



INVESTMENT INDUSTRY ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÈRES

New Rules for Telemarketing and the National Do Not Call List Telecom Decision 2007- 48

Important Implications for IIAC Members

What are the National Do Not Call Legislation and Unsolicited Telecommunications Rules?

The “Unsolicited Telecommunications Rules (the Rules) framework and the National Do Not Call List” (National DNCL) Decision were published by the Canadian Radio-television and Telecommunications Commission (CRTC) July 3, 2007.

The Rules create a regulatory framework for telemarketing calls and other unsolicited telecommunications received by consumers. They are intended to prevent undue inconvenience and nuisance of unsolicited telecommunications, while still allowing legitimate uses of such communications.

The Rules establish requirements for telemarketers relating to allowable times of day to call, required introductions, record maintenance and penalties. The National DNCL is part of the Rules that in many cases must be subscribed to and consulted prior to making calls. However, in certain circumstances, (for instance, where direct consent to be called has been provided) those conducting telemarketing will not have to consult the National DNCL, but will still have to comply with the broader framework of the Rules when making the call.

When does the Rules become effective?

The Rules were passed in July 2007, and new changes to the Unsolicited Telecommunications rules will be effective on September 30, 2008, concurrent with the launch of the National DNCL. Certain details about the Rules structure such as the fees to be paid other than the fees for subscription to the Do Not Call List have not been finalized. The IIAC will monitor developments and inform members about impending implementation dates.

Who is subject to the Rules?

Any firm that uses the phone for “solicitation” is subject to the Rules. The firm, and anyone working for the firm, is subject to the Rules if anyone in your firm is engaged in “telemarketing”. The Rules also applies to organizations that conduct telemarketing on behalf of your organization.

Solicitation means:

“the selling or promoting of a product or service, or the soliciting of money or money’s worth, whether directly or indirectly and whether on behalf of another person. This includes solicitation of donations by or on behalf of charitable organizations.”

Telemarketing is defined as:

“the use of telecommunications facilities to make unsolicited telecommunications for the purposes of solicitation.”

The National DNCL Rules do not apply to a telemarketing communication made to a business consumer.

We have been advised by the CRTC that the Rules and the National DNCL does not apply to calls to existing clients in terms of “servicing” the account. Calls to convey and obtain information about the portfolio, and recommendations in respect of appropriate products and services within the normal investment advisor – client relationship are not considered telemarketing and are outside the framework of the Rules.

In situations involving referrals and cold calling, the Rules will apply and the National DNCL may apply.

Where investment advisors prospect for clients by calling potential clients with whom they have no previous contact or where there was no personal referral, the investment advisor will have to comply with both the Rules and the National DNCL.

If an investment advisor is referred to a potential client, but the potential client has not directly provided the advisor with consent to be called, the Rules and the National DNCL will apply. This is the case even where the potential client has provided consent to be called indirectly through the person referring the potential client.

The situations where only the Rules, but not the National DNCL will apply are where the potential client has provided express consent to be called. This means that the potential client must have communicated directly with the investment advisor (through email, a conversation, conventional mail, or a telecommunication initiated by the potential client) providing consent to be called.

Alternatively, the potential client may have communicated express consent by filling out a form or otherwise indicating their willingness to be contacted pursuant to a request for information provided by the firm, for instance at a firm event, trade show or other promotional event.

This means if anyone in your firm engages in cold calling of potential clients, or contacts prospects through referrals, then the firm is subject to the Rules, including the National DNCL section of the Rules.

How does the Rules Work?

There are two elements to the regulatory structure. The Rules are a framework that sets out requirements for businesses that conduct their business using the phone to sell or promote products and/or services to existing and potential clients. The Rules require such businesses to maintain their own separate do not call list and keep the consumer's name and number on the list for 3 years and 31 days from the date of the consumer's do not call request, as well as follow specific rules about the times when they can call clients (9am – 9:30 pm weekdays – 10am – 6pm weekends) and the information they must provide to them.

There are also provisions relating to information to be contained in fax telemarketing. Firms must also provide a local or toll free number where consumers can ask questions or make comments about the telemarketing communication, and respond to such questions or comments within 3 business days. The Rules also contains liability provisions for violations of the Rules.

The second element of the Rules is the National DNCL Rules. The National DNCL is a nationwide registry that will prohibit “telemarketers” from placing unsolicited telemarketing calls to telephone numbers that are registered on it. Individuals will be able to register their phone numbers on the National DNCL in a variety of ways, including by phone and over the internet. A firm that conducts telemarketing must:

- become a registered subscriber of the National DNCL and pay all applicable fees,
- use the National DNCL for any calls that do not fall under the existing exemptions to make sure that such communications are not placed with numbers on the National DNCL,
- keep records of its use of the National DNCL for 3 years from the date the records are created.

Each legal entity within a firm must register and subscribe to the National DNCL separately. This means that a bank cannot share its registration and subscription with its investment banking arm. Also if salespersons or groups of salespersons are organized as separate legal entities then each salesperson or group must register and subscribe to the National DNCL. The CRTC has advised us that where the relationship is structured on a principal-agent basis, the firm will be the entity responsible for registering and subscribing to the National DNCL.

What are the exemptions from the National DNCL Rules?

Although the Rules will not apply to firms whose clients are solely businesses, for which a business to business exemption applies, there are a number of other exemptions to the National DNCL Rules. The exemptions apply to registered charities, political parties, organizations undertaking surveys and newspapers soliciting subscriptions.

For the purposes of IIAC members, the key exemption in the regulation is for “existing business relationships”, which is defined as follows:

“existing business relationship” means a business relationship that has been formed by a voluntary two-way communication between the person making the telecommunication and the person to whom the telecommunication is made, arising from

- (a) *the purchase of services or the purchase, lease or rental of products, within the eighteen-month period immediately preceding the date of the telecommunication, by the person to whom the telecommunication is made from the person or organization on whose behalf the telecommunication is made;*
- (b) *an inquiry or application, within the six-month period immediately preceding the date of the telecommunication, by the person to whom the telecommunication is made in respect of a product or service offered by the person or organization on whose behalf the telecommunication is made; or*
- (c) *any other written contract between the person to whom the telecommunication is made and the person or organization on whose behalf the telecommunication is made that is currently in existence or that expired within the eighteen-month period immediately preceding the date of the telecommunication.*

As above, the existing business relationship is confined to the relationship established between a consumer and one distinct legal entity. It cannot be extended to affiliates or joint marketing partners. This has implications for IAs and firms that have structures where the IAs’ business is set up as a separate legal entity from the firm. The implication relates to not only the ability to use the exemption, (as other IAs that are not part of that legal entity cannot rely on this exemption unless they also have an existing business relationship), but as noted above, also in relation to fees paid under the Rules in respect of registration and to subscribe to the DNCL.

In respect of the application of the Rules, there are some fine, but important distinctions to be made in respect of the relationship between IAs and their clients or prospective clients with whom they have had prior contact.

In respect of an IA – client relationship where the account has been opened and the relationship is already established, the communication related to servicing the account between the IA and client are not subject to the Rules at all, so there is no need to ascertain whether the exemption applies and the remaining obligations under the Rules.

However, in situations where there has been some prior contact with a prospective client, but they do not have an account and have not provided express consent to be called (for example if the firm had received an inquiry from them in the previous six months, and the IA called to re-establish contact or inform them of a new development) the Rules will apply, but the exemption is available. This means that the firm is still obligated to register under the National DNCL, pay fees, observe the time restrictions for calling and otherwise comply with the introduction and call display requirements of the Rules, it is not required to subscribe to the National DNCL list and check the list prior to the call.

The entire Rules framework, including the requirement to subscribe to the National DNCL will apply if any of the firm's business is generated through cold calling potential clients or referrals

On a practical level, it should be noted that the enforcement process for the National DNCL is complaint driven. In order for the firm or broker to be sanctioned in any way, a potential client would have to complain to the authority administering the National DNCL about the brokers call within 14 days of receiving an unsolicited telemarketing effort.

In addition, the firm will not be held liable for violating the National DNCL Rules if at the time the call is made, the client was a business or the person had a personal relationship with the client. Although this is not an explicit exemption, it is available as a defence; with the onus on the telemarketer to establish that such a relationship existed at the time of the call. The Rules do not define the scope of a personal relationship.

How can I avoid problems with the National DNCL Rules in respect of my existing clients?

Although the CRTC has indicated that once an account has been opened, the Rules will not apply, they have also recommended that it may be prudent to include express consent to be contacted by phone in the client opening documentation. Express consent includes:

- (a) written consent to be contacted by way of telecommunications, signed by the consumer giving consent;**
- (b) oral consent, verified by an independent third party or where an audio recording of the consent is retained by the telemarketer or client of the telemarketer;**
- (c) electronic consent through the use of a toll-free number;**
- (d) electronic consent via the Internet; or**
- (e) consent through other methods as long as a documented record of consumer consent is created by the consumer or by an independent third party.**

What are the implications for violating the Rules?

As noted, violations of the Rules and the National DNCL Rules are complaint driven. If a potential client whose number is registered on the National DNCL receives a call from a firm with whom they have no existing business relationship, or if the broker is relying on the existing business relationship and calls outside the prescribed hours, does not provide a proper introduction or does not allow for his number to be displayed to the recipient, the aggrieved party must file the complaint within 14 days of receiving the call. The CRTC will investigate the complaint to assess whether a violation has occurred and will decide whether to issue a notice of violation and impose monetary penalties. The penalties for each violation range up to \$1,500 for individuals and to up to \$15,000 for corporations.

The CRTC elected not to provide guidelines to assist in determining the number and types of violations that may lead to such penalties. The following factors, however, will be considered in determining whether to issue a notice of a violation and what amount of the associated penalty may be:

- the nature of the violation (minor, serious, very serious, negligent or intentional),
- the number and frequency of complaints and violations,
- the relative disincentive of the measure, and
- the potential for future violations.

How can firms prepare?

Systems and processes to be put in place

- Download the National DNCL and scrub calling lists if applicable (there is a 31 day grace period)
- Set up a toll free number or local number for consumer contact
- Set up record keeping mechanisms related to the National DNCL
- Create scripts to comply with identification rules for telemarketing calls
- Set up infrastructure and processes for internal do not call lists
- Modify client documentation such as the account opening documentation to obtain consent for telecommunications.

IIAC will be working with the CRTC and others to provide further information and details to members through presentations and compliance tools. IIAC has a webinar explaining the Rules and the implications for members, available on our website at www.iiac.ca.

Fees for DNCL Subscriptions

Subscription Rates

Subscription option - by area code				
Number of area codes	Annual	6-month	3-month	1-month
All area codes	\$11,280	\$5,640	\$2,970	\$1,125
By individual area code	\$615	\$310	\$155	\$55
Subscription option - by telephone number				
Telephone number query¹		Per query		
Any area code (maximum 100 queries per query session)		\$0.50		

Accordingly, telemarketers that are required to subscribe to the National DNCL can expect to pay the following in these hypothetical examples:

1. **A telemarketer that conducts telemarketing campaigns across Canada throughout the year could get an annual subscription for \$11,280, which would give them access to all area codes for a full year.**
2. **A telemarketer that conducts telemarketing campaigns in just four area codes throughout the year could get a subscription for \$2,460.**
3. **A telemarketer that conducts a seasonal telemarketing campaign across Canada that lasts just three consecutive months could get a subscription for \$2,970.**
4. **A telemarketer that conducts a limited telemarketing campaign that targets just 50 telephone numbers could query those 50 numbers for \$25.**