



Do-Not-Call Q&A Pennsylvania Law/Federal Rules

The Pennsylvania Telemarketer Registration Act, (“Pennsylvania Act”), as amended, applies to telephone solicitation and marketing activities performed by REALTORS® in Pennsylvania. The Federal Communications Commission, (“FCC”), in conjunction with Federal Trade Commission, (“FTC”), have issued rules and regulations (“Federal Regulations”) creating a federal do-not-call registry which will have similar, but slightly different, effects on those same activities. This document will help to explain the relationship between the state law and federal regulations and to instruct REALTORS® how to remain in compliance with both.

Q: Do these rules apply to REALTORS®?

A: Yes. Although REALTORS® may not consider themselves to be “telemarketers,” as the term is commonly used, most telephone solicitation and marketing activities performed by REALTORS® fit within the definition of “telemarketing” under the Pennsylvania Act and especially under the broader Federal Regulations definition of telemarketing.

Q: Should I follow the Pennsylvania Act or the Federal Regulations?

A: The FCC has created regulations that govern both intrastate (within the state) and interstate (state-to-state) telemarketing calls. These regulations will pre-empt any state law which is more lenient than the Federal Regulations, but will allow state laws which are more restrictive to be given full effect within that state. This means that where the Pennsylvania Act is more restrictive, state law will; where the Federal Regulations are more restrictive, however, the regulations will govern all calls made into our out of Pennsylvania. In other words, REALTORS® will have to comply with the most restrictive provisions of each in order to lawfully solicit business by telephone.

Q: What is “telemarketing”?

A: The Pennsylvania Act defines “telemarketing” as a “plan, program or campaign” which is conducted to induce the purchase of consumer goods and services (including the sale of real property and a real estate broker’s services) by “use of *more than one* telephone call.” The Federal Regulations, however, define it as a “person or entity that initiates a telephone call or message....” The Federal definition is narrower than the state definition, making it clear that a single phone call can be considered telemarketing. It is clear that most “cold calling” or “mass marketing” programs performed by REALTORS® (or others on their behalf) will constitute “telemarketing.”

Q: What do the Pennsylvania Act and Federal Regulations prohibit?

A: The Pennsylvania Act generally prohibits anyone engaging in “telemarketing” from contacting any consumer whose name appears on the state Do-Not-Call List. The Federal

Regulations contain a similar prohibition with respect to the national list. The Federal Regulations also require each company to maintain a “company-specific” do-not-call list composed of consumers who have directly contacted the company to request placement on such a list. The consumer’s name must remain on the company-specific list for a minimum of five years. All telemarketing is prohibited before 8:00 a.m. and after 9:00 p.m. under both state and federal law.

Q: What Do-Not-Call list should I use, and where can I find it?

A: The Pennsylvania Act created a state Do-Not-Call list. The Federal Regulations, jointly enforced by the FCC and the FTC, created a national Do-Not-Call list. The Federal Regulations will allow states to maintain their own lists, but will require each state-specific list to include all persons registered on the national list.

Amendments to the Pennsylvania Act in September, 2003 authorized the Attorney General of Pennsylvania to release data from the Pennsylvania list to the federal list administrator for inclusion on the federal list. The amendment also allows the state Attorney General to enter into an agreement with the administrator of the federal list to administer the Pennsylvania list. On May 11, 2004, the Attorney General sent data from the Pennsylvania list to the FTC for inclusion in the Federal list, but **DID NOT** authorize the FTC to act as the list administrator. This means that while at least some consumers on the PA list are also on the Federal list, Pennsylvania telemarketers are still required to access both lists.

The Pennsylvania Act requires telemarketers to obtain updated lists from the PA List Administrator every calendar quarter, and to cease calling anyone on that updated list within 30 days of the release of the list. A CD copy of the revised list is automatically provided to subscribers at the end of each calendar quarter. The Federal Regulations require telemarketers to download or otherwise access the national list at least every 31 days. The national list is updated with a new registrant’s telephone number within hours of registration and is available for download from the FTC Web site at any time. Telemarketers may access the list at any time, but must do so at least every 31 days. Note that there are no automatic updates send by the FTC; telemarketers must access the list directly.

Q: Is there a cost for the Do-Not-Call list?

A: The cost to access the Pennsylvania list is \$465/year. The Pennsylvania list can be obtained from the Direct Marketing Association (DMA) at www.the-dma.org. You can also check numbers against the state list at no charge by going to the PAR Web site at www.parealtor.org and accessing our registry verification feature in the password-protected Pro-WEB portion of the site.

The Federal list is accessible via the Web at <http://telemarketing.donotcall.gov>. Access is free for up to 5 area codes. Each area code after the first 5 incurs a cost; the current cost (as of December, 2006) is \$62/year. Rather than download the list to your computer, you can check phone numbers online at this site after you have registered for access. Note that you cannot check the Federal Do-Not-Call list through the PAR Web site.

Q: Are there any other lists I need to worry about?

A: Aside from the state and federal lists, each telemarketer must also maintain an “internal” company-wide Do-Not-Call list with numbers from consumers who have specifically requested to

not be contacted by that telemarketer. A consumer must be added to the internal list within a maximum of 30 days after any request to be added. While individual licensees may choose to maintain their own Do-Not-Call lists, it is advisable for brokers to maintain brokerage-wide lists that are distributed to each licensee and staff. This list should include anyone who made a request through staff or through any licensee.

Q: How can I tell if a number is “safe” to call?

A: REALTORS® who conduct any telephone marketing activities must be sure to procure or access the new or updated State List from the List Administrator or a service provider every calendar quarter. REALTORS® will also have to obtain the relevant portions of the federal list a minimum of once 31 days (updates are not automatically provided). REALTORS® must also maintain their own company-specific lists. Prior to making any telephone solicitations the telephone number of the consumer to be contacted should be cross-referenced with the most recent state, federal and company-specific do-not-call lists possessed by the REALTOR®. If the telephone number is found on one of those lists the REALTOR® may not call that consumer unless one or more of the exceptions defined below applies to that consumer.

Q: What is the “Established Business Relationship” exception?

A: The Pennsylvania Act provides that you may contact those customers whose names appear on the List if you have “an *established business relationship* within the **past 12 months** preceding the call.” The Federal Regulations expand the time period for the exception to 18 months following a purchase, rental, lease or financial transaction between the telemarketer and consumer. In this case the Pennsylvania Act is more restrictive and **the 12 month rule must be followed in Pennsylvania**. Also, a request by a consumer to be placed on a company-specific do-not-call list will negate this exception under the Federal Regulations.

The Pennsylvania Act defines “established business relationship” somewhat broadly to include any “voluntary two-way communication” between you and the customer that was based on “an inquiry, application, purchase or transaction by the [consumer].” The Federal Regulations separately allow for “an inquiry or application regarding a product or service offered by a seller” to qualify as an established business relationship, but limits the time period for a return call to the consumer to three months in that scenario.

Therefore, to comply with the federal and state rules if the “established business relationship” is based solely upon a prior “inquiry or application” by the customer that did not result in a sale, lease or consummation of a transaction, you may only contact the customer within three months of the date of the original inquiry/application by the consumer (Federal Regulations) and you must immediately obtain permission to continue the conversation regarding the new subject matter (Pennsylvania Act/Federal Regulations).

Q: Are there any other exceptions to the ban on these telemarketing activities?

A: There are a few additional important exceptions of which REALTORS® should be aware.

Under the Pennsylvania Act if you have obtained “consent” or are responding to an “express request” to contact a customer, you will not be in violation of the Pennsylvania Act. However, the

Federal Regulations are more restrictive and require “written permission,” rather than simple consent or a verbal request. While the Federal Regulations require a signed writing to evidence such a request or consent, the following examples would likely qualify under this exception. [Note that they examples may also qualify separately under the federal version of the Established Business Relationship exception, discussed above.]

Example 1: The “consent” or “express request” exception can be easily satisfied in situations where a consumer contacts a REALTOR®’s office to inquire about his or her services or a particular property.

In that instance, if the REALTOR® is unavailable, the receptionist or person taking the phone message should **specifically ask the caller** whether he or she wishes to have the REALTOR® return the call. The response should be conspicuously noted on the message slip. In this way, if the customer desires a return call, there is a record of his or her “consent” to, or “request” for, a return call. For purposes of the Federal Regulations this would qualify as an “inquiry” satisfying the federal Established Business Relationship exception and would allow a return call to the consumer within **three months** of the consumer’s call to the REALTOR®. If the customer declines the invitation, the REALTOR® should avoid contacting the caller.

Example 2: Suppose that a consumer contacts the office of a REALTOR to inquire about purchasing a particular property, but decides, during the telephone call, that she will be unable to afford the price. May the REALTOR® contact her about another property if he or she subsequently locates something more suitable?

Under the Pennsylvania Act the best practice is for the REALTOR® to inquire whether he or she may contact the customer in the future. In this way he or she has requested “consent.” If you fail to do so, and subsequently contact the consumer, you may be risking liability, though the state version of “Established Business Relationship” exception (discussed above) could be employed.

OTHER EXCEPTIONS: The Federal Regulations allow for a “personal relationship” exception. However, no personal relationship exception exists in the Pennsylvania Act, therefore, Pennsylvania REALTORS® may not call consumers in Pennsylvania based on a personal relationship exception. Exceptions also exist for tax exempt organizations and political campaigns, but are generally not applicable to REALTORS®.

Q: What about Caller ID Information?

A: The Pennsylvania Act prohibits telemarketers from blocking their telephones Caller ID information from being received by a consumer. **The Federal Regulations, which are more restrictive and therefore controlling, require telemarketers to transmit Caller ID information wherever technologically possible when making telephone solicitations.**

Q: Are there any restrictions on faxes or e-mail?

A: While the Pennsylvania Act currently has no restrictions on fax solicitations, the **Federal Regulations allow the faxing of advertisements only with permission of the recipient.** Written permission is not yet required, but may be required starting in January 2005 unless currently

suspended portions of the Federal Regulations are revised before then. Permission for the faxing of advertisements may be implied from the existence of an Existing Business Relationship as defined below. The telephone number of the sending machine, the date and time a fax was sent and the identity of the sender must be transmitted with each fax advertisement.

Commercial e-mail solicitations are governed by the 2004 Federal “CAN-SPAM” law. Additional information on this law can be found on Do-Not-Call Resources page of the PAR Web site at www.parealtor.org.

Q: Are there any other prohibitions?

A: The Federal Regulations have specific rules regarding abandoned calls, predictive dialers, blast faxes and other methods more commonly employed by professional telemarketing groups/associations which may be obtained from the FCC or FTC if needed. If you use any of these marketing methods you should check with your attorney or your broker’s attorney about compliance issues.

Q: What if I/we mistakenly contact someone on the List?

A: The Pennsylvania Act and the Federal Regulations both provide a good faith exception. If a REALTOR®’s office: (1) adopts a written policy; (2) trains its personnel about prohibited conduct under the Pennsylvania Act/Federal Regulations; and (3) maintains and records current (i.e. obtains or downloads the state and/or federal lists within three months prior to the inadvertent call) lists of residential subscribers who may not be contacted, then a REALTOR® who mistakenly contacts a person identified on the List will not be penalized for the inadvertent contact.

Q: Where can I find a sample brokerage policy?

A: PAR has posted a sample office policy on the Do-Not-Call Resources page of the PAR Web site at www.parealtor.org. Note that this policy is only a broad outline of possible positions that may be taken by a brokerage and is not meant to be adopted without revision. Decisions on certain aspects of the policy may depend on other broker policies and procedures, and all brokerage policies should be reviewed by brokerage counsel to be sure they meet both your business and legal objectives.

Q: What if someone wants to see my brokerage Do-Not-Call policy?

A: In the case of licensees and staff, to qualify for the good faith exception above a broker must not just have a Do-Not-Call policy, but must also properly train staff on the implementation of the policy. As such, all licensees and staff in an office should have a copy of the policy and should confirm in writing that they have received and read it, and that they understand their obligations.

The law also provides that a consumer is entitled to receive a copy of an entity’s Do-Not-Call policy upon request. If a consumer contacts your brokerage in any manner to request a copy of the policy, you should send it to them – preferably via certified mail or some other means that allows you to verify receipt.

Q: What should I do if I am not sure about my responsibilities?

A: You should discuss the issue with your broker or appropriate supervisor. If you are still unsure how to handle a situation, PAR members may contact the PAR Legal Hotline or contact the Attorney General's Office, FCC or FTC.

Q: What are the penalties for violating the Pennsylvania Act and/or Federal Regulations?

A: Violating the Pennsylvania Act can subject you to penalties of up to \$1,000 per call. In certain circumstances you could be liable for triple damages. The Federal Regulations contain provisions providing for fines up to \$500. You could also be subject to "administrative forfeiture" proceedings that could involve amounts of up to \$11,000 per call. Further the Federal Regulations provide for a private cause of action (lawsuit) to be brought by list subscribers who receive more than one unlawful solicitation within a single year.

Q: Are there products to help me comply?

A: Yes. PAR has endorsed a product called DNCQuickcheck that allows you to have all your Federal and PA list information downloaded into one online, password-protected site where you can check both lists at the same time. DNCQuickcheck also maintains your internal company-wide Do-Not-Call list and permits you to upload a copy of your brokerage Do-Not-Call policy in order to automate the process of sending it out to those who may request it.

DNCQuickcheck is suitable for use by individual agents and by brokers. Either way, the program provides a complete "audit trail" and integrated reporting capabilities that allows you to see just exactly when and something was done in the system. For example, it can tell you when a number was checked and by whom, which can help defend against claims that the brokerage is not adequately administering its policies.

More information can be found under the Member Benefits section of the PAR Web site at www.parealtor.org. **Remember to go through the PAR site in order to get your PAR member discount.**