

Report From Agency

DATCP Docket No. 12-R-04
Rules Clearinghouse No. 12-036

Final Draft Rule
November 1, 2012

PROPOSED ORDER OF THE WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION ADOPTING RULES

2 The Wisconsin department of agriculture, trade and consumer protection proposes the following
3 rule *to renumber* ATCP 127.02 (1) and (2); *to amend* ATCP 127.80 (8) and (10) (intro) (a)
4 (intro.) (b) (intro.) and 2. and (c) to (i); and *to create* ATCP 127.02 (1) and (2), 127.14 (16),
5 127.80 (6m) and 127.80 (12); *relating to* telephone solicitations; no-call and no-text list.

Analysis Prepared by the Department of Agriculture, Trade and Consumer Protection

This rule implements 2011 Wisconsin Act 197, which prohibits text message solicitation to residential customers enrolled in the Wisconsin No Call program. This rule updates the existing ch. ATCP 127, Subchapter V – Telephone Solicitations; No-Call List, to align the rule with recent changes to s. 100.52, Stats. In addition, this rule prohibits a telephone solicitation practice known as “spoofing.”

Statutes Interpreted

Statutes Interpreted: ss. 100.20 (1) and 100.52, Stats.

Statutory Authority

Statutory Authority: ss. 93.07 (1), 100.20 (2), and 100.52, Stats.

Explanation of Agency Authority

DATCP has broad general authority, under s. 93.07(1), Stats., to interpret laws under its jurisdiction. DATCP has authority under s. 100.20 (2), Stats., to promulgate rules forbidding methods of competition or trade practices which the department determines to be unfair, and to prescribe fair methods of competition and trade practices. Section 100.52, Stats., directs DATCP to, establish by rule, a nonsolicitation directory of residential telephone numbers (the “no-call

list”), establish a registration system for telephone solicitors, and distribute the nonsolicitation directory to the telephone solicitors.

Related Statutes and Rules

Section 100.20 (1), Stats., requires trade practices in business to be fair. Unfair trade practices are prohibited. DATCP has rulemaking authority under s. 100.20 (2), Stats., to regulate unfair trade practices through administrative rules.

Section 100.52, Stats., governs telephone solicitations. It directs DATCP to maintain a nonsolicitation directory listing of residential telephone numbers and register telephone solicitors.

Chapter ATCP 127, Subchapter II - Telephone Solicitations, was promulgated under DATCP’s authority to regulate unfair trade practices. Among other things, this subchapter requires a telephone solicitor to disclose its name and prohibits it from using a fictitious name or misrepresenting its identity, affiliation, location or other characteristics.

Chapter ATCP 127, Subchapter V - Telephone Solicitations; No-Call List, implements s. 100.52, Stats. This subchapter establishes procedures for a telephone customer to include telephone numbers onto the no-call list and for telephone solicitors to register with DATCP.

Plain Language Analysis

Background

The Wisconsin no-call program was established by statute in 2001 and DATCP promulgated a rule, ch. ATCP 127, to implement the program in 2002. Telephone solicitors are prohibited from calling residential customers on the state no-call list. There are exceptions for calls made to current clients and for calls made on behalf of non-profit and political organizations. Solicitors are required to register with DATCP and to pay an annual or quarterly fee to solicit residential customers located in Wisconsin. A residential customer who does not want to receive unsolicited commercial calls must provide his or her telephone number and zip code to DATCP every two years to remain on the no-call and no-text list. In 2008, the statute was amended (by 2007 Wisconsin Act 226) to include cellular phones. In 2012, the statute was further amended (by 2011 Wisconsin Act 197) to include regulation of text messages.

Rule Content

General

This rule does all of the following:

- Defines “caller identification information” and “caller identification service.”
- Prohibits telephone solicitors from transmitting misleading or inaccurate caller identification information.
- For purposes of the no-call list, clarifies that the definition of “telephone solicitation” includes text messages, and creates a definition of “text message.”

“Spoofing”

Under current rules, telephone solicitors are required to disclose the name of the primary seller, and the name of the person making the telephone solicitation, before asking any questions or making any statements other than an initial greeting. Current rules prohibit sellers from using fictitious names or otherwise misrepresenting the seller’s identity, location, or other characteristics.

This rule prohibits telephone solicitors from causing, either directly or indirectly, caller identification services to transmit or display misleading or inaccurate caller identification information. This practice has come to be known as “spoofing.”

No Text

Under s. 100.52, Stats., and current rules, telephone customers may enroll for the Wisconsin no-call list. Telephone solicitors are prohibited from calling telephone numbers on the list, and must register annually with DATCP.

This rule follows recent changes to s. 100.52, Stats., and includes text messaging under the definition of “telephone solicitation.”

Summary of, and comparison with, existing or proposed federal statutes and regulations

The Federal Trade Commission (FTC) and Federal Communications Commission (FCC) administer the Telephone Consumer Protection Act (TCPA). This act established the national Do-Not-Call list. FCC rules prohibit sending unwanted text messages to wireless phone numbers if they are sent using an autodialer, or the number is on the national Do-Not-Call list.

FTC and FCC also administer the CAN-SPAM Act (Controlling the Assault of Non-Solicited Pornography and Marketing). This law (and its associated rules) prohibits sending unwanted commercial email messages to wireless devices without prior permission.

FCC administers the Truth in Caller ID Act of 2009. This act and its associated rules prohibit transmitting misleading or inaccurate caller ID information with the intent to defraud, cause harm, or wrongfully obtain anything of value. It applies to any person or any entity (not just telemarketers).

Pursuant to FCC rules, a registered telemarketer is specifically required to transmit or display its telephone number or the number of the seller on whose behalf the telemarketer is calling, and, if possible, its name or the name of the company for which it is selling products or services. It is also required to display a telephone number that the consumer can call during regular business hours to ask to no longer be called.

Comparison with rules in adjacent states

Many states have do-not-call programs. Several states, like Wisconsin, maintain their own do-not-call list. Others, including Illinois, Michigan, and Minnesota, have laws allowing for state enforcement of do-not-call provisions, but rely on the FTC's registry rather than maintaining their own. Under FTC rules, texting is included in the do-not-call provisions.

Iowa does not presently have statutes or rules relating to a do-not-call program.

Summary of factual data and analytical methodologies

Telemarketing and the No-Call program has constantly been at the top of the list of most consumer complaints since the inception of No-Call program. During calendar year 2011, DATCP received 1,669 written consumer complaints about telemarketing and the no-call list.

Analysis and supporting documents used to determine effect on small business or in preparation of an economic impact analysis

There are approximately 2,095,000 phone numbers on the Wisconsin do-not-call list.

Since passage of 2011 Wisconsin Act 197, some previously registered telemarketers have revised their registration statements to include additional phone lines that they use for solicitation via text message. In aggregate, this represents 61 additional lines, or additional registration fees of \$4,575.

Effect on small business

This rule will have minimal impact on business. This rule might affect the following businesses in the following ways (many of which are "small businesses"):

- ***Direct marketers that conduct both telephone solicitation and text message solicitation.*** Wisconsin's no-call program was established in 2001. Therefore, businesses in this category are already regulated under current law, and will only experience minimal additional regulatory obligations or expenses. Currently, there are approximately 460 telephone solicitors registered for the Wisconsin no-call program.
- ***Direct marketers that conduct text message solicitation but are not currently registered telephone solicitors.*** Under this rule (as well as s. 100.52, Stats., as amended by 2011 Wisconsin Act 197), businesses that send text message solicitations must register with the Wisconsin No Call program and refrain from sending text messages to numbers on the no-call list. The annual registration fees consist of the following; subject to a maximum limit of \$20,000:

- A basic fee of \$700 for the first year and \$500 each subsequent year.
- An additional fee of \$75 for each telephone line used for registrants who use four or more lines.
- An additional \$25 fee for each e-mail address the registrant would like DATCP to transmit the no-call list, in excess of one.
- An additional \$25 fee for each compact disc set the registrant would like DATCP to mail.
- An additional \$1,000 for each hard-copy the registrant would like DATCP to mail.

Many of the businesses affected by this rule are “small businesses.” However, given the subject matter, there are very few accommodations or special exceptions that can be made for small businesses.

This rule and the existing rule include many provisions that will benefit large and small businesses alike. For example:

- DATCP publishes a fact-sheet for solicitors, explaining the requirements and prohibitions contained in the rule.
- The rule allows solicitors to obtain the no-call list in a variety of formats, so they can use what is most convenient to them.

This new law and proposed rule may result in savings for some consumers on their monthly wireless service bills. On some plans, the provider charges the customer for each text message received. The new no-text provision protects consumers from these charges. DATCP does not have sufficient data to estimate a dollar amount that consumers might save. A complete *business impact analysis* is attached.

Agency contact person

Questions and comments related to this rule may be directed to:

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Place where comments are to be submitted and deadline for submission

Rule comments can be submitted online at <https://health.wisconsin.gov/admrules/public/Home> or submitted directly to the agency at:

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Rule comments were accepted until October 4, 2012

Text of Rule

1 **SECTION 1.** ATCP 127.02 (1) and (2) are renumbered to 127.02 (3) and (4).

2 **SECTION 2.** ATCP 127.02 (1) and (2) are created to read:

3 ATCP 127.02 (1) “Caller identification information” means information provided by a
4 caller identification service regarding the telephone number, name, or other information
5 regarding the seller originating a telephone solicitation.

6 ATCP 127.02 (2) “Caller identification service” means any service or device designed to
7 provide the user of the service or device with the telephone number, name, or other information
8 regarding the origination of a telephone solicitation.

9 **SECTION 3.** ATCP 127.14 (16) is created to read:

10 ATCP 127.14 (16) Cause, either directly or indirectly, any caller identification service to
11 transmit or display misleading or inaccurate caller identification information.

12 **SECTION 4.** ATCP 127.80 (6m) is created to read:

13 ATCP 127.80 (6m) “Short Message Service (SMS)” means a commonly used system for
14 transmitting data over cellular telephone networks.

15 **SECTION 5.** ATCP 127.80 (8) and (10) (intro.), (a) (intro.), (b) (intro.) and 2. and (c) to
16 (i) are amended to read:

1 ATCP 127.80 (8) “Telephone line” means a circuit or channel, including a voice grade
2 equivalent channel, that is derived from a line, cable or digital facility, and that may be used to
3 make a telephone call or send a text message.

4 (10) (intro.) “Telephone solicitation” means an unsolicited telephone call or text message
5 for the purpose of encouraging the ~~call~~ recipient to buy property, goods or services, or that is part
6 of a plan or scheme to encourage the ~~call~~ recipient to buy property, goods or services.

7 “Telephone solicitation” does not include any of the following:

8 (a) (intro.) A telephone call or text message encouraging the ~~call~~ recipient to buy
9 property, goods or services from a nonprofit organization if all of the following apply:

10 (b) (intro.) A telephone call or text message made by an individual acting on his or her
11 own behalf, and not as an employee or agent for any other person. This exemption does not
12 apply to a ~~caller~~ a person that calls or sends a text message who does any of the following:

13 2. Sells or promotes the sale of goods that the ~~caller~~ person who calls or sends a text
14 message buys from another person who controls or limits the ~~caller's~~ sales methods of the person
15 who calls or sends a text message.

16 (c) A telephone call or text message made in response to the ~~call~~ recipient’s affirmative
17 request for the call or text message.

18 (d) A telephone call or text message made to a current client.

19 (e) A telephone call or text message made to a number listed in the current local business
20 telephone directory.

21 (f) One telephone call or text message to determine whether a former client mistakenly
22 allowed a contractual relationship to lapse.

1 (g) A telephone call or text message made to determine a former client's level of
2 satisfaction, unless the call or text message is part of a plan or scheme to encourage the former
3 client to purchase property, goods or services.

4 (i) A telephone call or text message, made to a party to an existing contract, that is
5 necessary to complete the contract.

6 **SECTION 6.** ATCP 127.80 (12) is created to read:

7 ATCP 127.80 (12) "Text message" means an electronic text or graphic message sent to a
8 cellular telephone, pager, or similar wireless device that is equipped with SMS or similar
9 capability. "Text message" includes messages originated using SMS, e-mail, or similar
10 electronic communication.

11 **SECTION 7. EFFECTIVE DATE.** This rule takes effect on the first day of the month
12 following publication in the Wisconsin administrative register, as provided in s.
13 227.22(2)(intro.), Stats.

Dated this _____ day of _____, _____.

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By: _____
Ben Brancel
Secretary