



New Specifics Accompany Telemarketing Rules on First Anniversary

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The Unsolicited Telecommunications Rules - wide-ranging national rules governing unsolicited telemarketing - mark their first anniversary September 30, 2009.

All organizations that conduct telemarketing activities on their own behalf or on behalf of a third party need to be aware of, and comply with, the Unsolicited Telecommunications Rules, which include the National Do Not Call List (DNCL) Rules, the Telemarketing Rules, and the Automatic Dialing-Announcing Device (ADAD) Rules.

In the year that the Unsolicited Telecommunications Rules have been in effect, the Canadian Radio-Television and Telecommunications Commission (CRTC), the federal regulatory authority responsible for them:

- has issued, in the form of information bulletins, specifics on how they apply to the investment, insurance and real estate industries,
- has found that three telemarketers violated the DNCL Rules and issued fines totalling \$24,000; and
- has, as of May, 2009 had processed more than 145,000 complaints; conducted more than 700 investigations; and issued 70 warning letters.

Are you a telemarketer?

You are engaged in telemarketing if you use telecommunications equipment such as telephones or fax machines to make unsolicited communications soliciting the purchase of a product or service, whether on your own behalf or on behalf of another party. If you are responding to a client's request for service or information and are not in any way soliciting a sale, you are not telemarketing and the Unsolicited Telecommunications Rules do not apply.

Investment advisors

The CRTC has issued an Information Bulletin setting out how the Unsolicited Telecommunications Rules apply to investment advisors selling securities. The Information Bulletin states that the Rules do not apply to telecommunications made by investment advisors to existing clients because these clients expect to be contacted on an ongoing basis about changes in financial markets or changes in the status of their investment funds. Sales calls made by an investment advisor to prospective or former clients, however, do constitute telemarketing and so the Unsolicited Telecommunications Rules do apply.

Insurance agents and real estate agents

On May 15, 2009, the CRTC issued Information Bulletins on the Unsolicited Telecommunications Rules and the National Do Not Call List Rules as they relate to the insurance and real estate industries.



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These bulletins state that telecommunications made by insurance agents or brokers and by real estate agents to sell or promote products or services constitute telemarketing and the Unsolicited Telecommunications Rules apply.

If an insurance agent acts for only one insurance company, that insurance company is responsible for registering with the National DNCL operator, becoming a registered subscriber to the National DNCL and paying all applicable fees. If the insurance broker represents more than one insurance company, the broker, or the insurance brokerage that he or she represents, is responsible.

The real estate brokerage that a real estate agent represents is responsible for registering with the National DNCL operator, becoming a registered subscriber to the National DNCL and paying all applicable fees. However, as discussed below, an exemption from the National DNCL Rules may apply in certain circumstances.

National DNCL Rules

The National DNCL Rules establish the National Do Not Call List on which consumers may register their telephone numbers if they do not wish to be contacted by telemarketers. In April, 2009, the registration period for telephone numbers that appear on the National DNCL was extended to five years from three years. (As of May, 2009, approximately 6.8 million telephone numbers had been registered on the DNCL.)

Under the National DNCL Rules:

- a telemarketer shall not initiate telemarketing calls to consumers who have registered their numbers on the National DNCL unless the consumer has expressly consented to being contacted by the telemarketer or client of the telemarketer. In addition, a client of a telemarketer shall make all reasonable efforts to ensure that the telemarketer does not initiate such calls;
- a telemarketer shall not initiate telemarketing calls on its own behalf unless it is a registered subscriber to the National DNCL and has paid all applicable fees. (The current annual subscription fee by area code is \$615. For all Canadian area codes the fee is \$11,280);
- a telemarketer shall not initiate telemarketing calls on behalf of a client unless the client is a registered subscriber to the National DNCL and has paid all applicable fees;
- telemarketers and clients must use a version of the National DNCL obtained within the 31 days preceding the date that the telemarketing call is made; and
- the telemarketer must keep proof of subscription to the National DNCL, and payment of the subscription fees, both for itself and for its clients, for three years.

The National DNCL must be purchased directly from Bell, the National DNCL Operator. It must not be sold or disclosed to anyone outside of the telemarketer's organization.

Exceptions to National DNCL Rules

There are a number of exceptions to the National DNCL Rules. The most relevant for most businesses are that these rules do not apply to telemarketing to a business consumer or to a person with whom an organization has an existing business relationship unless that person has made a do-not-call request to the organization.

In addition, the National DNCL Rules do not apply to calls made on behalf of Canadian registered charities, political parties and candidates, or to newspapers soliciting subscriptions. However, the Telemarketing Rules described below do apply.

Business consumers

The Information Bulletin issued by the CRTC on the insurance industry (the Insurance Bulletin) provides that telecommunications made by insurance companies to managing general agencies (MGAs) to promote or sell insurance products, and telecommunications made by MGAs to insurance

agents and brokers to promote insurance products, are business-to-business telemarketing and are exempt from the National DNCL Rules.

Existing Business Relationship

The National DNCL Rules do not apply to an “existing business relationship” in which:

- the person has purchased products or services from the organization in the 18 months immediately prior to the telemarketing communication;
- the person has made an inquiry to the organization with respect to products or services in the six months immediately prior to the telemarketing communication; or
- there is a written contract between the person and the organization at the time of the telemarketing communication, or such a contract existed and expired in the 18 months immediately prior to the telemarketing communication.

The existing business relationship exists only between the consumer and the distinct legal entity with which the consumer has dealt. It does not extend to affiliates of that entity unless the consumer has expressly consented to contact by such affiliates.

In the Insurance Bulletin the CRTC states that insurance agents who sell the products of only one insurer may rely on the existing business relationship exemption if the customer has made an inquiry or bought insurance from the insurance company represented by the agent. However, if a customer makes an inquiry about an insurance product from a broker who represents more than one insurer, the existing business relationship only exists between the customer and the broker (and the brokerage, if the broker represents a brokerage), but does not extend to the insurance company unless the customer actually enters into an insurance contract with that company.

The CRTC receives a large number of complaints with respect to the existing business relationship exemption. If you are relying on that exemption when you make telemarketing calls, it is advisable to remind the consumer, at the start of the call, that they are an existing customer.

Telemarketing Rules

The Telemarketing Rules apply whether or not the telecommunication is exempt from the National DNCL Rules. The Telemarketing Rules include the following rules:

- all telemarketers conducting telemarketing on their own behalf must register with the National DNCL operator. (Registration is free. As of May, 2009, approximately 6,000 telemarketers had registered);
- telemarketers may telemarket only on behalf of clients who have registered with the National DNCL operator;
- the telemarketer must keep proof of subscription to the National DNCL for itself and its clients for three years;
- all telemarketers and clients of telemarketers must establish and maintain their own internal do-not-call lists.

The telemarketer must process any do-not-call requests from consumers at the time they are received and must add those names and phone numbers to its own internal do-not-call-list, and make all reasonable efforts to ensure the client adds the names and phone numbers to its internal do-not-call list within 31 days of the request and maintain them on such lists for three years and 31 days from the date of the request;

- a telemarketer shall not initiate telemarketing calls to consumers on its own do-not-call list or the do-not-call list of its client, and the client must make all reasonable efforts to ensure that the telemarketer does not initiate any such calls. The internal do-not-call lists allow consumers who are

covered by an exemption from the National DNCL Rules, such as the existing business relationship exemption, to ask that they not receive telemarketing calls from an organization that would otherwise be permitted to contact them;

- when the call is answered, the telemarketer must provide the name (or a fictional name) of the person making the call and must identify the telemarketer and the client (if the call is made on behalf of a client);
- on request, the telemarketer must provide a local or toll-free telephone number so that the consumer may ask questions, make comments about the telecommunication or make or verify a do-not-call request. The telephone number must be answered by a live person or a voice mail system that takes messages and the call must be returned within three business days; and
- telemarketing calls may be made only between 9:00 a.m. and 9:30 p.m. weekdays and 10:00 a.m. and 6:00 p.m. on weekends.

The telemarketing rules do not apply to voicemail broadcasts.

Automatic Dialing-Announcing Device (ADAD) Rules

The ADAD Rules apply even if the telemarketing call is exempt from the National DNCL Rules. ADADs may not be used for telemarketing unless the consumer has provided express consent to receiving ADAD calls from the telemarketer or the client of the telemarketer. However, ADAD calls are permitted if there is no attempt to sell, such as public service calls. The ADAD Rules set out the conditions that apply to the uses of ADADs for telemarketing, including the hours at which such calls may be made (if calling-hour restrictions are not set out in provincial legislation), the telephone numbers that may be called, and the message that must be given at the start of the call.

Violation of Unsolicited Telecommunications Rules

The CRTC will investigate consumer complaints of non-compliance with the requirements of the Unsolicited Telecommunications Rules. If a violation has occurred, the CRTC will generally work with the telemarketer to facilitate a corrective action on a voluntary basis. However, if the telemarketer does not voluntarily take corrective action, the CRTC has the power to impose monetary penalties of up to \$1,500 for individuals and \$15,000 for corporations for each day during which the violation continues.

In August, 2009, the CRTC imposed the first administrative monetary penalties on telemarketers who violated the DNCL Rules. A fine of \$4,000 was issued to an individual telemarketer and fines of \$10,000 each were issued to two corporate telemarketers. All three had sent fax telemarketing communications to customers who had registered on the DNCL. In addition, the two corporations were not registered subscribers to the National DNCL and had not paid the applicable fees. The CRTC rejected the two corporations' argument that they were not telemarketers and had not sent the faxes, finding that the faxes promoted services provided by such corporations and that the contact number shown on the faxes were registered to the sole director of each of the corporations (who was the same individual in both cases).

Electronic Commerce Protection Act

In April, 2009, the federal government introduced its anti-spam legislation, the *Electronic Commerce Protection Act* (Bill C-27) to regulate 'spam' (unsolicited electronic mail). Bill C-27 includes provisions repealing the sections of the *Telecommunications Act* that create the legislative framework for the National DNCL. If the legislation takes effect in its original form, telemarketers will be prohibited from sending electronic commercial messages to consumers unless the consumer 'opts in' and specifically asks to be called. Submissions from the public on Bill C-27 were due by August 15, 2009.

If you require assistance in complying with your obligations under the Unsolicited Telecommunications Rules, please contact Jill McCutcheon or Kelly Morris. ■