

MEMORANDUM WITH RESPECT TO THE FEDERAL DO NOT CALL LIST
PURSUANT TO THE FEDERAL TELEPHONE CONSUMER PROTECTION ACT

1. Since October 1, 2003, the national do not call registry has been effective.

The registry pertains to wired and wireless telephone communications, residential telephone numbers and cell phones. Telephone numbers placed on the list will be retained for five years. No seller or telemarketer may solicit a person who has registered on the do not call list.¹ It is therefore required that the seller or telemarketer check the do not call list prior to making any business telephone call. Any list used by a seller or telemarketer cannot be dated more than thirty days prior to the time of making the call. If no list is utilized, the caller must check the do not call list thirty days or less before making a call.

2. A seller or telemarketer acting on behalf of the seller that has made a good faith effort to provide consumers with an opportunity to exercise their do not call rights should not be liable for violations that result from an error if it can demonstrate that as part of the seller's or telemarketer's routine business practices:

(I) it has established and implemented written procedures to comply with the do not call rules; and

¹Exemptions will be discussed below

- (ii) it has trained its personnel and any entity assisting in its compliance in the procedures established pursuant to the do not call rules; and
- (iii) the seller or telemarketer acting on behalf of the seller has maintained and recorded a list of telephone numbers the seller may not contact (the company specific do not call list); and
- (iv) the seller or telemarketer uses a processes to prevent telemarketing to any telephone number on any list established pursuant to the do not call rule employing a version of the do not call registry obtained from the administrator or the registry no more than thirty days prior to the date any call is made and maintains records documenting this process; and
- (v) any subsequent call otherwise violating the do not call rules is the result of error.

3. A seller or telemarketer may call a business or a consumer even if their name is on the national do not call list if they have an established business relationship with that consumer. An established business relationship means that the seller or telemarketer has closed a transaction or completed a purchase within 18 months prior to making the call or that there has been inquiry or application made by the consumer to the seller or telemarketer within 3 months prior to the making of the call.

Every seller or telemarketer must maintain a company specific do not call list. If

a consumer asks to be put on the company specific do not call list, then that consumer may not be called even though they fall within an exemption to the national do not call list; i.e., there is an established business relationship. Once a consumer has asked to be placed on the company specific do not call list, the company may not call that consumer even if the consumer continues to do business with the company.

4. Sellers and telemarketers may contact consumers who have given the seller or telemarketer prior written express permission. Such permission must be in writing, must be signed by the consumer and must contain the telephone number at which the consumer consents to be contacted. Such an express agreement will remain in effect until such time as the consumer asks to be placed on a company specific do not call list.

5. Tax exempt not-for-profit corporations are exempt from the do not call regulations. While tax exempt not-for-profit organizations are exempt from the regulation, a mixed purpose telephone solicitation such as a business corporation calling to sell a product where part of the proceeds are to be donated to a specific charity are not exempt.

6. The do not call regulations do not apply to calls made to a person with whom the telemarketer or seller has a personal relationship. The fact that the person called was recommended to the seller or telemarketer does not create a personal relationship. A personal relationship means that the seller or telemarketer personally

knows the consumer to whom the call is placed. The do not call list may be purchased or obtained from the do not call administrator. It is unlawful to purchase this list from any other entity or to dispense the list to any entity who has not paid the required fee to the administrator. (There is no charge for the first five area codes requested by any entity.) The information on the list will consist solely of the telephone number of the consumer who has registered.

7. Company specific do not call list must be retained for five years. A seller or telemarketer must honor a request to be placed on the company specific do not call list within a reasonable time of such request. Such a reasonable time must not exceed 30 days from the date that the request is made. However, where the telemarketer or seller has the capacity to honor the request to be placed on the company specific do not call list in less than 30 days, the company or telemarketer is required to do so.

8. An inquiry or application intended to demonstrate an established business relationship must be such as to create an expectation on the part of the consumer that a particular company will call them. An established business relationship with one company may extend to an affiliate of that company if the consumer would reasonably expect the affiliate to be included as part of the relationship. The test is the reasonable expectation for the consumer as to which companies will call them. A call from a company whose name may not be recognized by the consumer may violate the do not call

regulations assuming the consumer is listed on the registry.

The rule prohibits using any technology to dial a telephone number for the purpose of determining whether the line is a fax or voice line.

9. An unsolicited advertisement means any material advertising the commercial availability or quality of any property, goods or service which is transmitted to any person without that person's prior express invitation or permission. Dual purpose phone calls are covered by the regulations; i.e., a call from a mortgage broker advising the recipient of new low rates which are available. If a call is intended to offer property, goods or services for sale either during the call or in the future, that call is an advertisement. A call seeking people who help sell a product or services; i.e., recruiting, where the person accepting those calls are encouraged to purchase, rent or invest in property goods or services during or after the call are advertisements.

10 Artificial or prerecorded messages delivered by an automatic telephone dialing system must identify the business, individual or other entity initiating the call and supply the telephone number or address of such business. The name provided must be the legal name under which the business individual or entity calling is the registered to operate. The legal name of a business person or other entity is the name which is

registered with the state.² The telephone number included in the message must be a number that the consumer can use during normal business hours to ask to be placed on a company specific do not call list.

11. Any technology used to dial telephone numbers must be such as to abandon no more than 3% of the calls which are actually answered by a recipient of the call. The 3% is measured over a 30 day period. A call is considered abandoned if it is not transferred to a live sales agent within 2 seconds of the recipients completed greeting. If a call is abandoned, the telemarketer or seller must deliver to the recipient of the phone call, the telemarketer's name, telephone number and the fact that the call was made for telemarketing purposes. A telemarketer must allow the phone to ring for 15 seconds or 4

²The Regulations discuss the need to use the corporate name filed with the state or, if an individual is doing business under an assumed name, the assumed name filed with the state. However, the language is broad and is not clear whether a licensee using a prerecorded or computerized message would be required to use the name as it appears on their license as opposed to a nickname which the person may use in their business. It seems clear, however, that the practice in the industry by agents only identify themselves by their first name and the name of the agency that they work for is prohibited and that the agent using a prerecorded message must at least use their full name.

rings, whichever is shorter, before discontinuing any unanswered call. Telemarketers or sellers using technological dialing devices must maintain records that provide clear and convincing evidence that the dialer's use complies with the above specifications. Calls which are not answered by the recipient shall not be considered abandoned. The message required to be given with respect to the abandoned telephone call may not be used to deliver an unsolicited advertisement. Prerecorded messages sent by companies to recipients with whom they have an established business relationship or with prior expressed written consent will not be considered abandoned if they are delivered within 2 seconds of the recipients completing the greeting. Any such message must identify the business, individual or entity making the call and contain a telephone number that the consumer may call to request placement on a company specific do not call list. You may not use automatic telephone dialing systems or artificial or prerecorded messages, in any telephone call made to a wireless telephone number. This includes both voice and text messages.

12. All sellers and telemarketers must transmit caller ID information regardless of their caller system and are prohibited from blocking the transmission of caller ID information. In fact, if such information is not received by the recipient, the telemarketer or seller must provide clear and convincing evidence that the caller ID information could not be transmitted. Telemarketers and sellers must insure that either

automated number identification (ANI) or calling party number (CPN) are available for all telemarketing calls. The CPN can include any number associated with telemarketer or seller that allows the customer to identify the caller. The telephone number supplied must permit an individual to use that number during regular business hours for the purpose of making a request to be placed on a company specific do not call list. The caller identification rules must be adhered to whether or not there is a prior established business relationship or prior express written consent.

13. In the event of a violation of the rules involving the use of automatic dialing systems, artificial or prerecorded voice messages, a consumer may bring an immediate action in state court. In the event of other telephone solicitations in violation with these rules, a consumer may bring an action in state court if he or she has received more than one telephone call from a particular seller or telemarketer within any 12 month period. Penalties for violation of the law include enforcement by the FCC, enforcement by state government and, most importantly, a private lawsuit for \$500 per violation which sum can be trebled (\$1,500) if the violation occurs knowingly and willfully. Almost as important as the amount of the penalty is the expense and inconvenience of appearing in small claims court for violations of the law (the law is enforceable in any state court).

Telemarketing calls must be made between the hours of 8:00 a.m. and 9:00 p.m. local time at the called parties location.

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