



Independent Insurance Agents



Brokers of America, Inc.



**THE FEDERAL COMMUNICATIONS COMMISSION'S DO NOT CALL RULE:
APPLICATION TO FAXES
AS OF JANUARY 1, 2005**

This FAQ is not intended to provide specific advice about individual legal, business or other questions. It was prepared solely as a guide, and is not a recommendation that a particular course of action be followed. If specific legal or other expert advice is required or desired, the services of an appropriate, competent professional should be sought.

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The Federal Communications Commission (FCC) published a Do Not Call (DNC) rule on July 25, 2003 amending its rules implementing the Telephone Consumer Protection Act of 1991. This new rule has a potentially significant impact on insurance agency and brokerage firms as well as trade associations. The rule addresses two broad categories of activities: (1) telemarketing; and (2) fax solicitations. This FAQ explains the FCC's DNC rule governing fax solicitations. The DNC rules governing telemarketing are explained in a separate FAQ entitled: "The Federal Communications Commission's and Federal Trade Commission's Do Not Call Rules: Application To Telemarketing as of October 1, 2003."

In short, the new rule concerning fax solicitations requires that before anyone can send any fax that contains an unsolicited commercial advertisement (defined below), prior written consent must be obtained from the recipient. The details of the rule regarding the timing and procedures for obtaining the required written consent are described below.

1. What is the new rule about unsolicited faxes?

The new rule prohibits sending faxes that contain "unsolicited commercial advertisements." Under the new rule, unsolicited commercial advertisements are defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."

The prohibition against faxing unsolicited commercial advertisements applies to **all** faxes that contain unsolicited commercial advertisements: business-to-consumer, business-to-business, consumer-to-consumer, and consumer-to-business.

2. **Are there any exemptions from compliance with the new rule?**

No. It applies to for-profit and nonprofit entities, as well as recipients with whom the sender has an established business relationship (EBR).

Thus, members of an association and non-members are treated the same under the new rule, just as existing clients of an insurance agency are treated the same as new clients under the new rule.

3. **Why has this not been an issue before?**

Before the new rule was adopted, if a company had an EBR with a person, that person was presumed to have consented to receive unsolicited commercial faxes. The prior rules prohibited “cold faxing” to those with no connection to the person or entity sending the fax, but had little or no impact on faxes to those with some connection – even if tenuous – to the person or entity sending the fax.

4. **Does the new rule preempt other federal laws or state laws on unsolicited faxes?**

In short, yes. There is a rule which was issued by the Federal Trade Commission that does not apply to the insurance industry relative to the business of insurance, but the new rule adopted by the FCC applies to everyone, including insurance agencies, insurance brokerage firms, insurance companies and trade associations. And the new rule applies to *intra*state and *inter*state faxes. Further, if a state law or regulation is less restrictive than the new rule or there is no state law or regulation on such faxes, the new rule governs those faxes.

5. **When does the new rule go into effect?**

This new rule, as it relates to faxing unsolicited commercial advertisements, is scheduled to go into effect on January 1, 2005. Thus, on January 1, 2005, prior express consent is required to send unsolicited commercial advertisements by fax.

6. What kind of faxes are covered by the new rule?

The rule covers unsolicited commercial advertisements, which are defined as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.”

The FCC views this definition broadly to cover virtually any transaction involving money. (IIABA believes that this reading is overly broad, but until the FCC clarifies this matter, it is suggested that you exercise caution.) Under the FCC’s interpretation, even an offer for “free” goods or services could be construed as an unsolicited commercial advertisement if the free offer is part of a plan to induce the purchase of goods or services.

The FCC also explained that any fax that includes an unsolicited commercial advertisement (even if the vast majority of the fax is not an unsolicited commercial advertisement) is considered to be an unsolicited commercial advertisement. In other words, if a fax is at all “tainted” with an unsolicited commercial advertisement, the fax is covered by the new rule.

7. What are some examples of faxes *NOT* subject to the new rule?

Faxes *NOT* subject to the new DNC rule include:

- Informational newsletters (that do not contain any advertising or solicitations);
- Legislative and regulatory updates;
- Information about an insurance policy which has been purchased (such as a certificate of insurance or declarations page), if the fax does not contain any type of solicitation;
- Surveys;
- Notices concerning association Board, election and membership meetings (provided that the notices do not contain any advertising or solicitations, such as for a convention); and
- Solicitations for contributions to a PAC (provided there is no expectation by the donor of receiving any goods or services in return).

8. What are some examples of faxes that *ARE* subject to the new rule?

Faxes that *ARE* subject to the new DNC rule include:

- Proposals;
- Price quotes;
- Applications for insurance (new or renewal);
- Reminders that policies are about to expire and should be renewed;
- Descriptions of insurance coverage offered for sale to the recipient;
- Invitations/brochures to seminars/conferences for which attendees must pay a charge;
- Invitations/brochures to seminars that are free but at which there will be a sales presentation made; and
- Solicitations to sponsor events (such as an association conference or event).

There are several items that are frequently included in faxes that are likely to be construed by the FCC as unsolicited commercial advertisements (thus tainting the entire fax):

- Referrals to links on web sites that contain commercial advertisements *along with some material on the fax suggesting that a person visit the site* (merely including a referral to a link on a web site should be treated the same as a phone number or email address);
- Reminders of upcoming seminars/conferences for which a fee is charged, or if free, at which a sales presentation will be made;
- Invitations to join an organization; and
- References to insurance policies or coverages available to be purchased by the recipient.

9. **How do I comply with the new rule?**

Prior to sending any faxes that contain unsolicited commercial advertisements, you must obtain the signed written consent of the recipient, with the fax number(s) to which the fax transmission(s) will be sent. There are several sample consent forms in the ATTACHMENTS to this FAQ.

There are a number of ways to obtain consent:

- Until January 1, 2005, fax the consent form and request that it be signed and returned;
- After January 1, 2005, call and obtain consent to fax a written consent form (or call and obtain consent and begin faxing);
- Include consent forms in membership applications (for associations and their subsidiaries);
- Include consent forms in annual association dues statements (for associations and their subsidiaries);
- Include consent forms in all invitations/brochures to seminars/conferences;
- Include consent forms in written communications with insureds, such as communications about their policies (new or renewal) or new coverages;
- Include consent forms in mailings or emails in response to requests for information;
- Include consent forms on all online data collection forms, such as online registration forms for association seminars/conferences;
- Include the consent form in a mailing and ask that it be returned by mail or fax; or
- Include the consent form in an email and ask that it be returned by mail or fax.

The consent required cannot be presumed by requiring recipients of commercial fax solicitations to contact you to opt-out of receiving such faxes.

10. What do I need to do in order to send a fax covered by the new rule to an individual?

If faxing to an individual, you must obtain a signed consent form with that person's name and the fax number(s) you can use. If any fax numbers provided are work fax numbers, any faxes sent to that person should clearly identify the individual recipient (if a work fax is given and the recipient is not clearly identified, the company could complain that it was receiving unsolicited faxes). (See ATTACHMENT A and FAQ 18 concerning information required on faxes.)

11. What do I need to do in order to send a fax covered by the new rule to a company?

If faxing to a company (such as an insurance agency or a commercial insured, rather than an individual at a company), you must obtain consent signed by a person with the authority to provide consent. The consent should confirm that the person signing it has authority to do so. The form should request all of the fax numbers for which consent is being given (e.g., if a company has ten fax numbers, in order to send faxes to all ten numbers, they must all be written on the form). If a company that has provided consent complains about receiving faxes from you, the written consent form should help you avoid liability for faxes sent before the complaint, but you should stop sending faxes to that company. (See ATTACHMENT B.)

12. Can I obtain electronic consent?

Yes. Electronic signatures can be obtained on a web site or via email. For web sites, you should include a space on your consent form for a person to type the fax number(s) and name on the form (for company consent, it is prudent to include a space for the title of the person signing, when possible). Additionally, there should be a button to click or a box to check indicating that the person has consented to receiving faxes. The consent should be clearly labeled and the space for the name to be typed in by the person granting permission must be separate from any other spot where the name is provided (this space is basically a "typed signature" line). (See ATTACHMENT C.)

13. Should I do anything different if the electronic consent is by email?

Yes. If you are not emailing a consent form to be completed, you should confirm that permission is being granted to receive faxes with a statement such as:

By replying to this email and including my name and fax number(s), I consent to receive faxes sent by or on behalf of *(list legal names of entities (including subsidiaries) as registered with the state corporation commission)*.

(See ATTACHMENT D.)

14. Must the fax number be included in the consent?

Yes. The rule requires the written consent to include the fax number(s) for which consent is being given. This means that if a person signs a consent form without the fax number(s), the consent is not valid. The fax number(s) can be preprinted on a form, but be sure to allow space on the form for the number to be changed in case the pre-printed fax number(s) changes.

For electronic consent, the FCC has informally indicated that a person giving consent must type in the fax number(s). Under the relevant electronic signatures law, however, if the person must also type in his or her name and click a button (or check a box), then there is no reason why the fax number(s) cannot automatically be included in the online form (e.g., for a membership renewal).

15. What do I do with the consent forms?

You should retain the consent forms so that you can respond to complaints, if any. There are no specific regulations about retention of these records, but it is recommended that the forms either be filed in hard copy or digitally imaged for easy retrieval for at least the entire time period you are sending faxes to that person. For electronic consent, it is recommended that you retain the email or store the web site data in an accessible format.

16. For how long does consent last?

Consent is valid until revoked or until a fax number changes. A person may revoke consent orally, by fax, by email, by letter or by any other method to put you on notice that the person no longer consents to receiving covered faxes. If a person revokes consent, you may not send any additional faxes covered by the new rule. If a person changes fax numbers (e.g., if that person moves to a different company, or the fax number otherwise changes) the consent is no longer valid and you must obtain a new consent form with the new fax number on it. If the change in a fax number is due to a new area code being assigned, the consent should remain valid.

17. What are the penalties for not complying with the new rule?

Individuals and businesses that receive unsolicited faxes have three remedies, as follows:

- FCC: can investigate and impose penalties of up to \$11,000 per violation.
- State Attorneys General: can seek penalties of \$500 per violation, which can be trebled for knowing and willful violations.
- Private suits: can be filed in state court for \$500 per violation, which can be trebled for knowing and willful violations.

There may be instances when you determine that it is impractical or impossible to obtain prior written consent before sending something that meets the definition of an unsolicited commercial advertisement, such as an insurance application. If the fax is being sent to

someone who requested it, there is a low likelihood that the person will complain about receiving what was requested. However, prudence dictates that every reasonable effort be made to get prior written consent to fax material covered by the new rule to avoid a complaint after the fact that the fax was sent without complying with applicable law.

18. Are there any other rules that apply to the content of faxes?

Yes. **All** faxes (not just those containing unsolicited commercial advertisements) must include on either the first page or in the margin of each page sent the following information:

- The date and time sent;
- An identification of the business, entity or individual sending the fax; and
- The telephone number of the fax machine or a telephone number of that business, entity or individual.

If a fax broadcaster is sending the fax on behalf of another entity and “demonstrates a high degree of involvement” in sending the faxes, such as providing fax numbers or designing the faxes, then the broadcaster also must be identified on the fax.

19. Are the rules the same if I use a computer to send or receive a fax?

Yes. The rules apply to any form of fax regardless of the technology used to send or receive it.

20. Are there restrictions on when faxes may be sent?

No. Faxes may be sent at any time.

21. Does the new rule require prior consent to send unsolicited commercial emails?

No. The new rule addresses only unsolicited commercial faxes.

22. Can I include permission to send unsolicited emails in the consent for faxes covered by the new rule?

Yes. The new DNC rule does not require you to get permission to send unsolicited emails, nor does it stop you from doing so. If there are state laws or regulations where you do business that govern unsolicited emails, the new rule does not affect the application or enforcement of those state laws or regulations. If you do include email in your fax consent form, it is possible that future state or federal laws or regulations may impose different requirements for that email permission, so you will need to review your consent form if such laws or regulations are enacted to determine if it satisfies them.

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ATTACHMENT A

Sample Consent Form: Individual (To be filled in)

<u>Fax Consent Form</u>
Name of person providing consent: _____
Fax number(s) for which consent is being provided: _____
By providing the fax number(s) above, I consent to receive faxes sent by or on behalf of <i>(list legal names of entities (including subsidiaries) as registered with the state corporation commission)</i> .
Signature: _____
Date: _____

Sample Consent Form: Individual (Preprinted)

<u>Fax Consent Form</u>
Name of person providing consent: <i>(Name preprinted)</i>
Fax number(s) for which consent is being provided: <i>(Fax number(s) preprinted)</i>
Check here for change(s) in fax number(s): New fax number(s): _____
By providing the fax number(s) above, I consent to receive faxes sent by or on behalf of <i>(list legal names of entities (including subsidiaries) as registered with the state corporation commission)</i> .
Signature: _____
Date: _____

ATTACHMENT B

Sample Consent Form: Company (To be filled in)

Fax Consent Form

Company/organization name for which consent is being provided:

Name/title of person authorized to provide such consent:

Fax number(s) for which consent is being provided:

By providing the fax number(s) above, I am authorized to and consent to the company/organization receiving faxes sent by or on behalf of *(list legal names of entities (including subsidiaries) as registered with the state corporation commission)*.

Signature: _____

Date: _____

Sample Consent Form: Company (Preprinted)

Fax Consent Form

Company/organization name for which consent is being provided: *(Name preprinted)*

Name/title of person authorized to provide such consent: *(Name preprinted if available)*

Fax number(s) for which consent is being provided: *(Fax number(s) preprinted)*

Check here for change(s) in fax number(s): New fax number(s): _____

By providing the fax number(s) above, I am authorized to and consent to the company/organization receiving faxes sent by or on behalf of *(list legal names of entities (including subsidiaries) as registered with the state corporation commission)*.

Signature: _____

Date: _____

ATTACHMENT C

Sample Online Consent Form: Individual

Fax Consent Form

Fax Number(s): _____ Name: _____

By entering my name and fax number(s) and checking this box, I consent to receive faxes sent by or on behalf of *(list legal names of entities (including subsidiaries) as registered with the state corporation commission)*.

Sample Online Consent Form: Company

Fax Consent Form

Fax Number(s): _____ Name/Title: _____

Company/Organization Name: _____

By entering my company/organization name and fax number(s), and my name, and by checking this box, I am authorized to and consent to the company/organization receiving faxes sent by or on behalf of *(list legal names of entities (including subsidiaries) as registered with the state corporation commission)*.

ATTACHMENT D

For email, you should include a statement:

By replying to this email and including my name and fax number(s), I consent to receive faxes sent by or on behalf of *(list legal names of entities (including subsidiaries) as registered with the state corporation commission)*.

ATTACHMENT E

Sample Consent Language: For an Agency to Add to a Form

IMPORTANT NOTE: An agency should not alter an insurance company form without prior written permission from the company.

For inclusion on a form, such as a client information form or other form, you may incorporate a statement such as:

By providing the fax number(s) above, I am authorized to and consent to receive faxes sent by or on behalf of *(list legal names of entities (including subsidiaries) as registered with the state corporation commission)*.

Sample Consent Language: For an Association to Add to a Form

IMPORTANT NOTE: This language should be easy to see and read. A good place to put it is just above the signature block in type no smaller than used for other text.

For inclusion on a form, such as a membership application form, dues statement, or seminar/conference registration brochure, you may incorporate a statement such as:

By providing the fax number(s) above, I am authorized to and consent to receive faxes sent by or on behalf of *(list legal names of entities (including subsidiaries) as registered with the state corporation commission)* and the Independent Insurance Agents & Brokers of America and its subsidiaries.