, Godfrey & Kahn at <http://wra/pdf/resources/fccno-callmemo.pdf>, and the summary of the FCC regulations at <http://wra/pdf/resources/fccregs.pdf>.

## **National “Do Not Call” Registry**

The national “do not call” registry is a computer database of the telephone numbers of consumers who do not wish to receive telephone solicitation calls at home or on their cell phones. The FTC will manage the national “do not call” registry, and the FTC, FCC and state officials will enforce the federal “do not call” regulations.

The national “do not call” registry is nationwide in scope, includes all telemarketers and sellers making telephone solicitation calls (except for certain non-profit organizations), and covers both interstate and intrastate telemarketing calls to residential and cell phone numbers.

### **Consumer Registration**

Wisconsin has reported that it will not share the numbers on its existing state “do not call” list with the national registry. As a result, Wisconsin consumers who want their number on the national “do not call” registry must register either online at <http://www.donotcall.gov/> or by calling (888) 382-1222, TTY (866) 290-4236 from the telephone number the person wants to register. Consumers may register cell phone numbers. Registration is free and is good for five years.

## **Calls Covered by the National “Do Not Call” Registry**

The FTC’s “do not call” provisions cover any plan, program or campaign to sell goods or services through interstate phone calls. This includes calls by telemarketers who solicit consumers on behalf of others and sellers who are paid to provide or arrange to provide goods or services to consumers. The term telephone solicitation means a telephone call for the purpose of encouraging the purchase of, rental of, or investment in property, goods or services.

## **Frequently Asked Questions About the National “Do Not Call” Registry**

*Can a company use numbers on the registry for any purpose other than preventing telemarketing calls?*

No, the registry may not be used for any purpose other than preventing telemarketing calls to the numbers on the registry. Any entity that accesses the national registry must certify that it is accessing the registry solely to comply with the federal “do not call” rules or to prevent calls to numbers on the registry.

*How can a company access the registry?*

The FTC is preparing a fully automated and secure Web site at [www.telemarketing.donotcall.gov](http://www.telemarketing.donotcall.gov) to provide access to the registry’s database of telephone numbers, sorted by area code. (That Web site is NOT yet available.)

*When can a company access the national “do not call” registry?*

The national “do not call” registry will be available to the telemarketing industry September 1, 2003. Enforcement of the national “do not call” registry begins October 1, 2003. Companies must access the registry and remove the numbers on the registry from their calling lists by

October 1, 2003 to be in compliance with the federal “do not call” rules.

*What information must a company provide to access the registry?*

The first time a company accesses the system, the company will be asked to provide certain limited identifying information, such as the company name and address, contact person, and the contact person’s telephone number and e-mail address.

*How much does it cost to access the registry?*

Data for up to five area codes will be available for free. Beyond that, there is an annual fee of \$25 per area code of data, with a maximum annual fee of \$7,375 for the entire United States database. The “annual period,” is defined as the 12 months following the first day of the month in which the company paid the fee. For example, a seller who pays its annual fee on September 15, 2003, has an “annual period” that runs from September 1, 2003 through August 31, 2004.

*Who must pay the fee?*

All sellers covered by the federal rules must pay the appropriate fee for data from a particular area code before they call, or cause a telemarketer to call, any consumer within that area code, even those consumers whose telephone numbers are not on the registry. The only exceptions are for sellers that call only consumers with which they have an existing business relationship or written agreement to call, and do not access the national registry for any other purpose. But before placing calls on behalf of a seller-client, telemarketers are required to ensure that their seller-client has paid the appropriate annual fee.

*How can a company pay the fee?*

Fees will be payable via credit card (which will permit the transfer of data in the same session, if the payment is approved) or electronic funds transfer

(EFT). EFT will require a wait of approximately three days for the funds to clear before data access will be provided.

*What happens after a company pays for access?*

The company will be given a unique account number and permitted access to the appropriate portions of the registry. On subsequent visits to the Web site, the company may download either a full updated list of numbers from the selected area codes, or a more limited list, consisting of changes to the registry (both additions and deletions) that have occurred since the day of the last download. The change file will consist of each telephone number that has changed, whether it was added or deleted, and the date of the change.

*How often must a company access the registry and remove numbers from their calling list?*

After October 1, 2003, a company will have to synchronize their lists with an updated version of the registry every three months.

*How often may a company download data from the national registry?*

A company may access data as often as they like during the course of their annual access period. However, to protect system integrity, a company may download data files from the national registry only once in any 24-hour period.

*What information can a company access from the national registry?*

The only consumer information that companies will receive from the national registry is registrants’ telephone numbers, sorted by area code. Companies will be able to access as many area codes as desired.

*May a company check just a few numbers at a time to see if they are registered?*

Companies that have paid the appropriate fee will be allowed to check up to ten telephone numbers at a time via interactive Internet pages. This will permit small volume callers to comply with the “do not call” requirements without having to download a potentially large list of all registered telephone numbers within a particular area.

*What format will the registry use?*

Data also will be available in three different sets: full lists, change lists, and small list look-ups. Full lists and change lists will be available as flat files or XML tagged data files. With a Web browser, a company will access a secure Web page to select the preferred download set. For the small list lookup, a company will be asked to enter from one to ten telephone numbers on an online form. After entering the numbers and clicking a button, the national registry will display the list of entered numbers and whether each number is in the national registry.

Companies will be limited to the numbers in the area code(s) to which they have subscribed. The full list will contain just ten-digit telephone numbers, with a single number on each line. For the change list in flat file format, each line of the file will contain a telephone number, the date of the change, and an “A” (for Added) or “D” (for Deleted). Change lists will be available to provide changes on a daily basis (representing the additions and deletions from the day before).

*What happens to companies that don't pay for access to the national registry?*

A company that is a seller or telemarketer could be liable for placing any telemarketing calls (even to numbers NOT on the registry) unless the seller has paid the required fee for access to the registry. Violators may be subject to fines of up to \$11,000 per violation and each call may be considered a separate violation.

*What if a company calls a number that's not on the registry without checking the registry first?*

It's against the law to call (or cause a telemarketer to call) any number on the registry (unless the seller has an established business relationship with the consumer whose number is being called, or the consumer has given written agreement to be called). It's also against the law under the FTC regulations for a seller to call (or cause a telemarketer to call) any person whose number is within a given area code unless the seller first has paid the annual fee for access to the portion of the registry that includes numbers within that area code.

*What is a company's liability if the company inadvertently calls a number on the registry?*

The TCPA has a “safe harbor” for inadvertent mistakes. If a seller or telemarketer can show that, as part of its routine business practice, it meets all the requirements of the safe harbor, it will not be subject to civil penalties or sanctions for mistakenly calling a consumer who has asked for no more calls, or for calling a person on the registry. To meet the safe harbor requirements, the seller or telemarketer must demonstrate that it:

1. Has written procedures to comply with the “do not call” requirements
2. Trains its personnel in those procedures
3. Monitors and enforces compliance with these procedures
4. Maintains a company-specific list of telephone numbers that it may not call
5. Accesses the national registry no more than three months before calling any consumer, and maintains records documenting this process

6. Any call made in violation of the “do not call” rules was the result of an error.

## **REALTOR® Pointers for Calling Wisconsin Numbers**

REALTORS® and other professionals in Wisconsin who make telephone solicitation calls will have to comply with both the Wisconsin and the FCC rules for intrastate calls.

### **Signed, Written Consent to Call a Consumer's Residence**

The first key to concurrent compliance with both the Wisconsin and FCC rules will be to obtain a signed, written consent from the person giving permission to call the specified home and cell phone numbers.

Wisconsin law requires an affirmative request for the call, but does not require that the request be in writing. The FCC rules, on the other hand, mandate a written consent.

In those situations where REALTORS® proceed on the basis of a verbal request, it will be prudent to follow up with a signed written consent. The intervening time from the person's verbal permission to call and the time that a written signed consent is obtained generally will be covered by a federal rule exemption such as the exemption for the three months following an inquiry or application regarding a property, product or service offered by the company. For example, if a consumer calls in during a floor time period and asks to be called back with additional information about one or more properties, the prudent response under Wisconsin law is to secure verbal permission to call and to document that verbal permission in a file or log book. To ensure compliance under the federal rules, the next step would be to seek a signed written consent confirming the prior verbal permission.



## Wireless Telephone Numbers

The second key to concurrent compliance with both the Wisconsin and FCC rules is to remember that signed written consents will be necessary for cell and mobile phones as well as for home telephones starting October 1, 2003.

REALTORS® should consider revising the forms and language presently used for obtaining a person's consent to call the home telephone number to include consent to call the person's cell phones.

### Wisconsin "Do Not Call" List

No agent can legally make a "telephone solicitation" call to a number on the Wisconsin "do not call" list unless the broker is registered with DATCP as a telephone solicitor or the purpose of the call is exempt. For all calls where there is no affirmative request or written consent for a call to a residential or cell phone number, the broker must register with DATCP as a telemarketer and observe the "do not call" restrictions.

Brokers who allow or require cold calling without a prior consumer request for the cold call will not be able to escape DATCP's telephone solicitation registration requirements and fees. Contact DATCP for a registration packet (phone: (608) 224-4999, fax: (608) 224-4939, or at <https://nocall.wisconsin.gov/web/includes/help/telemarketerfaq.asp>), then register and pay their fees. If the broker/company is registered, then the agents can make telephone solicitation calls to the telephone numbers that are not on the "do not call" list, and can make calls under the Wisconsin telephone solicitation exceptions.

### National Registry Safe Harbor

NAR's attorneys recommend that Wisconsin brokers also register for the national registry, obtain the Wisconsin numbers from the national registry and follow the remaining

safe harbor steps stated on page 7 of this *Update*. This ensures protection from liability under the FCC rules. Whether this is mandatory for brokers in a state like Wisconsin, where all of the national registry numbers for Wisconsin are required by federal law to be added to the state no call list, is not known. No one can know for sure until the FCC issues interpretive and advisory guidance regarding the preemption provisions of the FCC rules.

### REALTOR® Pointers for Calls to Other States

Wisconsin REALTORS® who make telephone solicitation calls to consumers in other states must comply with the FTC and FCC rules and the laws in those states. Wisconsin "do not call" statutes and rules do not apply to interstate calls.

### Compliance with all National Registry Provisions

To the extent that a broker requires or permits cold calls to consumers in other states, the broker must access the national registry for the area codes that will be called after paying the appropriate fees. Brokers will have to fully comply with all federal telephone solicitation rules including all rules in the national "do not call" registry section beginning on page 5 of this *Update*.

Brokers who allow or require cold calling should follow the FCC safe harbor provisions that will protect from liability for violations of the federal rules. These provisions are outlined on page 7 of this *Update*.

### Compliance with State Laws

Brokers who place calls to telephone numbers in other states may have to comply with the state law in the state called if the laws in that state are more restrictive than the FCC rules and not preempted by the FCC rules. Brokers placing these type of calls may wish to review *Legal Update*

03.03 which provides a preliminary evaluation of the telephone solicitation laws in surrounding states (<https://www.wra.org/Legal/LegalUpdates/2003/lu0303.asp>) before seeking assistance from their company attorney for specific guidance.

### Unsolicited Fax Advertisements

The Telephone Consumer Protection Act of 1991 (TCPA) prohibits the use of any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine. An **unsolicited advertisement** is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." Under current Federal Communications Commission (FCC) regulations, a person or business may transmit unsolicited advertisements if there is established business relationship.

On July 25, 2003, the FCC published amended facsimile rules that originally were to go into effect on August 25, 2003. However, the FCC issued an order on August 18, 2003, postponing the effective date.

### FCC Fax Rules August 25, 2003 - December 31, 2004

During the sixteen-month period beginning August 25, 2003 and ending December 31, 2004, REALTOR® associations and brokers do not have to obtain signed written consents before they send unsolicited fax advertisements to individuals and businesses with whom they have established business relationships. However, they still must obtain prior express permission from fax recipients with whom they do not have established business relationships.

Under the FCC's new definition of an "established business relation-



ship," which does go into effect on August 25, 2003, there must be a prior or existing relationship formed by a voluntary two-way communication between the entity sending the faxed ad (transmitting entity) and the individual or business receiving the fax (fax recipient). This relationship must be based on the fax recipient's purchase or transaction with the transmitting entity within the last 18 months, or on the fax recipient's inquiry or application regarding products or services offered by the transmitting entity within the last three months.

Therefore, until January 1, 2005, a company or individual may transmit an unsolicited faxed advertisement if the transmitting entity has:

1. The prior express permission of the fax recipient. REALTORS® may continue to use the "Consent to Fax" form on page 12 or the Communication Consent form on page 13 of this Update for this purpose.
2. A prior or existing business relationship formed by a voluntary two-way communication, and based upon the fax recipient's purchase or financial transaction with the transmitting entity within the last 18 months. This will cover REALTOR® relationships with current and past clients and customers, and with REALTOR® associations and multiple listing services.
3. A prior or existing business relationship formed by a voluntary two-way communication, and based upon the fax recipient's inquiry or application regarding products or services offered by the transmitting entity within the last three months. This will cover REALTOR® relationships with new prospects, and REALTOR® association relationships with non-members calling to purchase

goods and services.

### **FCC Fax Rules January 1, 2005**

Beginning January 1, 2005, the FCC facsimile rules will require that a person or business obtain the prior express consent of the fax recipient before transmitting an unsolicited advertisement. This permission must be in writing, clearly state that the recipient consents to receiving faxed advertisements, give the recipient's fax number and include the recipient's signature. The rule applies to all businesses and persons and there are no exceptions. Examples of faxes that cannot be sent by brokers or associations, beginning January 1, 2005, without prior written consent include:

- Property data sheets
- Comp book order forms
- Education flyers
- Convention deadline reminder
- Applications for new MLS Participants
- Membership dues renewal notice

Brokers may fax offers to purchase and other negotiation forms to each other and to consumers without consent, as well as other information such as school district reports or a copy of an applicable law.

NAR, state and local associations will be allowed to fax strictly informational material to members, including political or advocacy messages, regardless of whether or not the fax recipient has given advance written permission. Any general information that does not include an advertisement will not be subject to the FCC fax rules. If, however, those informational materials contain any product sales information prior written permission will again be required.


### **Consent to Fax Form**

Before the rules go into effect on

January 1, 2005, parties may fax consent forms to others, which can be signed and returned by fax. After the rules are in effect, parties may NOT fax an authorization form to others, but others may print out a form sent by e-mail or from a Web site, or take a form received in the mail and sign it and fax it back. A sample Consent to Fax form appears on page 12 of this Update. Brokers may use this generic faxing consent form to obtain the consent of clients, customers, brokers or others to receive faxes from the broker.

Consent for a given fax number should be given by an individual with authority for that fax number. However, having the consent of the managing broker to transmit to the office fax machine may not be enough if you wish to transmit a fax to a particular sales associate. NAR observes that the rules seem to require the consent of the specific recipient. One way to deal with this is to fax to the broker and put a note on the cover sheet asking the broker to deliver the faxed material to the agent.

The term "signature" in the amended rule may include an electronic or digital form of signature to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law. The recipient must clearly consent to receive faxed advertisements from the company or person to whom permission is given, and provide the individual or business fax number to which faxes may be sent. Once written permission is granted, it generally remains in effect until the fax recipient notifies sender otherwise.

 **REALTOR® Practice Tips:** Incorporate fax consent language into documents requesting consent to call. Consent to fax language may be incorporated into agency disclosure forms, agency agreements and other documents

presently used to secure consent to call parties at their home telephone numbers.

Violations of the FCC fax rules will subject the offender to potential FCC enforcement, state enforcement, and more importantly, a possible private lawsuit for up to \$1,500 (\$500 per violation, which can be trebled if the violation is knowing and willful).

The FCC rules also contain identification requirements for all fax transmissions of unsolicited advertisements. Companies sending messages via telephone facsimile machines may only transmit faxed messages which identify the sending person or company to the message recipients, state the telephone number of the sending machine, and indicate the date and time sent.

### **Wisconsin Law Prohibiting Unsolicited Fax Messages**

Wis. Stat. § 134.72 also contains prohibitions regarding the sending of unsolicited facsimile messages. Under the statute, a facsimile solicitation is defined as “the unsolicited transmission of a document by a facsimile machine for the purpose of encouraging a person to purchase property, goods or services.” The statute provides that a person may not send a facsimile solicitation without the consent of the person solicited unless the document transmitted by facsimile machine does not exceed one page in length, is received after 9 p.m. and before 6 a.m., and the person sending the facsimile solicitation has had a previous business relationship with the recipient. In addition, a person may not send a facsimile solicitation to a person who has notified the sender in writing or by fax that the person does not want to receive any fax solicitations. The statute applies to any intrastate facsimile solicitation and any interstate facsimile solicitation received by a person in Wisconsin. Violators may be required to forfeit not more than \$500. There are no

published state or federal opinions that discuss the statute or reporting enforcement of the provision.

This statute should not have much, if any, impact upon brokers who generally send faxes in response to requests for information. Brokers who fax MLS datasheets to the MLS do not do so for the purpose of encouraging the MLS to buy the property. Thus, these fax transmissions do not appear to fit within the Wisconsin definition of a facsimile transmission. However, it does suggest that associations or other groups that do send out fax messages advertising products and services to members should do so overnight or should have the consent of the fax recipients.

### **Legal Hotline Questions Revisited**

The following Legal Hotline questions originally were asked with respect to Wisconsin’s “do not call” statute and rules. The questions are being repeated below because the FTC and FCC regulations have changed some of the answers. The entire group of telephone solicitation questions and the revised answers appear on the WRA Web site at [http://wra/legal/Hottips/management/telephone\\_solicitation.asp?](http://wra/legal/Hottips/management/telephone_solicitation.asp?)

*If a buyer’s agent sees a home advertised in the newspaper with a telephone number, can the buyer’s agent call the number?*

The owner’s ad arguably invites agents to bring buyers to the owner. The agent arguably may call the owner if that is the sole purpose of the call and the agent does not attempt to sell the owner any goods or services. The ad is not an affirmative request for brokers to call and pitch their listing services. If the FSBO owner is on the “do not call” list, the agent may contact the FSBO seller by any means other than a call to a residential telephone number or cell phone number on the “do not call” list, or a fax transmission.

*Since the “do not call” list went into effect, an agent started e-mailing FSBOs offering a free home selling consultation along with his resume. A few have replied saying it is illegal for the agent to do this and if the agent continues, he will be reported, etc. The agent has taken them off his list. Is the agent doing anything wrong?*

At present there are no laws regulating the sending of e-mail, but it is wise to not upset individuals who do not wish to receive unsolicited e-mails.

*Can a licensee still call a customer’s cell phone or is consent required for that, too?*

Under the federal telephone solicitation rules enacted by the FCC, cell phone numbers will be included on the national “do not call” registry. Therefore, signed, written consent is needed if the cell phone number is on the national registry.

*If the WRA is successful with its legislative, administrative or legal efforts to invalidate the rules, will we be able to go back to the old days of calling people who are on the “do not call” list?*

The FCC rules provide the minimum standards for intrastate calls across the nation and will apply to calls within Wisconsin if Wisconsin “do not call” rules become less restrictive.

*If I can’t call people on the “do not call” list how can I contact them?*

- If you have consent you can call them.
- If they are not on the “do not call” list you can call them.
- You can call them at work.
- You can e-mail them.
- You can fax them if you have express permission or an established business relationship.

- You can send mailings.
- You can meet them in person.

***What language should be used on an open house register to get permission to call a prospect back?***

Brokers cannot just put a disclaimer on the top of the sign-in sheet and then rely upon the fact that a prospect signed on another page. The prospects must make an affirmative request and this must be an informed consent. The language requesting follow-up calls about the open house property and/or other properties may need to be repeated on each page. It is also recommended that the prospect have to check a box or circle “yes” or “no” regarding the request for follow-up calls to home.

The language used will be different than the WRA sample language for agency contracts and disclosure forms. In this situation, the prospect may indicate, for example, “The open house host or hostess has my permission to call me at home or on my cell phone about the property I have just seen and similar properties on the market,” and provide a space for the prospect to write down the numbers that can be called. A procedure for using the language may also be added to the office policy manual. Brokers may also wish to incorporate consent to fax language as well—this would require consent language and spaces where the prospect would fill in his or her fax number and his or her signature.

***If another broker sends a broker the name of a prospective buyer as a referral, may the broker call that prospect?***

No, the broker needs an affirmative request from that prospective buyer. The referral from the other broker does not give this permission. The broker may call the prospect at work, send e-mail, write a letter or knock on the door, but the broker cannot call the prospect at home or on his or her cell phone if the prospect’s num-

bers are on the “do not call” list, nor transmit a fax—unless the broker has express permission or an established business relationship. FCC telephone solicitation rules require that consent be in writing and signed by the prospect.

***Does a FSBO ad in the paper work as permission to call the owner and offer listing services?***

No, the owner’s ad arguably invites agents to bring buyers to the owner. It is not an affirmative request for brokers to call and pitch their listing services. If the FSBO owner is on the “do not call” list, then the broker may contact the FSBO by any means other than a call to a residential or cell phone number on the “do not call” list or a fax transmission.

***If someone calls in while an agent is on floor time, how does the agent get permission to call the person back and follow up with information about properties?***

The agent may verbally ask for permission to call the person back, keep a log of verbal consents and follow up in writing. If a prospect says the agent may call him or her back with information about certain properties, the agent should record the person’s name, telephone number, specific consent and other contact information in a log. The agent’s conversation with the prospect must be clear and exact because any consent is limited to the purpose of that request. For example, “If you would like me to keep you up to date on any properties (in that price range, neighborhood, size, etc.), what is the best way for me to contact you? If you want me to call you at home or on your cell phone, the new telephone no-call rules require that I get an affirmative request from you. (Record contact information and purpose for any requested calls to the home in a log) Let me make sure that I understand: You are giving me permission to call you at home or on your cell phone for the purpose of \_\_\_\_\_, is that cor-

rect?” (Record purpose/limits for residential calls in a log)

It will be very helpful to get additional contact information such as work telephone numbers, e-mail addresses and mailing addresses. These may all be used to full advantage and will come in handy when the agent follows up to secure a written request for telephone calls. The agent may fax property datasheets or other documents in the nature of an advertisement for property, goods, or services for the three months following the prospect’s inquiry or with the express permission of the prospect.

***How long may a broker call back buyers based upon previous inquiries?***

Although the DATCP “do not call” rules allow calls made in response to the call recipient’s affirmative request for a call, the rules do not have a timeframe for return calls. Brokers should not assume that any inquiry from a buyer prospect about properties constitutes an affirmative request for return telephone calls. This may be sufficient under FCC rules where an inquiry triggers a three-month window when return calls may be placed, but under Wisconsin law any request or consent needs to be specific. Brokers should develop systems to document the scope of the authorization given by the consumer for follow-up calls, including telephone numbers and time limits.

***Can REALTORS® still do cold calling in Wisconsin if they have signed up and paid for the non-solicitation directory?***

Registration is only the first step to compliance with the “do not call” rules and regulations. Agents should check with their broker-owners to see what the office policy for calling activities will be given the DATCP no-call rules. Cold calling can be done to any number not on the “do not call” list. No agent can legally make a telephone solicitation call to a



number on the “do not call” list unless the purpose of the call is exempt. The registration fees as well as overview of the “do not call” rules are found in *Legal Update 02.11*.

In addition, brokers should also access the Wisconsin numbers on the national registry and follow the safe-harbor procedures to ensure maximum liability protection under federal law.

### Communication Consent

See the Communication Consent Form on page 13 of this *Update*. This form is designed for brokers to use with their customers and clients. The form collects contact information from customers and clients and secures the required written consents needed for certain faxes and telephone calls. In the form, the consumer gives written permission is needed to transmit unsolicited facsimile advertisements and to make telephone solicitation calls. The form may be completed to name a real estate company or a specific agent, in the discretion of the consumer.

### “Do Not Call” and “Do Not Fax” Resources

See the Telemarketing Solicitation Rules & the No Call List REALTOR® Resource page at [www.wra.org/nocalls](http://www.wra.org/nocalls) and the FCC fax regulations at [www.wra.org/faxregs](http://www.wra.org/faxregs) for additional information.

- FTC Web site at: [www.ftc.gov/donot-call](http://www.ftc.gov/donot-call)
- FCC Web site at [www.fcc.gov/cgb/donotcall](http://www.fcc.gov/cgb/donotcall)

### Conclusion

The multiple layers of regulations restricting telephone calls and faxes can be very confusing and frustrating. The basic rules generally applicable to REALTORS® in Wisconsin—in particular, those who make cold calls within Wisconsin—are:

- Get consents to call in writing, stating the residential and cell phone numbers that may be called and signed by the person giving the consent.
- Get consents to fax in writing, stating the facsimiles numbers that may be used and signed by the person giving the consent.
- Sign up for the national do not call registry and obtain the Wisconsin numbers (no charge for up to five area codes).
- Follow the federal safe harbor procedures under the federal “do not call” rules to optimize liability protection.

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**This *Legal Update* and other *Updates* beginning with 92.01 can be found in the members-only legal section of the WRA Web site at: <http://www.wra.org>.**

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