

Clearinghouse Rule 14-050

DATCP Docket No. 14-R-08
Rules Clearinghouse No.

Hearing Draft Rule
July 15, 2014

**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 amend* ATCP 127, subchapter V (Title), ATCP 127.80 (10) (a) 1., 127.80 (10) (c), 127.83
4 (2) (b), 127.83 (2) (c), and 127.83 (4); *to repeal* ATCP 127.81 (3) (c), (d), (e) and (Note); *to*
5 *repeal and recreate* ATCP 127.80 (5), 127.81 (2) (j), 127.82 and 127.84; *to create* ATCP 127.80
6 (6r) and 127.83 (2) (b) (Note); *relating to* telephone solicitations and the state do-not-call
7 registry.

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

This rule implements s. 100.52, Stats., which directs the department of agriculture, trade and consumer protection (DATCP) to promulgate rules related to telephone solicitations and the do-not-call registry and s. 100.20, Stats., which regulates fair trade practices in business.

Statutes Interpreted

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

Statutory Authority

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

Explanation of Statutory 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 trade practices which DATCP determines to be unfair, and to prescribe fair trade practices. Section 100.52, Stats., directs DATCP to establish by rule a registration system for telephone

solicitors that provides DATCP with proof that the telephone solicitor has complied with federal law in obtaining the state do-not-call registry.

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 establish a registration system for telephone solicitors that provides DATCP with proof that the telephone solicitor has complied with federal law in obtaining the state do-not-call registry.

Chapter ATCP 127, Subchapter II, Telephone Solicitations, was promulgated under DATCP's authority to regulate unfair trade practices. Among other things, this subchapter requires telephone solicitors to disclose their name and prohibits them from using fictitious names or misrepresenting their identity, affiliation, location or characteristics.

The existing Chapter ATCP 127, Subchapter V, Telephone Solicitations; No-Call List, implements s. 100.52, Stats. This subchapter establishes mechanisms for telephone customers to enter their numbers onto the no-call list that is compiled by the state and for telephone solicitors to register with DATCP to obtain the list.

Plain Language Analysis

Background

Section 100.52, Stats., established the Wisconsin no call program in 2001. DATCP promulgated chapter ATCP 127, subchapter V in 2002. This law required the department to create a no-call list and prohibited telephone solicitors from calling residential customers on the list. Residential customers who did not want to receive unsolicited commercial calls provided their telephone number and zip code to DATCP every two years to remain on the non-solicitation list.

The law also required the department to enact a rule that requires solicitors to register with DATCP and pay an annual fee to obtain the no call list and to solicit residential customers located in Wisconsin.

The no call law provides exceptions to the prohibition against calls made to Wisconsin residents by an unregistered solicitor. For example, calls made to current clients, calls made to persons who have consented to receive the call, and calls made on behalf of non-profit and political organizations, may be made by solicitors who have not registered with the department.

The law also prohibits telephone solicitors from making pre-recorded telephone solicitations to either residential or business customers, and from making telephone calls to business customers who ask them in writing to not make the calls.

The law was amended in 2008 to prohibit telephone solicitors from calling cell phones on the state No Call list. The law was amended in 2012 to prohibit telephone solicitors from sending text messages to residential customers on the state no-call list.

The Federal Trade Commission (FTC) maintains a federal do-not-call registry. Under the federal do-not-call program, Wisconsin residents have been able to register their numbers on that list permanently.

The Wisconsin no call law was most recently amended by 2013 Act 234 which has eliminated the separate, DATCP-maintained Wisconsin no-call list. As of August 1, 2014, Wisconsin residents who do not want to receive unsolicited telephone calls or texts from telemarketers will now only sign up on the FTC do-not-call registry without any need to re-register, and all telephone numbers on the existing Wisconsin no-call list will be transferred to that registry. Under the new state law, telephone solicitors must register with the FTC to obtain and follow Wisconsin's portion of the federal do-not-call registry (state do-not-call registry). Solicitors must also continue to register with DATCP and DATCP will continue to administer and enforce the Wisconsin no call law.

Rule Content

General

This rule does all of the following:

- Establishes updated registration requirements for telephone solicitors.
- Repeals portions of the rule made obsolete under the statute change.
- Updates recordkeeping requirements.
- Interprets Wisconsin's consent requirement to harmonize with federal requirements.
- Makes other minor updates and changes including corrections to mistaken citations.

Registration requirements

This rule updates registration requirements for telephone solicitors. This rule requires telephone solicitors to provide DATCP with proof of registration with the FTC and the ability to obtain updated do-not-call registry information. The federal Subscription Account Number (SAN) will serve as proof of registration.

Obsolete rule provisions

This rule repeals sections of the existing rule that became obsolete as a result of the statutory change. Sections of the rule that are repealed include those requiring consumers to register for the no-call list with DATCP and DATCP to provide the no-call list to telephone solicitors on a quarterly basis.

Recordkeeping requirements

The proposed rule extends recordkeeping requirements from two to three years and adds requirements for telephone solicitors to keep records of the numbers called and proof of consent from consumers on the state do-not-call registry to receive calls or texts. These changes will make the rule more consistent with the statute of limitations and enhance investigations of

complaints and enforcement of violations of the rule.

Consent requirement

The FTC requires express written consent for telephone solicitors to “robocall” (or “robotext”) numbers registered on the federal do-not-call registry. The proposed rule harmonizes Wisconsin’s rule with the federal standard.

Other changes

The proposed rule makes other minor clarifying and corrective changes to the rule.

Summary of and Comparison with Existing or Proposed Federal Statutes and Regulations

Federal Programs

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 registry. Residential customers can permanently register their telephone numbers on the federal do-not-call registry.

Surrounding State Programs

Many states have do-not-call programs. Several states 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 consumer do-not-call registry rather than maintaining their own. Iowa encourages its residents to sign up on the federal do-not-call registry.

Summary of Factual Data and Analytical Methodologies

To develop this rule, DATCP reviewed federal and state laws related to telephone solicitations, data related to telephone solicitor registration, past enforcement actions, and consumer complaints.

Analysis and Supporting Documents used to Determine Effect on Small Business

The effect on small business was determined by reviewing estimates of costs to comply with the law.

Effect on Small Business

This rule will, generally, have minimal impact on business. This rule might affect the following businesses in the following ways (many of these businesses are “small businesses”):

Telephone solicitors that are currently registered with DATCP but not with the FTC.

Under s. 100.52, Stats., and this rule, telephone solicitors will be required to register with DATCP and also with the FTC. Most telephone solicitors have been registered with both DATCP and the FTC and will not be impacted by this requirement. The few solicitors who have only registered with DATCP will incur an additional registration fee with the FTC. The first five

area codes in a national do-no-call registry subscription are free, so this annual access fee would be \$59 for the 6th Wisconsin area code.

Offsetting this added fee, telephone solicitors will no longer be required to pay the following fees:

- \$25 for each additional email address to receive a compact disc containing the no-call list.
- \$25 for each mailing address to receive a compact disc containing the no-call list.
- \$1,000 for each mailing address to receive the no-call list in a hard-copy printed form.

Recordkeeping requirements

Currently, persons making telephone solicitations, regardless of whether they may be required to register under the Wisconsin no call law, are required under ATCP 127, subchapter II, to keep certain records necessary to enforce the general direct marketing rules. The recordkeeping requirements in this proposed rule may increase the number of records businesses keep and store, which may have some financial cost associated with it.

This rule and DATCP's administrative efforts related to the rule benefit large and small businesses alike. For example:

- DATCP publishes a fact-sheet for solicitors, clearly explaining the requirements and prohibitions contained in the rule.
- DATCP administers and enforces violations of the rule which ensures a level playing field for all businesses.

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.

A complete *business impact analysis* is attached.

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Where Comments May Be Submitted

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1 **SECTION 1:** ATCP 127, subchapter V (Title) is amended to read:

2 **Subchapter V – Telephone Solicitations; ~~No-Call List~~ State Do-Not-Call Registry**

3 **SECTION 2:** ATCP 127.80 (5) is repealed and recreated to read:

4 ATCP 127.80 (5) “National do-not-call registry” means the national database established
5 by the federal trade commission under 47 USC 227 (c) (3) that consists of telephone numbers of
6 residential customers who object to receiving telephone solicitations.

7 **SECTION 3.** ATCP 127.80 (6r) is created to read:

8 ATCP 127.80 (6r) “State do-not-call registry” means the portion of the national do-not-
9 call registry that consists of numbers with Wisconsin area codes.

10 **SECTION 4.** ATCP 127.80 (10) (a) 1. is amended to read:

11 ATCP 127.80 (10) (a) 1. The nonprofit organization complies with subch. ~~II~~ IV of ch. ~~202~~
12 440, Stats., if applicable.

13 **SECTION 5.** ATCP 127.80 (10) (c) is amended to read:

14 ATCP 127.80 (10) (c) A telephone call or text message made in response to the
15 recipient’s affirmative request for ~~the~~ that call or text message.

16 **Section 6.** ATCP 127.81 (2) (j) is repealed and recreated to read:

17 ATCP 127.81 (2) (j) The registrant’s valid subscription access number (SAN) for the
18 national do-not-call registry.

19 **SECTION 7.** ATCP 127.81 (3) (c), (d), (e) and (Note) are repealed.

20 **SECTION 8.** ATCP 127.82 is repealed and recreated to read:

1 ATCP 127.82 **Do-Not-Call Registry**. (1) OBTAINING THE REGISTRY. Registered
2 telephone solicitors must obtain and use a current state do-not-call registry from the national do-
3 not-call registry website at least once every 31 days.

4 **Note:** The state do-not-call registry can be obtained at this website
5 <https://telemarketing.donotcall.gov/>. Registration with the FTC and a valid Subscriber Access
6 Number are required.

7
8 (2) SOLICITATIONS PROHIBITED. No person may make a telephone solicitation, either
9 directly or through an employee or agent, to a covered telephone customer whose telephone
10 number appears on the current state do-not-call registry. A telephone solicitation made in
11 violation of this subsection does not, by itself, result in a monetary loss for which a current
12 telephone customer may seek recovery under s. 100.20 (5), Stats., unless that customer sustains
13 an actual monetary loss as a result of another violation of this chapter.

14 (3) STATEDO-NOT-CALL REGISTRY NOT OPEN TO PUBLIC INSPECTION. The department
15 may not release a state do-not-call registry, except that the department may release a state do-
16 not-call registry as necessary to enforce this subchapter, or to comply with a subpoena or judicial
17 process, subject to any protective orders that may be necessary to ensure the confidentiality of
18 the list.

19 **SECTION 9.** ATCP 127.83 (2) (b) is amended to read:

20 ATCP 127.83 (2) (b) Use an electronically prerecorded message in a telephone call for
21 the purpose of encouraging a covered or noncovered telephone customer to purchase property,
22 goods or services, without ~~the prior consent of that telephone customer~~ first obtaining a written
23 agreement that contains the telephone number and signature of the customer to be called. The
24 agreement shall disclose in writing that the customer is not required to sign the agreement as a
25 condition of making a purchase and, by signing the agreement, the customer authorizes

1 telemarketing calls from that person. This paragraph does not apply if that person meets the
2 provisions of s. ATCP 127.80 (10) (a), (b) or (d).

3 **SECTION 10.** ATCP 127.83 (2) (b) (Note) is created to read:

4 ATCP 127.83 (2) (c) **Note:** A written agreement and disclosures may be in an electronic
5 form as provided in s. 137.15, Stats.

6
7 **SECTION 11.** ATCP 127.83 (2) (c) is amended to read:

8 ATCP 127.83 (2) (c) Make a telephone solicitation to a noncovered telephone customer if
9 the noncovered telephone customer has notified the person ~~by mail~~ in writing that the
10 noncovered telephone customer does not wish to receive telephone solicitations.

11 **SECTION 12.** ATCP 127.83 (4) is amended to read:

12 ATCP 127.83 (4) A person making a telephone solicitation to a noncovered telephone
13 customer shall give the call recipient, at the call recipient's request, a mailing address, fax
14 number or email address to which the noncovered telephone customer may ~~mail~~ submit a
15 written notice under sub. (2) (c). The person shall provide the mailing address, fax number or
16 email address within 10 days after the call recipient requests it.

17 **SECTION 13.** ATCP 127.84 Recordkeeping is repealed and recreated to read:

18 ATCP 127.84 **Recordkeeping.** (1) RECORDS REQUIRED. Persons who employ or
19 contract with individuals to make telephone solicitations shall keep all of the following records:

20 (a) The telephone numbers and SMS accesses to make telephone solicitations.

21 (b) Each written agreement provided pursuant to ATCP 127.90 (10) (c) and ATCP
22 127.83 (2) (b).

23 (c) The records required pursuant to ATCP 127.18 (1).

24 (2) KEEPING RECORDS. (a) A seller shall keep each record required under sub. (1) for at
25 least 3 years after the seller creates that record.

1 (b) The department, pursuant to an investigation of possible violations of this subchapter,
2 may ask a seller to provide copies of records under sub. (1) that are reasonably relevant to that
3 investigation. The seller shall provide the requested copies within a reasonable time specified by
4 the department.

5 **SECTION 14. EFFECTIVE DATE:** This rule takes effect on the first day of the month
6 following publication in the Wisconsin administrative register, as provided in s.
7 227.22(2)(intro.), Stats.

Dated this _____ day of _____, _____.

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By: _____
Ben Brancel
Secretary

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