

Clearinghouse Rule 12-036

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

Hearing Draft Rule
August 1, 2012

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

- 1 The Wisconsin department of agriculture, trade and consumer protection proposes the following
2 rule *to renumber* ATCP 127.02 (1) and (2); *to amend* ATCP 127.80 (10) (intro), and *to create*
3 ATCP 127.02 (1) and (2), 127.14 (16), and 127.80 (12); *relating to* telephone solicitations; no-
4 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 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 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 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.”

Fiscal Impact

This rule, together with 2011 Wisconsin Act 197, may result in some increase to both DATCP’s revenues and costs. However, DATCP does not have sufficient data to estimate a dollar amount. There may be new revenue from telephone solicitor registration fees from solicitors who specialize in text message solicitations (and therefore must now register for the first time) and from solicitors who are currently registered, but must now pay a supplemental fee for using additional lines. There may be some one-time costs incurred as DATCP makes programmatic changes to accommodate the new rule. These one-time costs include such items as revising hand-outs and brochures, solicitor registration forms, updating databases, and educating registered solicitors and consumers about the change in law. The additional revenues and costs represent small changes, and the costs can be absorbed within DATCP’s budget.

DATCP anticipates additional annual costs as a result of new consumer complaints and investigations. Last year DATCP received approximately 1,200 consumer complaints related to telemarketing practices and the no-call list. Because this rule, along with 2011 Wisconsin Act 197, expands the types of communications to which the no-call list applies, it is likely that the

number of complaints will increase. However, there is insufficient data to predict the rate of increase. A complete *Fiscal Estimate* is attached.

Business Impact

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 greater than four 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, in excess of one.
 - An additional \$1,000 for each hard-copy the registrant would like DATCP to mail, in excess of one.

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.

Environmental Impact

This rule will not have any environmental impact.

Federal and Surrounding State Programs

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 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.

Surrounding State Programs

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.

DATCP Contact

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

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Rule comments will be accepted up to two weeks after the last public hearing is held on this rule. Hearing dates will be scheduled after this rule is approved by the Board of Agriculture, Trade and Consumer Protection.

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 (2) “Caller identification service” means any service or device designed to provide the
7 user of the service or device with the telephone number, name, or other information regarding
8 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 (10) (intro.) is amended to read:

13 ATCP 127.80 (10) (intro.) “Telephone solicitation” means an unsolicited telephone call
14 or text message for the purpose of encouraging the call recipient to buy property, goods or
15 services, or that is part of a plan or scheme to encourage the call recipient to buy property, goods
16 or services. “Telephone solicitation” does not include any of the following:

17 **SECTION 5.** ATCP 127.80 (12) is created to read:

18 ATCP 127.80 (12) “Text message” means an electronic text or graphic message sent to a
19 cellular telephone, pager, or similar wireless device equipped with short message service or
20 similar capability, whether the message is initiated as a short message service message,
21 electronic mail message, or similar electronic communication.

1 **SECTION 6. EFFECTIVE DATE AND INITIAL APPLICABILITY.** This rule takes effect on
2 the first day of the month following publication in the Wisconsin administrative register, as
3 provided in s. 227.22(2)(intro.), Stats.

Dated this _____ day of _____, _____.

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By: _____
Ben Brancel
Secretary