

## Do Not Call Rules

At the request of NAEDA, the association's legal counsel prepared the following summary of the do not call rules issued by the FCC in its *Report and Order* released on July 3, 2003, and incorporated into the new regulations implementing the Telephone Consumer Protection Act of 1991 ("TCPA"). The rules prohibiting telephone solicitations to residential telephone subscribers registered with the National Do Not Call Registry are in effect.

### Impact of FCC Do Not Call Rules on Equipment Dealers

The bottom line for dealers is they cannot place a marketing call to any phone numbers listed on the National Do Not Call Registry unless:

- (a) the customer being called purchased goods or services from a dealer in the 18 months prior to the call,
- (b) the customer being called inquired or made an application regarding a dealer's goods or services in the three months prior to the call or
- (c) the customer has given a dealer written permission to call that number.

#### • National Do Not Call Registry

The primary change made by the new rules is the joint creation by the FTC and the FCC of a National Do Not Call Registry. This registry allows residential telephone subscribers to register their home telephone line and mobile/cellular lines for a period of five years. Businesses that receive telemarketing calls are not protected by the new rules and cannot list their phone numbers on the registry. Effective Oct. 1, 2003, if a telephone number is in the registry it will be unlawful for any dealer to initiate a "telephone solicitation" to a customer or potential customer at that telephone number. Telephone solicitations include any telephone call or message initiated for the purpose of "encouraging the purchase or rental of, or investment in, property, goods, or services."

Please note that there are several exceptions to the definition of "telephone solicitation". The term "telephone solicitation" does not include calls or messages made (a) to any customer or potential customer with such person's prior express invitation or permission, (b) to any customer or potential customer with whom a dealer has an established business relationship, or (c) by or on behalf of a tax-exempt nonprofit organization.

A person's prior express invitation or permission requires a signed, written consent, including the telephone number that may be called.

An established business relationship exists if (a) the customer or potential customer purchased goods or services from a dealer within the 18 months prior to the call or (b) the customer or potential customer inquired or made an application regarding a dealer's goods or services within the three months prior to the call. A dealer may also make a call to a number on the national registry if a dealer has a personal relationship (family, friend or acquaintance) with the person being called.

In addition, there is a "safe harbor" provision. If a dealer makes a telephone solicitation to a person listed on the National Do Not Call Registry, the dealer will not be liable for the violation if the dealer meets the following requirements and demonstrates the violation was the result of an error:

- a. it has a written procedure for complying with the do not call rules;
- b. it has trained its personnel in the procedures established by the do not call rules;
- c. it maintains a list of numbers it may not contact;
- d. it has a process to prevent violations through the use of a do not call registry that is no more than three months old prior to the call and maintains records documenting this process; and
- e. it uses a process to ensure it does not sell, rent, lease, purchase or use the National Do Not Call Registry for any purpose but compliance with the do not call rules.

## • Compliance Issues

### 1. National Do Not Call Registry

The National Do Not Call Registry will be administered by AT&T. Companies will be able to access the registry by area code for a fee based on the number of area codes purchased. Any company may access up to five area codes free of charge. Please note that the safe harbor for the do not call rules requires a company to use a version of the registry that is no more than three months old at any time. However, once purchased, companies will have the ability to download registry information at any time at no additional cost.

### 2. Preemption

Many states have a do not call registry and rules. There will be an 18-month transition period for states to integrate their do not call registries into the national registry. However, effective Oct. 1, 2003, states may not require use of a registry unless it includes all phone numbers in the national registry that are listed for that state. Please note it is possible that, during the transition period, the state registries may contain phone numbers that do not appear on the national registry. Therefore, it may be necessary for dealers to obtain both registries.

States generally have jurisdiction over intrastate calls only – i.e., calls for which the caller and recipient are both located in the same state. However, many states also have enforced do not call rules against interstate calls. The FCC has jurisdiction over both interstate and intrastate calls. Because state do not call rules may differ from the FCC rules, there is potential for confusion. In states with rules governing intrastate calls, the federal rules will constitute a minimum level of restrictions and supersede all less restrictive rules. However, federal law does permit states to adopt more restrictive rules regarding intrastate calls. **Caution: If a dealer is located in a state with more restrictive do not call rules than the FCC, the dealer must comply with both rules. This will make compliance more complicated.**

Unfortunately, there is even more confusion with interstate calls. The FCC has stated that the federal rules will likely supersede all state rules on interstate calls, whether the state rules are more or less restrictive. However, the FCC also has hedged its bets and stated that any decision on whether a state law also will apply will be made on a case-by-case basis. Due to the confusion between the state and federal governments at this time with respect to interstate calls, our advice is that dealers should comply with both the federal rules and the rules of the state into which they are calling.

### 3. Penalties

The TCPA permits customers to sue dealers in state court if a customer receives more than one call within a 12-month period from the same dealer in violation of the do not call rules. The penalty to a dealer is \$500 per phone call. The per phone call penalty can be tripled if the violation is done willfully or knowingly. In addition, the FCC may separately pursue dealers for violations of the rules. If the FCC is successful, it can obtain significantly higher penalties for violations – up to \$11,000 per phone call. To make matters more complicated, if the state do not call rules apply to a dealer, a dealer could face additional penalties for violating those rules.

## • Conclusion

Dealers that make marketing calls to residential telephone numbers must begin complying with the federal do not call rules.

Unfortunately, due to potentially more restrictive state rules that are in existence already, dealers should also comply with the applicable state rules until more definitive guidance is provided from the government. Definitive guidance most likely will not come until lawsuits that may be filed to clarify the interaction between state and federal rules have been resolved.

This summary is provided as a general guide to equipment dealers and does not cover all of the details of the do not call rules. Due to current court challenges, this information is subject to change. NAEDA and its legal counsel will attempt to update this information as necessary from time to time. Dealers with questions may write to [naeda@naeda.com](mailto:naeda@naeda.com).