

## You Make the Call

*from the desk of David M. Touchstone*

Some of us enjoy having our favorite television show or our dinner interrupted by a telephone call from a stranger who wishes to sell us something. Most of us don't. In a 2003 survey, Americans rated telemarketing fourth among the one hundred worst ideas of the 20<sup>th</sup> century. Consumer complaints about telemarketing practices, as received by the Federal Trade Commission, increased ten fold between 1998 and 2002. This strong current of dissatisfaction has registered with policy makers and they have rushed to write multiple regulatory schemes to protect consumers. Perhaps, instead of "current of dissatisfaction", I ought to have said "tidal wave of indignation." In any event, the result has been a plethora of rulemaking undertakings concerning "do-not-call". As of December 23, 2004, 69 million numbers had been registered on the national do-not-call database.

Realtors (like dolphins in tuna nets) have, unfortunately, been caught up in this wave of rulemaking.

As we all know, many beginning agents, as well as quite a few experienced agents, rely on telephone cold calling to build their business. Because of the complexity and expense of the new "do-not-call" rules, quite a few agents have simply opted to discontinue telemarketing. Hopefully, this article will be of some assistance in guiding those who would like to build their business over the telephone, but stay within legal bounds.



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*First Commerce Title, President*

In order to understand where we are now, some legislative history is in order. In 1991, the U.S. Congress enacted The Telephone Consumer Protection Act ("TCPA"). Among other things, it authorized the Federal Trade Commission to implement regulations to control telemarketing calls. The FTC did promulgate regulations pursuant to its authority, but opted not to create a "do-not-call" database, believing that enforcement of same would be too difficult and expensive. Instead, the FTC made a rule which required telemarketers to maintain their own "do-not-call" databases, to be comprised of consumers who had objected to *that* telemarketer. This, of course, put the consumer in the position of registering with every telemarketer. Obviously, this plan was unworkable as a meaningful bulwark of consumer privacy. Nevertheless, you should be aware that this regulation is still on the books. Therefore, if

you should call a consumer whose name is not on the do-not-call list, but who has previously requested that his name be removed from *your list*, you will, nevertheless, be subject to imposition of the same federal fine as you would receive for the violation of calling a consumer registered on the do-not-call list.

In 1994, the Congress, sensing that the telemarketing problem was accelerating, passed the Telemarketing Consumer Fraud and Abuse Prevention Act (“TCFAPA”). The FTC promulgated additional regulations to enable enforcement of TCFAPA. One portion of those regulations requires the telemarketer to disclose his identity and the purpose of his call. This is still the law and you should always comply with this provision.

Finally, the Congress decided that the telemarketing problem had reached a point that a national do-not-call list was the only available redress. In March, 2002, the Congress enacted the Do-not-call Implementation Act (“DNCIA”). Under DNCIA, the FTC was required to issue additional regulations for the establishment of a national do-not-call registry database. Because, arguably, FTC has jurisdiction over only calls made on an interstate basis, the Federal Communications Commission (FCC) was likewise empowered by Congress. FCC clearly has jurisdiction over both interstate calls and intrastate calls. FTC and FCC have now issued regulations which harmonize and, apparently, provide for a seamless enforcement structure for any telemarketing call made in violation of the rules. If you wish to read FTC’s actual regulation (which incorporates its rule making delegation under TCPA, TCFAPA, and DNCIA), go to <http://www.ftc.gov/os/2002/tsrfinalrule.pdf>. If you wish to read the actual FCC regulation, you can find it at [\[edocket.access.gpo.gov/cfr\\\_2003octqtr/47cfr64.1200.htm\]\(http://edocket.access.gpo.gov/cfr\_2003octqtr/47cfr64.1200.htm\).](http://</a></p></div><div data-bbox=)

Under the cited federal regulations, these are the rules:

#### Database compliance

- Your broker must purchase the do-not-call database from FTC. The list is broken down by area code and the cost of the purchase will be based on how many area codes are purchased.
- The database cannot be shared with anyone outside your brokerage. The rationale is that the government wishes to sell the list the maximum number of times so as to spread the cost across as many producers as possible. The database contains only telephone numbers, not names, nor addresses.
- The database rule applies both to residential lines and cellular telephones.
- Your broker must establish *written* procedures to comply with the national do-not-call rules.
- Your broker must create an established procedure for training personnel (agents) how to comply with the do-not-call rules.
- Your broker must establish a process to prevent calls to numbers listed on the do-not-call list.
- The do-not-call list must never be aged more than 31

days. This provision was amended from the previous requirement that the list be no more than 3 months old. The new version became effective January 1, 2005. Names stay on the list for five years.

#### Other provisions

- You should never call anyone before 8 a.m. or after 9 p.m. (their time).
- If anyone you call asks you to put his name on your brokerage's do-not-call list, you must comply within 30 days (I suggest immediate compliance). Your broker must be able to demonstrate that the brokerage has a written policy for maintaining a company do-not-call list, that brokerage personnel (agents) are trained in the existence and use of the company do-not-call list, and that there is a company procedure for recording the names of persons who request that their names be added to the company do-not-call list. A do-not-call request must be honored for five years.
- You are exempt from a violation of calling someone listed on the national do-not-call list if you have had previous contact with said person at a time not prior to 18 months before your call, and if the prior contact was based on a purchase, transaction, or inquiry initiated by the person you are calling. However, you will not be exempt if the person

you are calling has requested placement of his name on the company do-not-call list.

- You are exempt from violating the national do-not-call rule if you have an established business relationship with the person or if the person you are calling is a family member, friend, or acquaintance.
- Although the rules do not specifically address calling a for sale by owner number, in 2003, Mozelle Thompson, one of five Federal Trade Commissioners, opined at a National Association of Realtors Conference in San Francisco that calling a for sale by owner number would not be prohibited *if the calling agent had a prospective buyer*.
- Any phone from which you call from must not block caller ID, and during the call you must give your name and a telephone number at which you can be called back.
- Each violation of the do-not-call rules is punishable by a fine of up to \$11,000.00.

So much for the federal rules. You might recall at the beginning of this article that I mentioned that all the policy makers wanted to weigh in on telemarketers. Well, that includes the State. On July 10, 2003, the Louisiana Public Service Commission issued its General Order regulating telemarketing. This regulation was issued pursuant to the authority granted the Public Service Commission in R.S. 45:844.11—844.15. If you wish to view the entirety of the regulation, it

is on the internet at <http://www.lpsc.org/GeneralOrder07-10-03.pdf>. You can also read an easy to understand explanation of the regulation on the Louisiana Public Service Commission's website at <http://www.lpsc.org>. As we go on here, you will note some discordance between the Louisiana Public Service Commission's rules and the Federal Trade Commission's rules. You should be aware that the federal legislation which authorizes do-not-call allows for states to make their own do-not-call rules; however, in any instance in which the state rule is less onerous than the federal rule, the state rule will be overruled by the federal rule. As I read the federal rules and the state rules together, if your action constitutes a violation of both rules, then you are subject to *both* fines; if your action constitutes a violation of only one of the rules, then you are subject to that government's fine. Therefore, my advice is that your calling program complies with *both* the federal and state regulation whenever one regulation is more limiting than the other, you should comply with the more limiting regulation.

Here are the portions of the Public Service Commission's regulation which I deem to be pertinent to brokers and agents:

- The broker must register with the PSC on forms provided by the PSC, and must also disclose to the PSC all of the broker's agents who will be making telephone solicitations. The period of registration is from January 1 through December 31. For each said registration period, the broker must pay an annual registration fee of \$800.00, and each agent must pay an annual registration fee of \$100.00. Permits will be issued pursuant to the registrations; these permits can be revoked for violation of the regulation.
- In addition to the registration fees, the broker is required to pay \$400.00 a year to purchase the do-not-call list. The broker may obtain the database via email, by CD-rom, or in printed format. If the broker obtains the database in printed format, he will be required to pay an additional fee based on the cost of printing. Like the federal database, the state database will consist of telephone numbers only. The state database will be updated quarterly and the broker and his agents are required to adjust their records accordingly. Note here the difference between the federal rule of 31 days and the state rule of 90 days. Like the federal database, placement of one's name on the state database is good for five years.
- The broker is required to keep a log for a period of 12 months which can be provided to the LPSC in either numeric or chronological order which log shall contain: the number called, the time called, and the date called.
- The broker must provide to the LPSC a \$50,000.00 surety bond by a surety authorized to do business in the State of Louisiana.
- Like the federal rule, the state regulation prohibits the broker from sharing the database with anyone other than his agents. The agents, of course, are also prohibited from sharing the database outside the brokerage.
- The broker must maintain documentation that he has provided his agents the most recent version of the do-not-call list.
- The state regulation prohibits the broker or agent from using telephone equip-

ment which the broker or agent knows will block caller identification. This is a slight departure from the federal rule which makes no distinction about whether the caller knows or doesn't know that his equipment blocks caller ID. The best plan is to use equipment that you *know* does not block caller ID.

- The state regulation makes a flat prohibition against calling cellular and mobile phones even though they are not listed on the do-not-call list. This is more onerous than the federal rule.
- Under the state regulation, and unlike the federal regulation, the caller must identify himself and the telephone number from which he is calling *both* at the beginning of the call and at the conclusion of the call.
- If the Governor has called a state of emergency (think of the hurricane season, for example), no solicitation calls whatsoever can be made until the state of emergency has ceased.
- Under the state regulation, no calls can be made on Sunday or on Legal Holidays; this is more onerous than the federal regulation. Also, no calls can be made before 8:00 a.m., nor after 8:00 p.m.; again, this is more onerous than the federal regulation which allows calls up to 9:00 p.m.
- Under the state regulation, an advertisement accompanied by a return telephone number given by the person being called is considered a request for solicitations. Therefore, FSBO numbers can be called even though they are listed on the do-not-call list. The state exemption appears to be broader than the above stated exemption to the federal rule inasmuch as the state rule does not appear to require the caller to have a buyer.

Remember that the state has no power to diminish the federal rule. Under the state rule, no call can be initiated to a FSBO number listed on the do-not-call list after the FSBO advertisement has been removed for a period of six months or more.

- If the broker or agent is calling a subscriber with whom the broker or agent has maintained a business relationship at any time within 6 months prior to the call, the call is exempt even though the number is listed on the do-not-call list.
- The following is a list of potential fines for each violation of the regulation:
  - Illegal sharing of the do-not-call list - \$10,000.00;
  - Calling a number on the do-not-call list when the caller has failed to register with the LSPC - \$10,000.00;
  - Being properly registered, but calling a number on the do-not-call list to a subscriber who is 65 or older - \$3,000.00;
  - Being properly registered, but calling a number on the do-not-call list to a subscriber who is less than 65 - \$1,500.00.

While it appears that there is a move on for the LPSC to incorporate the FTC database into the LPSC database, the LPSC's website explicitly disclaims that its database contains all the numbers listed in the FTC database. Therefore, I recommend that both databases be purchased and that both lists should be consulted before a call is initiated, especially since the federal list is updated every 31 days, as opposed to the state list which is amended on a 90 day basis.

If you plan to use telemarketing as part of your business strategy, I urge you to

read this article carefully and to do additional research on the websites set forth above. Whenever there is discordance between the federal and state rules you should limit your actions according to the more limiting of the two rules. Brokers should thoroughly acquaint themselves with these rules and undertake written policies to implement their requirements as well as establish training programs for their agents.

Now that you know the rules, when it comes to choosing whether or not to telemarket, you're in a position to *make the call*.