

1997-98 SESSION
COMMITTEE HEARING
RECORDS

Committee Name:

*Joint Committee for
Review of
Administrative Rules*

(JCR-AR)

Sample:

- Record of Comm. Proceedings
- 97hr_AC-EdR_RCP_pt01a
- 97hr_AC-EdR_RCP_pt01b
- 97hr_AC-EdR_RCP_pt02

- Appointments ... Appt
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- 97hr_JCR-AR_Misc_pt07
- Record of Comm. Proceedings ... RCP
-

ATGP/27-HOME SOLICITATION

SELLING

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION

NOTICE OF HEARING
RULES RELATED TO TELECOMMUNICATIONS AND CABLE TELEVISION SERVICES

The State of Wisconsin Department of Agriculture, Trade and Consumer Protection announces that it will hold public hearings on a proposal to repeal and recreate Chapter ATCP 127, Wis. Adm. Code, relating to home solicitation selling. The public is invited to attend the hearings and make comments on the proposed rule. Following the public hearings, the hearing record will remain open until November 6, 1998 for additional written comments.

A copy of this rule may be obtained, free of charge, from the Bureau of Consumer Protection, Wisconsin Department of Agriculture, Trade and Consumer Protection, P.O. Box 8911, Madison, WI 53708-8911, or by calling 608/224-4965. Copies will also be available at the hearings.

If an INTERPRETER for the deaf and hard of hearing people is required, please notify this office by September 25, 1998 either by writing to James Rabbitt, P.O. Box 8911, Madison, WI 53708-8911, or by contacting the message relay system (TTY) at 608/246-5058.

Five hearings are scheduled:

Oct. 5, 1998, Monday Department of Agriculture, Trade and Consumer Protection Board Room 2811 Agriculture Drive Madison, WI	commencing at 1:00 p.m. Handicapped accessible
Oct. 6, 1998, Tuesday 10930 W. Potter Rd. Milwaukee, WI	commencing at 1:00 p.m. Handicapped accessible
Oct. 7, 1998, Wednesday State Office Building 200 N Jefferson Street Green Bay, WI	commencing at 1:00 p.m. Handicapped accessible
Oct. 8, 1998, Thursday North Central Technical College 1000 Schofield Rd. Wausau, WI	commencing at 1:00 p.m. Handicapped accessible
Oct. 9, 1998, Friday Department of Agriculture, Trade and Consumer Protection 3610 Oakwood Hills Parkway Eau Claire, WI	commencing at 1:00 p.m. Handicapped accessible

Written comments will be accepted until November 6, 1998.

Analysis by the Department of
Agriculture, Trade and Consumer Protection

Statutory authority: s. 100.20(2), Stats.

Statutes interpreted: s. 100.20, Stats.

This rule protects Wisconsin consumers against unfair and deceptive home solicitation selling practices. Home solicitation selling includes telemarketing, direct mail and door-to-door selling.

This rule updates and strengthens the department's current home solicitation selling rules under ch. ATCP 127, Wis. Adm. Code, to address new telemarketing and home solicitation selling practices. This rule also expands current rules to address new selling methods, such as electronic mail.

This rule is based, in part, on Federal Trade Commission telemarketing rules under 16 CFR 310, which took effect on December 31, 1995. However, this rule also protects consumers in other transactions, including direct mail and door-to-door transactions. It also goes beyond FTC telemarketing rules to cover intrastate transactions and new electronic sales methods such as e-mail.

This rule is consistent with federal rules, but incorporates other state law requirements related to home solicitation selling. By adopting this rule under Wisconsin's "Little FTC Act," s. 100.20, Stats., the department will provide more effective redress to Wisconsin consumers. Violations of this rule may be prosecuted under state law in Wisconsin courts. Consumers who suffer a monetary loss because of a violation of this rule may also sue the violator directly, and may recover double damages, costs and reasonable attorney fees.

Coverage

This rule applies to the sale of consumer goods or services by means of "home solicitations" including:

- Telephone and other electronic solicitations (e.g., electronic mail) to a consumer's residence.
- Mail solicitations (other than catalog sales).

- Door-to-door and other "transient" solicitations. A "transient" solicitation means a face-to-face solicitation at any of the following places:

- * A consumer's residence
- * A location, other than the seller's home or regular place of business, to which the seller invites the consumer by means of a home solicitation.
- * A location, other than the seller's home or regular place of business, at which the seller offers consumer goods or services for delivery at a later date.

This rule does not apply to any of the following:

- Mass advertisements (e.g., in a newspaper, television, radio or internet home page) which are not addressed to individual consumers or consumer residences.
- Transactions at a seller's home or regular place of business.
- Transactions at places like a farmer's market, where goods are delivered at the point of sale.
- Catalog sales.
- Transactions initiated by a consumer (except in response to a home solicitation).
- Business-to-business sales.
- Banks, savings and loan associations, insurance companies, public utilities or telecommunications carriers whose activities are exempt under s. 93.01(1m), Stats.
- Real estate sales, other than sales of cemetery lots and "time shares" as defined in s. 707.02(24), Stats.
- Securities sold in compliance with ch. 551, Stats., or franchise investments sold in compliance with ch. 553, Stats.
- Pay-per-call services sold in compliance with s. 196.208, Stats.
- Charity raffles, unless the raffle is part of a seller's plan or scheme to sell consumer goods or services.

Opening Disclosures

Under this rule, a seller making a "home solicitation" must clearly disclose all of the following as part of that solicitation:

- The seller's correct name. If a seller (e.g., a contract telemarketing firm) makes a home solicitation for another seller, it must also disclose the name of the other seller.
- The name of the individual making the home solicitation, if the solicitation is a telephone or transient solicitation. For example, if Mary Smith makes telephone or transient solicitations for the ABC firm, she must disclose her name to the consumer. Smith may disclose a fictitious name which uniquely identifies her if the ABC firm keeps a record of that uniquely identifying fictitious name.
- That the seller is offering or promoting the sale of consumer goods or services.
- The kind of goods or services which the seller is offering or promoting.

A seller must make these opening disclosures in the following ways:

- Orally, if the home solicitation involves an oral or face-to-face communication. The seller must make the oral disclosures before asking any questions or making any statements to the consumer (other than an initial greeting).
- In writing, if the home solicitation involves a written or face-to-face solicitation.

Disclosures Prior to Sale

In a home solicitation transaction, a seller must disclose all of the following before the consumer agrees to buy or receive any consumer goods or services, and before the seller accepts any payment from the consumer:

- The nature and quantity of the consumer goods or services.
- The cost of the consumer goods or services, including material delivery and handling costs. If the cost may vary, the seller must disclose the maximum cost or the formula by which the total cost will be computed.
- All material terms and conditions affecting the sale, receipt or use of the consumer goods or services, including credit terms if any. (Cost disclosures in consumer credit transactions must comply with applicable requirements under ch. 422, Stats., and federal law.)

- The seller's policy related to refunds, cancellations and exchanges.
- The seller's correct name, mailing address, and telephone number if any.

A seller must make these disclosures in writing. However, a seller may make the disclosures by telephone if the seller confirms them in writing. The seller must give the written confirmation at or before the time that the seller first delivers consumer goods or services to the consumer, or accepts payment from the consumer.

Prize Promotions

This rule regulates sweepstakes and other prize promotions that involve an element of chance. Home solicitation sellers who use these promotions may not require consumers to make any purchase or payment as a condition to entry. A seller must also disclose all of the following in writing, before the consumer agrees to buy anything or makes any payment to the seller:

- The verifiable retail value of each offered prize.
- The odds of receiving each offered prize or, if the odds cannot be calculated in advance, the factors used in calculating the odds.
- That the consumer is not required to make any purchase or payment in order to participate in the prize promotion.
- Instructions on how the consumer may participate in the prize promotion without making a purchase or payment.
- All actions which the consumer must take, and all conditions which the consumer must meet, in order to receive or be eligible for a prize.
- The approximate length of any sales presentation which the consumer is invited to hear, view or attend, and the nature of the consumer goods or services that will be offered or promoted.
- All shipping, handling or other fees which the consumer must pay in order to receive or use a prize.

Prize Promotions; Misrepresentations

This rule prohibits any seller from misrepresenting the material terms of a prize promotion, including any of the following:

- The odds of winning a prize.
- The nature or value of a prize.

- The nature or existence of any conditions which a consumer must meet in order to obtain a prize or participate in a prize promotion.

Unauthorized Payment

Under this rule, no home solicitation seller may obtain or submit for payment any check, draft or other negotiable instrument drawn on a consumer's account without that consumer's express, verifiable authorization. The following authorizations are considered verifiable:

- An express written authorization. Express written authorization may include the consumer's signature on the check, draft or negotiable instrument.
- An express oral authorization if all of the following apply:
 - * The oral authorization is tape recorded and made available upon request to the consumer's bank.
 - * The oral authorization clearly authorizes payment for the goods and services offered to the consumer.
 - * The oral authorization clearly indicates that the consumer received information specifying all of the following:
 - The date and amount of the check, draft or instrument.
 - The payor's name.
 - The number of payments, if more than one.
 - A telephone number for consumer inquiries that is answered during normal business hours.
 - The date of the consumer's oral authorization.
- An authorization which the seller confirms in writing, provided that all of the following apply:
 - * The seller sends the written confirmation to the consumer before the seller submits the check, draft or other negotiable instrument for payment.

* The written confirmation includes all of the following information:

- The date and amount of the check, draft or instrument.
- The payor's name.
- The number of payments, if more than one.
- A telephone number for consumer inquiries that is answered during normal business hours.
- The date of the consumer's authorization.
- A procedure by which the consumer can obtain a refund from the seller if the written confirmation is inaccurate.

Credit Card Laundering

This rule prohibits "credit card laundering" related to home solicitation transactions. In "credit card laundering" schemes, unscrupulous sellers gain access to the credit card system -- from which they might otherwise be excluded -- by processing credit card transactions under the name of another merchant.

This rule prohibits a merchant from presenting for payment, to a credit card system, any credit card sales draft generated by a home solicitation transaction that is not a sale by that merchant to that credit card holder. No home solicitation seller may obtain access to a credit card system under the name of another merchant unless that access is authorized by that merchant's written agreement with the credit card system operator, or with an acquirer licensed by the credit card system operator.

Misrepresentations

This rule prohibits a seller from doing any of the following in a home solicitation transaction:

- Misrepresenting seller's identity, affiliation, location or characteristics.
- Misrepresenting the nature, purpose or intended length of a home solicitation.
- Misrepresenting the nature or terms of a home solicitation transaction, or any document related to that transaction.
- Misrepresenting the cost of goods or services offered or promoted by the seller, or failing to disclose material costs payable by the consumer.
- Misrepresenting the nature, quantity, material characteristics, performance or efficacy of the goods or services offered or promoted by the seller.

- Misrepresenting or failing to disclose material restrictions, limitations or conditions on the purchase, receipt, use or return of goods or services offered or promoted by the seller.
- Misrepresenting the material terms of a seller's refund, cancellation, exchange, repurchase or warranty policies.
- Misrepresenting that a seller is offering consumer goods or services free of charge or at a reduced price.
- Misrepresenting that a seller is affiliated with, or endorsed by, any government or 3rd-party organization.
- Misrepresenting that a seller has specially selected the consumer, or misrepresenting the basis on which a consumer has been selected.
- Misrepresenting any material aspect of an investment opportunity, including risk, liquidity, earnings potential or profitability.
- Failing to disclose, in connection with every purported offer of free goods or services in a home solicitation transaction, any costs which the consumer must incur and any conditions which the consumer must meet in order to receive those free goods or services.
- Making any other false, deceptive or misleading representation to a consumer.

Prohibited Practices; General

This rule prohibits a seller from doing any of the following in a home solicitation transaction:

- Threatening, intimidating or harassing a consumer.
- Failing to leave a consumer's premises upon request.
- Requesting or receiving payment for "credit repair" services until the seller provides the consumer with all of the following:
 - * All of the "credit repair services" for which the seller is requesting or receiving payment.
 - * A consumer report, from a bona fide consumer reporting agency, which demonstrates that the "credit repair services" have achieved all of the results promised to the consumer.
- Requesting or receiving payment for helping a consumer recover money lost in a prior home solicitation transaction

until at least 7 days after that consumer recovers that money. (This provision addresses so-called "recovery room" schemes, which prey on previously victimized consumers.)

- Requesting or receiving payment for "loan finder" services until the consumer actually receives the promised loan.

FISCAL ESTIMATE

Assumptions Used in Arriving at Fiscal Estimate

This rule updates and modernizes existing rules related to home solicitation selling. It also harmonizes state regulations with federal telemarketing rules. The revised rule requires information be given to consumers who are solicited away from regular business establishments about the product, costs, and identity of seller. The bill also prohibits certain deceptive practices.

The department already handles over 4,000 complaints annually from consumers about transactions which are initiated or consummated away from the sellers regular place of business. It is assumed that the number of complaints will not increase due to this revision. It is also assumed that this law will assist department staff by providing clearer definitions which, when applied, will enhance our efficiency in dealing with these problems.

Based on these assumptions, the department believes there is no fiscal effect associated with amendment of this rule.

Initial Regulatory Flexibility Analysis

Proposed ch. ATCP 127, Wis. Adm. Code

Home Solicitation Selling

This rule regulates businesses that solicit and sell consumer goods by mail, telephone, or other means away from a regular place of business. The rule provides methods whereby buyers can be informed of the conditions of their agreements in a manner that is meaningful and available to the consumer after the transaction is done and the seller is no longer at the same location.

These requirements should have little if any impact on small business. It is general business practice to inform potential customers who you are and the product you are selling and to produce invoices following the sale. It is also general practice to retain business records for a period of time for tax and other purposes. The practices regulated by the prize promotion,

unauthorized payment, telephone solicitation, and credit card laundering sections have been identified at federal rules hearings as practices which have lead to abuse of consumers and are already in effect for any business that solicits on an interstate scale. Businesses recordkeeping requirements are necessary for meaningful enforcement of the rules and should be already the norm for most businesses.

Scope

This rule is based, in part, on Federal Trade Commission telemarketing rules yet also protects consumers in intrastate transactions, direct mail, door-to-door, and electronic sales.

This rule does not apply to sales at a regular place of business, catalog sales, mass advertising, business to business sales, financial institutions, utilities, and real estate sales.

Opening Disclosures

This rule requires initial disclosures such as the seller's correct name, the name of the individual making the solicitation, the fact that the seller is offering or promoting a sale of goods or services, and the kind of goods or services the seller is offering or promoting.

These disclosures must be made orally, if the home solicitation involves an oral or face-to-face communication and in writing, if the home solicitation involves a written or face-to-face solicitation.

These requirements should have no significant impact on small business. Most sellers prefer to leave written information about their company and products with the consumer already.

Disclosures Prior to Sale

Before the sale or acceptance of payment a seller must disclose all of the following; the nature, quantity, cost, and material terms and conditions affecting the sale, receipt or use of the goods or services, and the seller's policy related to refunds, cancellations and exchanges.

These requirements add no additional cost to legitimate small business who already provide this information to consumers in part to protect themselves from excessive customer dissatisfaction.

Prize Promotions

This rule regulates sweepstakes and other prize promotions. Sellers who use these promotions may not require any purchase or payment as a condition to entry. A seller must also disclose the verifiable retail value of each offered prize, the odds of

receiving each offered prize, instructions on how to participate without making a purchase or payment, all actions which the consumer must take, and all conditions which the consumer must meet. This rule also prohibits any seller from misrepresenting the material terms of a prize promotion.

This requirement reflects conditions contained in Wisconsin's lottery and selling with pretense of a prize laws. It should have no fiscal impact on small business.

Unauthorized Payment

Under this rule, no seller may obtain or submit any negotiable instrument drawn on a consumer's account without express, verifiable authorization. Authorizations may be written or oral and must be verifiable by writing or tape recording.

This section may require businesses who currently do not have the facility to tape record oral authorizations to make a one time purchase of necessary equipment.

Credit Card Laundering

This rule prohibits "credit card laundering" schemes by which unscrupulous sellers gain access to the credit card system by processing credit card transactions under the name of another merchant.

This section targets only those sellers engaged in unscrupulous practices and should have no impact on legitimate small business.

Misrepresentations

This rule prohibits misrepresentations including:

The seller's identity, affiliation, location or characteristics or the nature, purpose or intended length of a home solicitation.

The cost, nature or terms including restrictions, limitations or conditions on the purchase, receipt, use or return of goods or services or any document related to that transaction. Failing to disclose is also prohibited.

The nature, quantity, or material characteristics of the goods or services.

That a seller is affiliated with, or endorsed by, any government or 3rd-party organization or has specially selected the consumer.

Any material aspect of an investment opportunity, including risk, liquidity, earnings potential or profitability.

Prohibited Practices; General

This rule prohibits a seller from doing any of the following in a home solicitation transaction:

Threatening, intimidating, harassing, or failing to leave a consumer's premises upon request.

Requesting or receiving payment for "credit repair" services until the consumer receives the "credit repair services" verified by a consumer report, from a consumer reporting agency, demonstrating all of the results promised to the consumer.

Requesting or receiving payment for helping a consumer recover money lost in a prior home solicitation transaction until at least 7 days after that consumer recovers that money.

Requesting or receiving payment for "loan finder" services until the consumer actually receives the promised loan.

Prohibited Telephone Solicitation Practices

This rule prohibits a home solicitation seller from doing any of the following:

Initiating a telephone solicitation to a consumer who has previously stated that he or she does not wish to receive telephone solicitations from the seller.

Repeatedly causing a consumer's telephone to ring, or repeatedly engaging a consumer in telephone conversation, with intent to annoy, abuse or harass a consumer.

Initiating a telephone solicitation before 8:00 AM or after 9:00 PM without the prior consent.

Recordkeeping

This rule requires a home solicitation seller to keep copies of all solicitation scripts and documents, transaction receipts, a description of each prize offered and the name and address of every consumer who received a prize. The rule also requires a seller to keep the real names, any fictitious name(s) used, address and telephone number, and job title or titles of individual solicitors acting on the seller's behalf.

This section is similar to the federal telemarketing rule requirements. Additionally, the records to be kept are generally held by small business for other purposes. Therefore there should be no fiscal impact to small business.

Assisting Violations

No person may knowingly assist any seller to engage in any activity or practice in violation of this chapter.

Small Business Impact

The impact on small business should be limited to those who are not already marketing under the federal telemarketing rules. Some small businesses may need to purchase equipment to tape record telephone authorizations from consumers. Most other requirements should be covered by practices already common in the business community.

Dated this 26th day of August, 1998.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By: Ben Brancel
Ben Brancel, Secretary