



# Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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## Telephone Solicitations & the No Call List

The Department of Agriculture, Trade and Consumer Protection (DATCP) is proudly proclaiming to Wisconsin residents that signing up on its "no call list" will stop the persistent calls from telemarketers that irritate so many people at home. REALTORS® may be just as relieved as anyone else to be done with nuisance calls. However, they may be surprised to find that some of their business calls are being lumped in with those prohibited by DATCP's telephone solicitation rules.

The legislature intended to prevent automated and other dinnertime telephone solicitation calls when it enacted § 100.52. In § 100.52, the legislature also directed DATCP to create a nonsolicitation directory of consumers who do not wish to receive telemarketing calls at home. In response, DATCP promulgated Wis. Admin. Code §§ ATCP 127.80-127.84 where the nonsolicitation directory was renamed the "no call list." Under DATCP's no call rule, consumers contact DATCP to put their telephone numbers on the no call list. Telemarketing firms must register with DATCP and pay fees to finance the compilation, updating and periodic distribution of the no call list. The rule is expected to go into effect on Jan. 1, 2003.

While § 100.52 regulates telephone solicitors in a reasonable manner, DATCP's no call rules broadly regulate telephone solicitations to potentially include many daily business calls made by REALTORS®. REALTORS®

may risk penalties and possible litigation unless they register as telemarketers or adjust their business practices.

This *Legal Update* reviews the § 100.52 legislation directing regulation of telephone solicitations and DATCP's interpretation of their no call rule. An examination of the actual no call rule language is followed by REALTOR® tips for minimizing liability under DATCP rule. The *Update* concludes with a review of other telephone solicitation laws and regulations.

### § 100.52—The Telephone Solicitations Statute

Wisconsin's telephone solicitations law was passed by the Wisconsin legislature and signed by the governor in 2001 as part of the 2001 budget bill. § 100.52 was intended to reduce, but not eliminate, unwanted telemarketing calls to residential telephone numbers. The text of the full statute is available at <http://www.legis.state.wi.us/statutes/01Stat0100.pdf> or at <https://nocall.wisconsin.gov/web/includes/help/100.52.pdf>.

### Nonsolicitation Directory

Wis. Stat. § 100.52 directs DATCP to establish a nonsolicitation directory listing. Specifically, DATCP is responsible for enacting rules that establish, maintain, and semiannually update a directory that includes listings of residential customers who do not wish to receive telephone solicitations made on behalf of telephone

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solicitors. A “telephone solicitor” is defined as a person, other than a nonprofit organization or an employee or contractor of a nonprofit organization, that employs or contracts with an individual to make a telephone solicitation. A “telephone solicitation” means the unsolicited initiation of a telephone conversation for the purpose of encouraging the recipient of the telephone call to purchase property, goods or services. The nonsolicitation directory is subject to strict privacy restrictions—it cannot be inspected, copied or released by DATCP to persons other than the registered telephone solicitors. The directory will be provided on a semiannual basis only to registered telephone solicitors via e-mail or printed copy.

### Registration of Telephone Solicitors

The statute directs DATCP to develop rules that require any telephone solicitor that requires an employee or contractor to make a telephone solicitation to a residential customer in Wisconsin to register with DATCP, obtain a registration number, and pay a registration fee. § 100.52 clearly states that the amount of the registration fee shall be based on the cost of establishing the nonsolicitation directory, and the amount that an individual telephone solicitor pays shall be based on the number of telephone lines used by the telephone solicitor to make telephone solicitations. There also is to be an annual registration renewal fee in subsequent years based on the cost of maintaining the nonsolicitation directory.

### Telephone Solicitation Practices

The statute directs DATCP to develop rules that require an individual who makes a telephone solicitation on behalf of a telephone solicitor to identify the telephone solicitor and the actual seller (if different) at the beginning of the telephone conversation. It also prohibits the following

actions by a telephone solicitor or an employee or contractor of a telephone solicitor:

1. The use of an electronically prerecorded message in telephone solicitation without the consent of the person called.
2. Calls to a person listed in the nonsolicitation directory.
3. Calls to nonresidential customers who have mailed written notice that they do not wish to receive telephone solicitations. The mailing address for notifying a telephone solicitor that a nonresidential customer does not wish to receive telephone solicitations must be given upon request. A “nonresidential customer” means a person, other than a residential customer, who is furnished telephone service. A “residential customer” is an individual who is furnished with basic local telephone service, but does not include an individual who operates a business at his or her residence.
4. Calls made by an employee or contractor of a telephone solicitor who is not registered with DATCP.

### Exemptions

A telephone solicitor or an employee or contractor of a telephone solicitor may, however, make a telephone solicitation when:

- The person called requested the telephone solicitation.
- The person called is a current client of the person actually selling the property, goods, or services that are the subject of the telephone solicitation. This exception does not apply if the person called is a current client of an affiliate of the seller rather than the actual seller.

§ 100.52 applies to all telephone solicitations received in Wisconsin. DATCP is directed to investigate violations, and may seek temporary or permanent injunctive or other relief. Violators may be required to forfeit \$100 for each violation.

## Summary of Statute § 100.52

In summary, the statute enacted by the legislature directs the establishment of a nonsolicitation directory for residential customers and requires telephone solicitors to register with DATCP and pay a fee based upon the cost of setting up the nonsolicitation directory. Telephone solicitors are persons who employ or contract with others to telephone people and encourage them to purchase property, goods or services.

**Key Point:** Telephone solicitors would likely include telemarketing companies and brokers whose independent contractor agents and/or employees perform telephone solicitations as part of their job descriptions. The statute would not regulate a sole proprietorship broker who occasionally does some prospecting on his or her own behalf. The statute would not cover a real estate licensee who works for a broker/employer and who on his or her own behalf does some cold calling. The statute would apply to a broker whose sales associates receive written or verbal direction to engage in prospecting calls, and it would also apply to a team leader whose team hires a non-licensee to do cold calling for the benefit of the team.

However, § 100.52 is not the final word on telephone solicitations. DATCP's rules implementing § 100.52 broadly define telephone solicitations to include many daily business calls made by REALTORS®. As a result, REALTORS® may have to register as telemarketers or adjust their business practices to avoid possible penalties and litigation.

## The DATCP No Call Rules

DATCP began collecting residential telephone numbers of consumers who do not want to be contacted by telemarketers in September even though the no call rules in §§ ATCP 127.80-127.84 had not yet been finalized. DATCP is creating its first

no call list which is scheduled to go into effect Jan. 1, 2003. Registration on the list lasts for two years and is free for consumers. Beginning Jan. 1, any business—whether located inside or outside of Wisconsin—that solicits Wisconsin residents by telephone must obtain a copy of the no call list and delete the listed consumers' telephone numbers from its own calling list. The text of the §§ 127.80-127.84 rules is available at <https://nocall.wisconsin.gov/web/includes/help/law.asp>.

The no call list has generated a fair amount of publicity because it is a popular and appealing program for consumers. DATCP's no call Web site, at <https://nocall.wisconsin.gov/web/home.asp>, proudly touts the no call program and gives a wealth of information including the statute, rule drafts, frequently asked questions for consumers and telemarketers, and registration forms. Although the Web site is careful to point out that "Adding your residential phone number to the List will help reduce (but not eliminate) telemarketing calls to your home," it is not clear whether the public really understands that the do not call list has several exceptions.

## DATCP Definitions of Telephone Solicitations and Exceptions

According to DATCP, the no call list should stop most, but not all, telephone solicitations to personal residences. A "telephone solicitation" means an unsolicited telephone call for the purpose of encouraging the call recipient to buy property, goods or services, or that is part of a plan or scheme to encourage the call recipient to buy property, goods or services. DATCP's definition is different than the legislature's definition because it adds the language "or that is part of a plan or scheme to encourage the call recipient to buy property, goods or services."

There are, however, several excep-

tions to the definition of a telephone solicitation, so a consumer may continue to receive calls. The crucial question may be to what extent, if any, these exceptions cover REALTORS® in their daily real estate practice, because the DATCP no call rules regulate telephone solicitations, not telephone solicitors per the § 100.52 legislation.

A consumer may continue to receive calls if the consumer is considered to be a current client of a service or goods provider. A current client is defined as a person who has a current agreement to receive property, goods or services of the same type promoted by the call from the caller or the seller on whose behalf the call is made. Thus, according to DATCP, a consumer may receive calls from the bank where the consumer has a savings account or the consumer's telephone or credit card company. If the telephone company encourages a current customer to purchase other local telephone services, the customer is a current client under this definition. But this customer is not a current client when the local telephone service provider encourages him or her to purchase long distance telephone services.

Under DATCP's no call rule, a consumer may also still receive calls from a "nonprofit organization" asking the consumer for a donation of property, goods or services, or asking the consumer to purchase property, goods or services from the nonprofit organization, provided the organization's sale proceeds are not subject to Wisconsin sales tax or federal income tax. Federal income tax laws require an otherwise exempt nonprofit organization to pay income tax on unrelated business taxable income. The definition of telephone solicitation actually only applies to phone calls promoting sales, not charity donations, but it will cover charity solicitations that are found to be part of a plan or scheme to sell property, goods or services.

A telephone call made by an individual acting on his or her own behalf, and not as an employee or agent for any other person, is also exempt from the no call rule. This exemption, however, does not apply if the caller sells or promotes the sale of property, goods or services for others, or sells or promotes the sale of goods that the caller buys from another person who controls or limits the caller's sales methods. Although this would seem to exempt a lot of calls, for instance, by a sole proprietor broker, the literal language cancels out any intended benefit - almost everyone with a job "sells or promotes the sale of property, goods or services for another person."

Other exceptions according to DATCP are calls made:

- In response to the consumer's affirmative written or verbal request;
- For noncommercial purposes such as polls, surveys and political purposes;
- To a business telephone number from the current local business telephone directory;
- To determine a former client's level of satisfaction, unless the call is part of a plan or scheme to encourage the former client to purchase more property, goods or services;
- To a party to an existing contract, that is necessary to complete the contract; or
- To determine whether a former client mistakenly allowed a contractual relationship to lapse (one call only).

According to DATCP, the no call rule was drafted to meet the reasonable expectations of consumers who do not wish to be called by telemarketers.

**Key Point:** It well may be that all of these exceptions cover most, if not all, of the solicitation calls that many consumers receive.

Despite DATCP's professed intent, the no call list may not provide any substantial benefit for consumers in these circumstances - it may not have the impact that the consumer thinks he or she will enjoy. DATCP apparently recognizes that the no call list may not stop a large number of telemarketing calls because it advises consumers that they can still stop many of the exempt calls by just telling them to not call again. Existing federal law requires businesses to place a consumer's name on their no call list, if requested by the consumer.

### Telemarketer Registration with DATCP

According to DATCP, a firm must register annually with DATCP if the firm employs or contracts with individuals to make telephone solicitations to residential customers. A firm that sells property, goods or services may register on behalf of another firm that hires individual telemarketers to promote sales by the registering firm. For example, an insurance company may register on behalf of a local insurance agency whose employees telemarket that company's insurance. But that registration does not cover the local agency's employees when they solicit another company's insurance.

Unlike § 100.52, which regulates telephone solicitors, DATCP's no call rule regulates telephone solicitations, that is, the telephone calls made to persons in Wisconsin. DATCP's rules provide that no individual may make a telephone solicitation call to a residential telephone customer unless the telephone solicitation is exempt or covered by a registration with DATCP.

**Key Point:** This is a substantial departure from the legislature's regulation of telephone solicitors which employ or contract with

persons to make telephone solicitations. DATCP's rules go beyond § 100.52 to regulate all individuals who place non-exempt telephone solicitation calls, not just telemarketing firms and their employees and agents. Unlike the statute, DATCP's rules would regulate a sole proprietorship broker who occasionally does some prospecting on his or her own behalf. Unlike the statute, DATCP's rules include a real estate licensee who works for a broker/employer and who on his or her own behalf does some cold calling.

### DATCP Telemarketer Registration Form

According to DATCP, "telemarketers or companies that market over the telephone" must complete an annual DATCP registration form and pay annual fees per § ATCP 127.81. The registration form must include the number of telephone lines that will be used to make telephone solicitations under the registration and the number of individuals who will make telephone solicitations under the registration. The registrant must provide the telephone numbers associated with each of the lines, and the names of the individuals if requested by DATCP. A registration expires on November 30 of each year.

A registrant must also indicate the form(s) in which the registrant wishes to receive the no call list. DATCP's no call rules indicate that no call lists will be available by e-mail transmission to an e-mail address provided by the registrant, as a compact disc mailed to an address provided by the registrant, and/or in a hard-copy printed form mailed to an address provided by the registrant.

### Telephone Solicitation Registration Fees

A person registering with DATCP must pay the following annual fees, or the maximum annual fee of

\$20,000, whichever is less:

- A first-year annual registration fee of \$700, and \$500 for each year thereafter.
- A supplementary annual fee of \$75 for each telephone line used to make telephone solicitations under the registration, but only if four or more telephone lines will be used. Small telemarketing firms will therefore pay less than large firms that use multiple lines.
- A supplementary annual fee of \$25 for each e-mail address to which DATCP is asked to send the no call list. This fee does not apply if the registrant asks DATCP to send the no call list to only one e-mail address.
- A supplementary annual fee of \$25 for each address to which DATCP is asked to send the no call list in compact disc form.
- A supplementary annual fee of \$1,000 for each address to which DATCP is asked to send the no call list in hard-copy print form.

Fees may be paid in quarterly installments. DATCP may reduce or waive one or more quarterly installments if the department's projected fiscal year-end cash balance exceeds projected expenditures in that fiscal year by more than 15 percent.

DATCP believes that it has tried to maintain a level playing field and a reasonable allocation of costs among competing businesses. Although the no call program will impose additional costs on telemarketing firms, DATCP suggests that it may also save costs incurred in calling consumers who do not wish to be called and who are not likely to respond favorably to sales solicitations.

### **The No Call List**

DATCP must compile a no call list containing the telephone numbers and ZIP codes of residential telephone customers who sign up for the

list. No person may make a non-exempt telephone solicitation, either directly or through an employee or agent, to a residential customer whose telephone number appears on the current no-call list.

A residential telephone customer may contact DATCP by telephone or go the DATCP Web site to sign up for the no call list. A customer's caregiver may sign up on behalf of the customer. A no call list takes effect on a date specified by DATCP, not sooner than 10 business days after DATCP distributes the list. DATCP must compile and distribute an updated no call list every three months. Telemarketing firms must add the numbers contained on the state's list to their own no call lists.

### **No Unauthorized Release**

A registered company may only redistribute the no call list to other persons covered by the registration. DATCP may release the no call list to its current registrants, and it may also release the list to enforce the no call rule or to comply with a subpoena or judicial process, subject to such protective orders as may be necessary to ensure the confidentiality of the list. DATCP may also release the list to the Federal Trade Commission or other federal agencies maintaining a national no call list.

### **Prohibited Telephone Solicitation Practices**

- Failing to comply with current DATCP marketing rules under Wis. Admin. Code ch. ATCP 127.
- Making telephone solicitations, unless the person doing the soliciting is covered by a current DATCP telemarketer registration.
- Making a telephone solicitation to a residential telephone customer whose telephone number appears on the current no call list.
- Using an electronically prerecorded message in a telephone solicitation to a residential or nonresidential

telephone customer without the prior consent of that telephone customer.

- Failing to disclose, at the request of a residential telephone customer receiving a telephone solicitation, the caller's Wisconsin registration number.
- Making a telephone solicitation to a nonresidential telephone customer if that business has notified the caller by mail that it does not wish to receive telephone solicitations. A caller must provide a business with the telemarketer's mailing address within 10 days after the business requests it.
- Requiring, instructing or authorizing an employee or agent to make a telephone solicitation in violation of this rule, or knowingly facilitating a violation of this rule.
- Intentionally blocking the Caller ID feature on residential telephone lines.

DATCP says that the law excludes businesses and business telephone numbers, but if a home office phone is a residential line, then it is eligible for the list. The law only covers telephone calls—it does not apply to faxes or e-mail. Automatic Dialing and Announcement Devices (ADADs) are illegal in Wisconsin and are prohibited by the law except when they are used to make exempt calls.

DATCP will investigate alleged violations and contact the offending businesses to make them aware of the no call list. DATCP says that it may pursue court action and monetary penalties if they receive subsequent complaints about the same business. Businesses who unlawfully call numbers on the no call list will be subject to the maximum penalty of \$100 for every violation.

### **Statutory Authority for DATCP Rule-Making**

DATCP currently regulates a wide variety of unfair and deceptive busi-

ness practices under Wis. Stat. § 100.20. DATCP is charged with eliminating unfair methods of competition in business and unfair trade practices in business. DATCP adopted the current Wis. Adm. Code ch. ATCP 127 in 1999 to protect consumers against unfair direct marketing practices and included telephone solicitation rules. These rules were designed to address unfair competition and unfair trade practices inflicted upon Wisconsin consumers by unscrupulous marketing companies and agents. That chapter was adopted under authority of § 100.20 (2). Violations of that chapter may be prosecuted under § 100.20(6) & § 100.26(3) or (6). A person who suffers a pecuniary (monetary) loss because of a violation of that chapter ATCP 127 may sue the violator directly under § 100.20(5) and recover twice the amount lost, in addition to costs and reasonable attorneys' fees. These remedies are afforded to consumers who are subjected to the unfair trade practices outlawed under chapter ATCP 127.

In Wis. Stat. § 100.52, the legislature directed DATCP to create a no call list of consumers who do not wish to receive telemarketing calls. Although § 100.52 was sufficient authority for DATCP to adopt rules for the no call list and contains penalty provisions for violators, DATCP unilaterally chose to utilize both § 100.20 & § 100.52 as its authority for developing the no call rules. That means that DATCP is calling upon its authority to eliminate unfair trade practices and is going beyond the legislative directive in the statutes. Doing so tremendously expanded the potential remedies available against no call rule violators.

DATCP also unilaterally added a rule note indicating that "a telephone solicitation to a residential telephone customer included on the "no-call" list ... does not, by itself, result in a monetary loss for which the customer may seek recovery under s.

100.20(5), Stats., unless the residential telephone customer sustains an actual monetary loss as a result of another violation of this chapter." This note apparently is intended to say that a consumer on the no call list cannot sue a caller for a monetary loss based upon receiving a telephone solicitation call unless there is an actual monetary loss. It is questionable whether DATCP can legally predetermine that no pecuniary or monetary damages will result from a particular solicitation call under particular circumstances.

## Comparison of § 100.52 and DATCP No Call Rules

While the legislature's enactment of § 100.52 to regulate telephone solicitors and their agents and employees was clear and straightforward, DATCP enacted ambiguous rules beyond the scope of the legislative directive. In doing so, most, if not all, of the telephone calls that REALTORS® place during the course of their daily real estate practice may be deemed telephone solicitations. Thus, REALTORS® may be at risk unless they register with DATCP or qualify each call as an exemption to the DATCP definition of telephone solicitation.

## Definitions of Telephone Solicitations

The statutory definition of a telephone solicitation under § 100.52(1)(i) is "the unsolicited initiation of a telephone conversation for the purpose of encouraging the recipient of the telephone call to purchase property, goods or services." This definition is clear and unambiguous.

The DATCP definition of "telephone solicitation" is an unsolicited telephone call for the purpose of encouraging the call recipient to buy property, goods or services, or a call that is part of a plan or scheme to encourage the call recipient to buy property, goods or services. The DATCP definition is different than the legisla-

ture's definition because it adds the language "or that is part of a plan or scheme to encourage the call recipient to buy property, goods or services."

The DATCP definition greatly expands the types of calls considered to be telephone solicitations. In the statutory definition, a telephone solicitation must have the purpose of encouraging a purchase. Under the DATCP no call rules, any telephone call made by a person who sells goods or services could be interpreted as part of a plan or scheme to encourage a purchase of goods or services. A call potentially could be linked to any prior or subsequent mailing or in-person contact that encouraged the purchase of property, goods or services. This casts doubt upon any telephone call made to a person who later might be encouraged to make a purchase.

**Key Point:** REALTORS® must carefully determine whether they should consider all telephone calls to potential, past and present real estate customers and clients to be telephone solicitations, and register with DATCP if all calls do not comfortably fit within an exception to the definition of telephone solicitation.

## Scope of Telephone Solicitation Registration Requirements

A telephone solicitor is defined by § 100.52(1)(j) as "a person, other than a nonprofit organization or an employee or contractor of a nonprofit organization, that employs or contracts with an individual to make a telephone solicitation."

"Telephone solicitations" are defined by § 100.52(1)(i) as "the unsolicited initiation of a telephone conversation for the purpose of encouraging the recipient of the telephone call to purchase property, goods or services." The definition of "telephone solicitation" includes not only traditional

telemarketing activity but also telephone calls from friends, family, social workers and others who call and give advice such as the best prices for school supplies are at X, go to your doctor if the fever does not subside, buy Z brand laundry detergent on sale at Y, etc. This broad definition of a telephone solicitation is not troublesome in § 100.52 because persons required to register are limited to people who employ others to make telephone solicitations on their behalf.

§ ATCP 127.81(1)(c), however, states “No individual may make a telephone solicitation to a residential telephone customer unless the telephone solicitation is covered by a registration under this section.” This rule requires registration of every person who makes a telephone solicitation, not just telephone solicitors. DATCP’s no call rule does not even use the term telephone solicitor much less make it the focus of regulation, as did the legislature in § 100.52.

The DATCP rules are far more expansive in coverage than the regulatory scheme enacted by the legislature. The legislature set out to regulate and monitor telephone solicitors, but DATCP has expanded the definition of telephone solicitation and designed a scheme where every person who makes a non-exempt telephone solicitation call must register with DATCP. Every Wisconsin citizen at one time or another calls a friend or family member at home to give advice about buying some product or service offered by a third person. These people would need to register with DATCP unless they fall within an exemption from the telephone solicitation definition. Clearly this could not have been the intent of the legislation.

There is also a practical problem with this new regulatory scheme: the registration forms are designed for the registration of telephone solicitors,

not individuals making telephone solicitations. Individuals may find it difficult to complete the registration form and may not have some of the information asked for such as a federal tax identification number. It may also be difficult for individuals to pay the \$700+ initial registration fee.

### **Fee Formulas**

§ 100.52(3)(a) requires telephone solicitors to pay two fees: an initial registration fee and an annual registration renewal fee. The initial registration fee “shall be based on the number of telephone lines used by the telephone solicitor to make telephone solicitations.” The amount of the registration renewal fee shall be based on the cost of maintaining the nonsolicitation directory. This statutory language is not ambiguous.

DATCP, however, deviates from the statutory fee structure by charging an initial registration fee of \$700 and annual renewal fees of \$500. These fees are not based on the number of telephone lines used. These fees are in addition to and distinct from the fee of \$75 per telephone line authorized by the statute. DATCP’s fee structure also includes additional add-on fees depending upon on how the nonsolicitation directory will be delivered to the telephone solicitor and the number of copies to be delivered. DATCP’s fee structure conflicts with the fees authorized by the legislature.

### **Definition of Residential Customer**

§ 100.52(1)(f) defines a residential customer as “an individual who is furnished with basic local exchange service by a telecommunications utility, but does not include an individual who operates a business at his or her residence.” This definition is clear and unambiguous.

The DATCP definition in § ATCP 127.80(5) revised this definition to delete the exclusion related to “an individual who operates a business at

his or her residence.” Thus, DATCP includes home offices and home businesses as residential customers. This means that home offices can sign up for the no call list and that calls to home offices and home businesses may be telephone solicitations requiring registration, contrary to the legislature’s clear regulatory scheme.

### **Exclusion of Nonprofit Organizations from the Definition of a Telephone Solicitor**

§ 100.52(1)(j) defines a telephone solicitor as “a person, other than a nonprofit organization or an employee or contractor of a nonprofit organization, that employs or contracts with an individual to make a telephone solicitation.” This definition is clear and unambiguous. Webster’s dictionary defines a non-profit organization as an organization “not conducted or operated for the purpose of making a profit.” This ordinarily would include organizations operated for charitable reasons, trade associations, educational organizations, recreation clubs, etc.

The DATCP rules do not define or use the term “telephone solicitor.” The DATCP telephone solicitation definition, however, limits the exclusion for nonprofit organizations to those nonprofit organizations whose sales proceeds are exempt from Wisconsin sales tax (occasional sales no more than 20 days per year) and from federal income tax. Federal income tax laws require an otherwise exempt nonprofit organization to pay income tax on unrelated business income. Therefore, the DATCP no call rules exclude many nonprofit organizations from the § 100.52 exemption from telephone solicitation registration. Nonprofit organizations that would be exempt under the statute must register and pay the registration fees under the no call rules.

### **Definitions of Client**

§ ATCP 127.80(2) defines a client as

a person who has a current agreement to receive, from the telephone caller or the person on whose behalf the call is made, property, goods or services of the type promoted by the telephone call. This definition creates substantial difficulties for real estate licensees and other professionals. Many professionals communicate with their clients regarding a range of products and services directly related, but not specifically included, in the contract or agreement between the client and the professional. Many of these products and services fall outside of the specifically stated scope of the client or customer agreement.

For example, a real estate licensee monitors a number of tasks that must be completed in preparation for the successful closing of the real estate transaction. Real estate licensees often call buyers and sellers to remind them of impending deadlines in contract contingencies for surveys, title commitments, loan commitments, inspections, insurance binders, etc. When calling to encourage the party to obtain these products or services, the real estate licensee is not calling about a product or service that is included in the real estate licensee's agreement to provide brokerage services.

These telephone calls are not telemarketing, and are often a welcome and needed safeguard of the party's interests and well-being. Numerous immediate deadlines usually drive the need for a licensee's telephone calls and written communications typically are not a practical or efficient alternative. Unfortunately, the narrow DATCP definition of "client" requires that the subject of the call be covered by the agency contract between the broker and his or her client if the call is going to fit within the client exemption. Otherwise the call is a telephone solicitation and the broker must register with DATCP unless another telephone solicitation exemption applies.

**Key Point:** Under the DATCP no call rules, an enormous number of REALTOR® follow-up calls unrelated to telemarketing may be subject to DATCP regulation and registration. The only way to avoid telephone solicitation registration and fee payment for brokers who do not engage in cold calling or telephone prospecting will be to find an exemption from the telephone solicitation definition.

### **Use of § 100.20 As Authority for Proposed Rules**

The legislative authority for the no call rules is Wis. Stat. § 100.52. DATCP, however, has added the new rules to the existing Wis. Admin. Code Chapter 127, which addresses various direct marketing issues. This chapter was enacted under the authority of Wis. Stat. § 100.20, which regulates unfair business competition and unfair trade practices. Despite the legislative directive, DATCP states that the new no call rules were enacted under the authority of both § 100.20 and § 100.52. The statutory authority for the rules is extremely important and must be closely scrutinized.

There is a question of whether DATCP has exceeded its authority by basing the no call rules upon § 100.20 where the regulation of competition and regulation of trade practices is limited to business activities. The regulatory scheme under Wis. Stat. § 100.52 is consistent with this business limitation—it regulates telephone solicitors (persons who employ others to make telephone solicitations) and the individuals employed or contracted with to make telephone solicitations.

The DATCP no call rules go beyond the business arena and regulate telephone solicitations. As defined by DATCP, telephone solicitations include many non-business calls but are regulated under the no call rules. These calls could be made by friends, relatives and others to simply advise

that an opportunity exists to purchase an item or service that would be helpful for the call recipient but which does not financially benefit the caller.

§ 100.20 arguably may be used to authorize administrative rules only when the activity being regulated or prohibited is unfair. There does not seem to have been any finding that telephone solicitations are, by definition, unfair. For example, when a real estate licensee is working with a buyer who announces just prior to closing that the buyer does not intend to close, the licensee may need to call the seller if the listing broker is unavailable and encourage the seller to hire an attorney. This call is regulated as a telephone solicitation under the DATCP no call rules, but it certainly is not an unfair business practice. A decision to not call for fear of violating the no call rules arguably would be more unfair than the telephone solicitation encouraging the seller to purchase the services of the attorney.

### **What REALTORS® Should Do About the New Telephone Solicitation Law**

Different REALTORS® may need to take different measures to protect themselves as best as is possible under the DATCP no call rules. Brokers who do allow or require telemarketing by their agents may not be able to escape the telephone solicitation registration requirements and fees. Brokers who do not engage in cold calling or related practices may need to seek other precautions to avoid having their follow-up and closing preparation calls becoming classified as telephone solicitations, subjecting the brokers to the same registration and fees as the brokers who do engage in telemarketing practices.

### **Register with DATCP**

Brokers and real estate companies that market over the telephone may obtain a copy of the Wisconsin no call list by completing DATCP's annual

application form and paying the annual fees. REALTORS® should contact DATCP to obtain a registration application packet:

Telephone: (608) 224-4999

Fax: (608) 224-4939

E-mail: WINoCall@datcp.state.wi.us

Web site: NoCall.Wisconsin.gov

Once a broker or firm has registered the company and its agents with DATCP, the agents may make telephone solicitation calls. They may engage in prospecting and cold calling and make follow-up and closing preparation calls to clients and customers as long as the prospect, client or customer is not on the no call list, and as long as they do not engage in any of the prohibited telephone solicitation practices (see page 5 of this *Update*).

A client or customer on the no call list should not be called unless the call falls outside of the definition of a telephone solicitation. In other words, the call must meet one of the telephone solicitation exemptions.

The registration fees that broker companies pay to DATCP may be allocated among the agents in the company and subject to reimbursement. Company policy may address these fees and internal company plans for reimbursements in independent contractor agreements between the company and the agents or in the office policy manual.

### **Modify Contracts to Include Affirmative Request for Calls**

The best way to protect REALTORS® who do not engage in cold calling but who do make follow-up calls and closing preparation calls is to find a reliable way to make sure these calls do not fall within the definition of a telephone solicitation. All REALTORS® should confer with their company legal counsel in developing the company's policies on telephone solicitations.

The telephone solicitation definition does not include:

- A telephone call encouraging the call recipient to buy property, goods or services from a “nonprofit organization” unless sale proceeds are subject to Wisconsin sales tax or federal income tax.

**REALTOR® Perspective:** REALTOR® firms and companies are not nonprofit organizations.

- A telephone call made by an individual acting on his or her own behalf, not as an employee or agent for any other person. This exemption does not apply to a caller who does any of the following: (a) sells or promotes the sale of property, goods or services for others, or (b) sells or promotes the sale of goods that the caller buys from another person who controls or limits the caller's sales methods.

**REALTOR® Perspective:** At first blush this seems to be an encouraging exemption, but if taken literally, most REALTORS® “sell or promote the sale of property, goods or services for other.” Thus, reliance upon this exemption should be undertaken only with caution and only upon the advice of company legal counsel.

- A telephone call made in response to the call recipient's affirmative request for that call.

**REALTOR® Perspective:** This may prove to be the best option for most brokers who may, after conferring with legal counsel, insert language in all agency agreements and all agency disclosures (starting immediately) relating to real estate sales: “(Seller) (Buyer) requests but does not require Broker to telephone (seller) (buyer) regarding issues, goods and services related to the real estate transaction. This request will terminate at such time as Broker is no longer providing brokerage services to (seller) (buyer).”

- A telephone call made to a current client. A current client is a person

who has a current agreement to receive, from the caller or the person on whose behalf the call is made, property, goods or services of the type promoted by the telephone call.

**REALTOR® Perspective:** Tinkering with the definition of clients and client services, as those concepts are employed under real estate license law is a possibility, but may prove difficult and confusing. It may be necessary to list goods, services and tasks (telephone calls) that are being embraced as part of client services.

- A telephone call made to a number listed in the current local business telephone directory.

**REALTOR® Perspective:** This may be a viable option for commercial brokers but obviously does not generally benefit residential brokers.

- One telephone call to determine whether a former client mistakenly allowed a contractual relationship to lapse.

**REALTOR® Perspective:** This type of call may be made by REALTORS® under those limited circumstances.

- A telephone call made to determine a former client's level of satisfaction, unless the call is part of a plan or scheme to encourage the former client to purchase more property, goods or services.

**REALTOR® Perspective:** This type of call may be made by REALTORS® under those limited circumstances but requires caution—there is a risk of the call later being classified as a telephone solicitation if it is deemed to be part of a scheme or plan to sell.

- A telephone call made to a party to an existing contract that is necessary to complete the contract.

**REALTOR® Perspective:** This

exemption may apply to calls a REALTOR® makes to the seller or the buyer regarding a listing contract or buyer agency agreement, as long as care is taken to limit the conversation to tasks needed to fulfill the contract or agreement.

### Sign Up on the No Call List

Wisconsin REALTORS®, like all other persons with residential telephone service, may sign up for the no call list in one of two ways: Over the telephone by calling (866) 9NOCALL / (866) 966-2255, toll-free in Wisconsin, or at the Wisconsin no call list Web site at <https://nocall.wisconsin.gov/web/registration.asp>.

### Other Telephone Solicitation Laws

Wisconsin REALTORS® who do engage in prospecting and cold calls should be careful to avoid the prohibited practices under the no call rules, as well as the other telemarketing regulations found in Chapter ATCP 127 and in state and federal law.

Under current law, telemarketers must refrain from making repeat calls to call recipients who say they do not want to be called again.

Additional laws protect all consumers regardless of whether they are or are not on the no call list:

- Telemarketers may call only between 8 a.m. and 9 p.m.
- Telemarketers must tell the consumer that they are selling something and what company it is for before they make their pitch.
- Before a consumer pays for any products or services, the consumer must be told the total cost.
- Consumers can stop unwanted calls from telemarketers by telling them not to call back. If they do, they're breaking the law and may be reported to the Bureau of Consumer Protection: (800) 422-7128 (Wisconsin only).

- Consumers can tell the telemarketer to put the consumer on the company's "do not call" list. Federal law requires telemarketers to keep such a list. However, the telemarketer's "do not call" list applies only to that individual company so a consumer would need to make separate requests of other businesses that call. (47 CFR 64.1200; 16 CFR 310)

### Conclusion

Many daily real estate practice telephone calls made by REALTORS® may be deemed telephone solicitations under DATCP's rules. REALTORS® may be at risk unless they register with DATCP or qualify each call as an exception to DATCP's telephone solicitation definition.

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