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Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

Inside This Issue

WISCONSIN REALTORS® ASSOCIATION

Federal Laws Impacting REALTOR® Practice

Although much of a Wisconsin REALTOR'S® daily business focus is on clients and customers within Wisconsin, Wisconsin real estate brokerage practice is nonetheless impacted by federal law. Local issues and regulations confronting a broker's clients and customers are of the utmost importance, but REALTORS® must not lose sight of the federal enactments that require broker compliance in real estate transactions. Many of the federal laws relevant to the real estate industry, including several with recent developments, are overviewed in this *Legal Update*.

The federal law topics highlighted in this *Update* include the new Junk Fax Prevention Act; the FACT Act for the disposal of consumer report information; the USA Patriot Act; the Internal Revenue Service (IRS) rules for reporting cash payments of over $10,000 received in a trade or business; the Foreign Investment in Real Property Tax Act of 1980 and the need for tax identification numbers; the Sherman Antitrust Act of 1890; the Real Estate Settlement Procedures Act (RESPA) referral rules; the Federal Trade Commission (FTC) and Federal Communications Commission (FCC) regulation of interstate and intrastate telephone solicitations and the national do-not-call registry; and the CAN-SPAM rules for commercial e-mail. The *Update* also summarizes the current status of Wisconsin's no-call law and concludes with a section of Hotline questions and answers addressing no call, CAN-SPAM and fax regulation issues.

New Federal Fax Legislation

The Junk Fax Prevention Act, S. 714, was passed by the Senate on Friday, June 24, passed by the House on Tuesday, June 28, 2005, and signed by the president on Saturday, July 9, 2005. The Junk Fax Prevention Act restores the "established business relationship" (EBR) exception that allows associations and businesses to send unsolicited commercial faxes to their members and clients without advance written consent (advance written consent would have been required under the rules developed by the FCC). The Act also establishes a new requirement for an opt-out message on the first page of all unsolicited advertisements that are faxed.

What does this mean for REALTORS® and REALTOR® Associations?

The bill does not legalize unsolicited fax advertisements or solicitations. You still must have permission or an EBR.

1. Established Business Relationship Exception Restored.

Businesses and associations do not have to worry about advance written consents for faxes containing advertising or commercial material if there is an EBR. REALTORS® will not have

Contacts

EDITORIAL STAFF
Author
Debbi Conrad

Production
Terry O'Connor
Tracy Rucka
Rick Staff

ASSOCIATION MANAGEMENT
Chairman
Kitty Jedwabny, CRB, CRS

President
William E. Malkasian, CAE

ADDRESS/PHONE
The Wisconsin
REALTORS® Association
4801 Forest Run Road
Suite 201
Madison, WI 53704-7337
(608) 241-2047
(800) 279-1972

LEGAL HOTLINE:
Ph: (608) 242-2296
Fax: (608) 242-2279
Web: www.wra.org

to get written permission from consumers with whom they have an EBR before faxing property listings or other information to them, and associations will not have to get advance written consent to fax its members, provided that either:

- There was an EBR already in existence when the Junk Fax Prevention Act became law (July 9, 2005), or;
- For a new EBR, the fax number was provided voluntarily by the recipient or is publicly available in a published directory, advertisement or web site.

2. New! Opt Out Required on First Page of Faxes.

The Act creates a new right for recipients to "opt out" of receiving future faxes. All REALTORS® and associations that send unsolicited commercial faxes – including faxes sent to recipients in an EBR – must include opt-out instructions on the first page of the fax. The instructions must be in clear and conspicuous terms that indicate that the recipient has the right to opt out of future unsolicited advertisements faxed to specified facsimile numbers and that the sender's failure to comply within a reasonable time is illegal.

The opt-out message must provide (1) a telephone number and a facsimile number to which the recipient may send his or her opt-out request, and (2) a no-cost means for recipients to opt out, all which must be available 24/7. Examples of a cost-free opt-out mechanism include a local or toll-free telephone or fax number. A long-distance phone number or toll call do not meet the requirements. There is some uncertainty whether an e-mail address ultimately will qualify as a cost-free mechanism, but an e-mail address certainly may be included as a second cost-free alternative.

The FCC will develop new rules within the next nine months to provide required opt-out language and define reasonable time" and "cost-free mechanism." The FCC also has the discretion to exempt nonprofit organizations from having to use the opt-out message and to put a time cut-off on EBRs.

ACTION REQUIRED: Put an opt-out provision with a telephone number and a fax number (one of these should be toll-free or local) on your fax cover pages or on the first page of all unsolicited commercial faxes.

POSSIBLE OPT-OUT LANGUAGE UNTIL THE FCC PROVIDES SPECIFIC WORDING: "You may request that the sender of this faxed message not send any future unsolicited advertisements to any facsimile number(s) that you designate. The sender is required by law to comply with your opt-out request within the shortest reasonable time. To opt out of further facsimile advertisements from this sender, please call _____ or fax _____ [the phone or fax number must be toll-free or local] or [e-mail _____ (if desired)] at any time on any day of the week."

REALTOR® Practice Tips: Prudent practice dictates that companies and associations use fax cover sheets with the opt-out message for all outgoing faxes to ensure compliance with the Act.

REALTOR® Practice Tips: Real estate brokers/companies may wish to establish office policies indicating that only office managers or Designated REALTORS® have the authority to opt out of faxed messages to office fax numbers.

3. Permission to Fax May Be Verbal.

The bill also clarifies that verbal permission to fax is an allowed means of granting express permission to fax. If a consumer calls in and asks that a property data sheet be faxed, the data sheet may lawfully be faxed, with the appropriate cover sheet containing the opt-out message, even though there is no EBR.

Definitions

An **"established business relationship"** (EBR) is a prior or existing relationship formed by voluntary two-way communication between a person or entity and a residential or business subscriber, with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity, which relationship has not been previously terminated by either party. There are no time limits for an EBR in the Junk Fax Prevention legislation, but the FCC may impose time limits in the upcoming months.

An **"unsolicited advertisement"** is "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."

The **penalties** for violating the federal fax law are $500 per facsimile, with treble damages for willful violations. Consumers have a private right of action, so consumers, state attorney generals and the FCC all may sue faxing violators.

For further information and compliance pointers, visit the National Association of REALTORS'® (NARs') "Field Guide to Do-Not-Call, Do-Not-Fax, and Do-Not-E-Mail Laws" at www.realtor.org/libweb.nsf/pages/fg707#nofax.

Disposing of Consumer Report Information

Most consumers consider their personal information contained in a credit report, employment background, medical history, CLUE Report or tenant rental history to be private and confidential, and the Federal Trade Commission (FTC) happens to agree with them. In an effort to maintain consumer privacy, protect against unauthorized access, and protect against identity theft, the Fair and Accurate Credit Transactions Act of 2003 (FACT Act) regulates the use of consumer report information. Specifically, the FTC's Disposal Rule regulates how individuals and businesses dispose of this sensitive consumer information when it is no longer needed.

What Consumer Information is Protected?

The FTC Disposal Rule protects consumer report information, that is consumer reports and the information derived from them. This includes information obtained from a consumer reporting company that is used – or expected to be used – in establishing a consumer's eligibility for credit, employment, or insurance. Credit reports, credit scores and CLUE Reports are consumer reports. So are the reports that businesses or individuals receive with information relating to a person's employment background, check writing history, tenant history or medical history.

Who Must Comply with the Disposal Rule?

The FTC Disposal Rule applies to all people and both large and small companies that use consumer report information. Real estate brokers, lenders, insurers, credit bureaus, employers, landlords, property managers, government agencies, collection agencies, mortgage brokers, attorneys and private investigators, for example, all must comply.

What are Proper Disposal Methods?

The standard for proper disposal of information derived from a consumer report is intended to be flexible. The Disposal Rule allows organizations and individuals to determine what measures are reasonable based on the sensitivity of the information, the costs and benefits of different disposal methods, and changes in technology. Although the Disposal Rule applies to consumer reports and the information derived from consumer reports, the FTC encourages those who dispose of any records containing a consumer's personal or financial information to take similar protective measures.

Reasonable measures for disposing of consumer report information may include:

- Burning or shredding papers containing consumer report information so that the information cannot be read or reconstructed;
- Destroying or erasing electronic files or media containing consumer report information so that the information cannot be read or reconstructed;
- Hiring a document destruction contractor to dispose of material specifically identified as consumer report information consistent with the rule after conducting a due diligence review of the contractor's qualifications, reputation and integrity. Such a due diligence inquiry might include:
  - Reviewing an independent audit of a disposal company's operations and/or its compliance with the rule;
  - Obtaining information about the disposal company from several references;
  - Requiring that the disposal company be certified by a recognized trade association, and;
  - Reviewing and evaluating the disposal company's information security policies or procedures.

Consumer Information Disposal for REALTORS®

REALTORS®, landlords and property managers will typically use some consumer report information in their daily practice. For REALTORS®, an individual's credit report and CLUE Report are examples of consumer information reports. Landlords and property managers will also likely use credit reports and other reports indicating tenant histories in rental properties. A consumer report is generally any report on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living prepared by or obtained from an agency that collects such information.

The FTC Disposal Rule does not dictate how long you may retain and use consumer report information – it simply governs how you dispose of the information once you have decided the time has come.

To comply with the FTC rule you must establish policies and procedures for the proper disposal of consumer information that protect against unauthorized access. While burning or pulverizing information may sound like more fun, most REALTORS® will shred the consumer report information. Crosscut shredders are the best choice because standard shredders are not as effective in blocking reconstruction of consumer information.

Electronic media – such as computer hard drives and floppy disks – should be destroyed or completely erased. Just deleting the files is not sufficient – media should be reformatted at the least. Throwing a computer into the trash is not acceptable unless the hard drive is destroyed.

Using a document destruction contractor is obviously an effective way to handle the situation, but the FTC rule requires that you to take steps to assure the third parties are reliable, following the due diligence procedures specified in the rule. This may not be practical for all REALTORS®.

The FTC Disposal Rule should not be a burden on any prudent REALTOR®, because real estate licensees have been obligated under license law to protect a client or customer's confidential information for many years. Wis. Stat. § 452.133(1)(d) provides that licensees must keep confidential any information given to the broker in confidence, or any information obtained by the broker that he or she knows a reasonable party would want to be kept confidential, unless disclosure is otherwise mandated under law. A broker must continue to keep the information confidential after the transaction is over and after the broker is no longer providing brokerage services to the party. The new FTC Disposal Rule complements these license law duties by requiring that when certain confidential information is disposed of that it be done in an effective manner to protect the party's privacy.

REALTOR® Practice Tips: The best practice is to apply the new federal rules to all records kept in the office (and at home if identity theft is a concern). After seven years have passed, most attorneys are comfortable recommending that old files be destroyed.

Dumping computer disks, hard drives or paper records in the garbage made no sense before these laws took effect and these laws will likely have little impact on any business that had adopted appropriate procedures to dispose of old transaction or financial records. The best part of the law is that it will force many who have not followed through on good intentions to finally put these procedures in place.

For more information about the FACT Act and the FTC Disposal Rule, visit the FTC Web site at www.ftc.gov/bcp/conline/pubs/alerts/disposalalrt.htm or www.ftc.gov/opa/2005/06/disposal.htm. The text of the FTC Disposal Rule is found at www.ftc.gov/os/2004/11/041118disposalfrn.pdf.

Fighting Terrorism in Real Estate Transactions

The "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001," otherwise known as the USA PATRIOT Act, was enacted after the terrorist attacks of September 11, 2001. Title III of the Act, known as the "International Money Laundering Abatement and Anti-terrorist Financing Act of 2001," is designed to combat international money laundering and the financing of terrorist organizations. As part of this effort, "financial institutions" are required to implement an anti-money laundering program and a customer identity program (CIP).

The Act does not directly affect the real estate industry. Real estate professionals engaged in brokerage or property management activities and their real estate firms presently do not need to implement anti money laundering programs. Financial institutions such as banks or lenders must implement a CIP and may ask clients and customers for personal information to complete a transaction. For more information on these requirements, see the WRA September 2004 *Broker Supervision Newsletter* at wra/online_pubs/broker_supervision/2004/br0409.asp?.

What is Expected of the Real Estate Professional?

Unlike financial institutions, real estate brokers and property managers

are not required to implement a CIP or establish other anti-money laundering programs. However, real estate brokers and managers are subject to executive order 13224, which expressly prohibits business transactions with individuals on the Specially Designated Nationals and Blocked Person List (SDN).

The U.S. Treasury Department Office of Foreign Asset Control maintains the SDN list. The SDN list is located at www.treas.gov/offices/enforcement/ofac/sdn. When it appears that a client or customer may be on the SDN list, real estate brokers should contact the Treasury Department's compliance hotline at (800) 540-6322 for further guidance. This is especially important if you lease commercial space or operate multi-unit housing.

REALTOR® Practice Tips: Real estate brokers and property managers should instruct their sales staff to periodically check the SDN list to ensure they are not dealing with restricted SDN individuals or entities.

Rental Property Pointers

An SDN check may be included as part of a personal credit check. Property owners and managers should also require a Social Security Number (SSN) or Individual Tax Identification Number (ITIN), which are available to both U.S. citizens and resident aliens legally entitled to work in the United States. The Internal Revenue Service issues ITIN numbers to non-citizens who need to report income for tax purposes, but who are not eligible for SSNs. SSNs – but not yet ITINs – can be verified by major credit reporting agencies such as Equifax and Experian. It is also prudent to require and make a photocopy of a picture ID such as a driver's license or passport.

With residential rental properties, the tenant screening and identification verification policies cannot violate fair housing law. It is illegal to refuse to rent based upon race, color or national origin. All screening policies must be applied consistently to every applicant. See HUD's guidance for screening tenants post-September 11 at www.hud.gov/offices/fheo/library/sept11.cfm.

The following tenant screening tips are taken from the REALTORS® Commercial Alliance Report, "Is your tenant a terrorist," published by NAR, Vol. 5, Issue 4 (Fall 2004), online at www.realtor.org/NCommSrc.nsf/files/FallRCA2004.pdf/$FILE/FallRCA2004.pdf:

1. **Be sure ID is current.** Look at expiration dates, and add a note to your tenant tickler file to recheck near the time a document expires.
2. **Look for misalignments**, raised letters, misspelled words, or fading that might indicate a forgery.
3. **Get a copy** of the passport or driver's license and keep it on file. (For residential rentals, you'll need to do it for every tenant to avoid possible fair housing violations.)
4. **Let your mind be cognizant** of anything that seems inconsistent. Don't just ignore your instincts.
5. **Be suspicious of cash**. There may be a good reason, but most people conduct major business transactions such as rent payments in other ways.
6. **Watch for tenants** who seem to avoid contact with you or other tenants.

The Institute of Real Estate Management (IREM) publishes "Preparing for Terrorism," a great resource manual for property managers, available for purchase by calling (800) 837-0706. For more information about the USA Patriot act, homeland security and terrorism, see NAR's "Field Guide to Terrorism and Real Estate," at www.realtor.org/libweb.nsf/pages/fg416.

Reporting Requirements for Large Cash Payments

REALTORS® are required to report cash payments of over $10,000 received in a real estate transaction. Cash is defined as (1) coins and currency of the United States or (2) cashier's checks, bank drafts, traveler's checks and money orders with a face value of $10,000 or less if the real estate licensee knows the payer is trying to avoid reporting the transaction on Form 8300. Cashier's checks, bank drafts, traveler's checks or money orders with a face amount of more than $10,000 are not treated as cash because the bank issuing them must report the cash transaction on other forms. Cashier's checks, bank drafts, traveler's checks or money orders from the proceeds of a bank loan or from a personal real estate transaction (as opposed to transactions occurring in a broker's real estate business) are not treated as cash either.

For example, Client A buys a house from Client B for $80,000. Client A gives a real estate company $12,000 in currency and a personal check for $68,000. This is a reportable transaction. The real estate company is acting as an agent in the normal course of trade or business and accordingly must report the cash received on Form 8300 because the amount of currency exceeded $10,000.

If the real estate company had received $4,000 in currency, an $8,000 cashier's check and a $68,000 personal check, this generally would not be a reportable transaction. The $8,000 cashier's check would not be counted as cash unless the real estate company knew that Client A was trying to avoid reporting the transaction on Form 8300.

REALTOR® Practice Tips: REALTORS® are required to report cash payments of over $10,000 – cash and currency, cashier's checks, bank drafts, traveler's checks and money orders with a face value of not more than $10,000 when reporting evasion if it is suspected – received in a real estate transaction to the IRS.

For more information, a copy of Form 8300 and of IRS Publication 1544, "Reporting Cash Payments of Over $10,000 Received in a Trade or Business," may be obtained from the Internal Revenue Service at www.irs.gov/pub/irs-pdf/p1544.pdf or by calling 1-800-TAX-FORM (1-800-829-3676).

Foreign Sellers of United States Property Need TIN Numbers

The sale of a United States real property interest by a foreign seller is subject to income tax withholding under the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA). FIRPTA authorized the United States to tax "foreign people" selling United States real property interests. A "foreign person" is defined in FIRPTA as a nonresident alien individual, foreign corporation, foreign partnership, foreign trust, or foreign estate. It does not include a resident alien individual. An alien refers to a person who is not a United States citizen. A resident alien is a non-citizen who is a lawful permanent resident of the United States at any time during the calendar year (meets the green card or the substantial presence test). United States real property interests include sales of interests in parcels of real property as well as sales of shares in certain American corporations that are considered property-holding corporations.

People buying United States real estate interests from foreign sellers, certain purchasers' agents, and settlement officers are required to withhold 10 percent of the amount realized to ensure Internal Revenue Service (IRS) taxation of the gains realized on the sale.

Under FIRPTA, the buyer is the withholding agent. The buyer must find out if the seller is a foreign person. If the seller is a foreign person and the buyer fails to withhold, the buyer may be held liable for the tax.

Buyers must use Forms 8288 and 8288-A to report and pay to the IRS any tax withheld on the acquisition of U.S. real property interests.

- Form 8288, "U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests" (Section 1445)
- Form 8288-A, "Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests" (Section 1445)

Buyers and foreign sellers of United States real property interests must have Taxpayer Identification Numbers (TINs) to use these forms to report and pay any required withholding or to request reduced tax withholding when disposing of the property interest. Individuals who do not qualify for SSNs may obtain ITINs to meet the requirement to supply a TIN. For all other entities, it is an employer identification number (EIN). TINs are required so that the IRS can identify foreign taxpayers and more easily match applications, withholding tax returns, notices, and other reporting documents with the foreign sellers' income tax returns.

The amount that must be withheld from the disposition of a United States real property interest can be adjusted pursuant to a withholding certificate issued by the IRS. The buyer, the buyer's agent, or the seller may try to reduce or eliminate the FIRPTA withholding amount by filing a Form 8288-B, "Application for Withholding Certificate for Disposition by Foreign Persons of U.S. Real Property Interests." The IRS will generally act on these requests within 90 days after receipt of a complete application including the TINs of all the parties to the transaction. A seller that applies for a withholding certificate must notify the buyer in writing that the certificate has been applied for on the day of, or the day prior to the transfer.

If an application for a withholding certificate is submitted to the IRS without a TIN, then it is considered incomplete and generally not processed. The TIN of the buyer and foreign seller must be provided to the IRS for the application or election to be considered complete. Amounts withheld must still be filed in a timely manner and paid to the IRS on Forms 8288 and 8288-A, even if the appropriate TINs are not provided.

It is important for brokers to determine their clients' residency status and TINs as early in the transaction process as possible. If a foreign seller or even the buyer does not have a TIN number, then instruct him to begin the process of obtaining a TIN as soon as possible, so that he can have it prior to closing. The foreign seller must have a TIN in order to file his United States income tax return for the year of the sale and to obtain a refund, if any is due to him.

REALTOR® Practice Tips: REALTORS® should confirm the residency status and TIN of their clients and customers as early as possible. If it is discovered that a party does not have a TIN, he or she should apply as soon as possible using Form W-7, available online at www.irs.gov/pub/irs-pdf/fw7.pdf.

REALTOR® Practice Tips: A seller looking to reduce or eliminate the FIRPTA withholding amount must file Form 8288-B, "Application for Withholding Certificate for Disposition by Foreign Persons of United States Real Property Interests." Since the Form 8288-B application for a withholding certificate, which reduces or eliminates the withholding amount, requires a TIN, a seller or buyer who does not qualify for a SSN may apply for an ITIN by attaching Form 8288-B to Form W-7 and mailing the documents to: Internal Revenue Service, Philadelphia Service Center, ITIN Unit, PO Box 447, Bensalem PA 19020.

Individuals can obtain a SSN by filing Form SS-5 with the Social Security Administration (see the directions online at www.ssa.gov/pubs/10002.html) or an ITIN by filing Form W-7 or W-7SP (in Spanish) with the IRS (www.irs.gov/pub/irs-pdf/fw7sp.pdf).

Antitrust Issues for REALTORS®

Antitrust law is intended to prevent competitors from conspiring together to eliminate competition in the free marketplace. Almost all antitrust litigation alleges at least one violation of Section 1 of the Sherman Antitrust Act of 1890, which provides that a contract, combination or conspiracy of persons acting together in a manner that unreasonably restrains interstate trade or commerce is declared to be illegal.

Price Fixing

Anti-competitive agreements about price are potentially the most serious because price is the primary way that firms compete for consumers in the marketplace: competitors cannot agree on any fees or commissions that they charge their clients and customers because this destroys competition. Each real estate company must act independently to set the commissions charged to sellers and commissions offered to other brokers for subagency or buyer agency. All commissions and co-broke commissions are negotiable on a transaction-by-transaction basis and there is no set or fixed amount of commission that must be offered. REALTORS® should strictly observe the following guidelines to avoid even the appearance of illegal price-fixing:

REALTOR® Practice Tips: All decisions concerning commissions or fees must be unilateral, independent business decisions made solely within the broker's office, without consultation or discussion with anyone from other firms.

REALTOR® Practice Tips: REALTORS® must avoid all communications and discussions with other brokers that relate in any way to the commission rates charged to sellers and buyers, and the rates paid to salespeople or to other brokers for cooperative commissions. If brokers reveal their intentions concerning fees or other competitive business activities to other brokers, they will have tainted not only their commission decisions but also the subsequent decisions of all brokers who were involved with or heard the discussion.

REALTOR® Practice Tips: The process by which a commission or fee is established should be carefully documented, for example, with spreadsheets showing business reasons and economic justification for the amount of a fee or fee increase, evidence of consultation with legal counsel before adopting any fee increase and a memo to licensees explaining commission decisions.

REALTOR® Practice Tips: Brokers should be sure that their sales agents and other staff are trained to explain the commissions and fees charged by the company in terms of independent decisions and competitive market forces and avoid giving the appearance of collusion among competing companies.

REALTOR® Practice Tips: Brokers at local REALTOR® association meetings and events must keep alert for any discussions concerning commission rates, pricing structures, listing policies, or marketing practices of other brokers and should ask that such discussions be immediately stopped and, if they are not, he or she should leave.

Group Boycotts

The objective of a group boycott is to induce a third party – another competitor, customer, or supplier – to change its practices and policies so that it conforms to the expectations and desires of the boycotters. A boycott occurs when competitors work together to exert pressure on a third party by collectively withholding, or inducing others to withhold, goods, services or patronage essential to the economic survival of the third party. Because real estate brokers, other real estate professionals and outside vendors (*e.g.,* newspapers) depend a great deal upon one another's business, a group of real estate companies can collectively refuse to deal with the targeted firm until the targeted firm either conforms its business practices to the group's expectations or goes out of business. Group boycotts for the express purpose of reducing or eliminating competition are treated as per se violations of the Sherman Act, regardless of any socially justifiable motives. REALTORS® should strictly observe the following guidelines to avoid even the appearance of illegal group boycotts:

REALTOR® Practice Tips: Agents must avoid comments that infer boycott conspiracies such as: "Before you list with ABC Realty, you should know that nobody works on their listings" or "the MLS will not accept their listings because they charge a flat fee."

REALTOR® Practice Tips: Broker decisions to lower the compensation offered to one or more particular firms, such as a discount or alternative service firm, must be made unilaterally – never after even casually discussing a competitor with other firms because the inference may be drawn that this action was pursuant to a conspiracy to boycott the competitor.

RESOURCES: For further information about antitrust law, see NAR's "Field Guide to Antitrust Law" at www.realtor.org/libweb.nsf/pages/fg704 and the Federal Trade Commission's, "Promoting Competition, Protecting Consumers: A Plain English Guide to Antitrust Laws" at www.ftc.gov/bc/compguide/index.htm.

RESPA Referral Rules

Congress enacted the Real Estate Settlement Procedures Act (RESPA) in 1974 with the stated legislative goal of protecting consumers in the home buying process. RESPA is designed to give consumers advance disclosure of settlement costs prior to closing, as well as eliminate kickbacks and referral fees that increase the cost of homeownership.

Settlement Service Providers

RESPA regulates all settlement service providers (SSPs) involved in the home buying process. SSPs include real estate brokerage firms, title insurance companies, lenders, appraisers and home inspection services. "Settlement services" are defined to include any services related to: (1) the origination, processing or funding of a federally-related mortgage loan; (2) mortgage broker services such as counseling, taking applications, obtaining verifications and appraisals, lender-borrower communications, etc.; (3) title company services; (4) an attorney's legal services; (5) closing document preparation; (6) credit reports and appraisals; (7) property inspections; (8) conducting the settlement; (9) mortgage insurance; (10) hazard, flood or casualty insurance, and homeowner warranties; (11) mortgage life, disability or similar insurance; (12) real property taxes and assessments; and (13) real estate brokers and agents.

Referral Fees and Kickbacks

Section 8 (a) of RESPA prohibits any person from giving or accepting any fee, kickback, or thing of value for the referral of settlement service business involving a federally related mortgage loan. Paying or receiving a fee or a "thing of value" for the referral of business related to a mortgage loan settlement without rendering a service is illegal under RESPA. Receiving compensation simply for referring a buyer or borrower to a SSP is prohibited, as is splitting or paying any settlement charge when no actual services were performed to earn the payment. A charge by a person for which no or nominal services were performed or for which duplicative fees are charged is an unearned fee and is also a RESPA violation.

For instance, it is illegal for a mortgage brokerage firm to pay $200 per loan to real estate agents who steer home buyers in its direction. Likewise, it is illegal for a lender to pay for a full one-page advertisement for a real estate agent in a local home buyer publication for every home borrower referral that led to a loan settlement. Other forms of kickbacks that are illegal under RESPA include gifts, prizes and raffles designed to reward high-referral agents with all-expense paid trips to exotic islands or cruises as a reward for referring business. However, RESPA does not prohibit the payment of referral fees between real estate licensees.

Things of Value

A "thing of value" can be an item of personal property, salaries, commissions, fees, duplicate payments of a charge, stock, dividends, distributions of partnership profits, franchise royalties, credits representing money that may be paid at a future date, the opportunity to participate in a money-making program, retained or increased earnings, increased equity in a parent or subsidiary entity, special bank deposits or accounts, special or unusual banking terms, services of all types at special or free rates, sales or rentals at special prices or rates, lease or rental payments based in whole or in part on the amount of business referred, trips and payment of another's expenses, or the reduction in credit against an existing obligation.

Any agreement or understanding that a "thing of value" will be given in exchange for a settlement service referral does not need to be written or verbalized. Such an agreement can be established by a practice, pattern, or course of conduct.

REALTOR® Practice Tips: Under RESPA, no person may give or receive fees or kickbacks for referral of settlement services, or give or receive a split or percentage of settlement charges other than for services actually provided. REALTORS® must carefully avoid paying referral fees or giving any thing of value to any other SSP (other than other brokers) in return for a referral.

Promotional and Educational Activities

RESPA allows SSPs to conduct normal promotional and educational activities, as long as the activities do not defray the normal expenses of another SSP and as long as they are not tied to referrals. For example, a title insurance company or mortgage lender can hold an educational class for real estate agents if the activity is not in exchange for (or tied to) referral business and does not defray the expenses an agent would have to pay for costs, such as of Continuing Education credits. An insurance company provides notepads, pens, or other office materials branded with the hazard insurance company's name, but cannot provide materials with the real estate broker's name because this would defray part of the broker's normal promotional expense.

A real estate agent and mortgage broker may jointly advertise their services in a real estate magazine, provided that each pays a pro rata share of the costs in proportion with his or her prominence in the advertisement. A mortgage brokerage may sponsor a hole-in-one contest at a golf tournament and prominently display a sign reflecting the brokerage's name and involvement in the tournament.

Affiliated Business Arrangements

An SSP that has an interest in another SSP company may refer customers to the affiliated company without violating the RESPA anti-kickback prohibition if they comply with RESPA's affiliated business arrangement (ABA) rules. An ABA is not a violation of Section 8 and permits referrals of business to an affiliated SSP so long as (1) the consumer receives a written disclosure of the nature of the relationship and an estimate of the affiliate's charges, (2) the consumer is not required to use the controlled entity and (3) the only thing of value received from the arrangement, other than payments for services rendered, is a return on ownership interest.

A referral to an affiliated SSP is not an illegal kickback or unearned fee under RESPA if the following conditions are met:

1. The agent or other person making the referral to the affiliated SSP has given each person being referred a written disclosure statement. The disclosure must be in the RESPA Affiliated Business Arrangement Disclosure Statement format and must disclose the nature of the relationship (ownership and financial) between the SSPs. The disclosure statement must also give an estimated price or range of prices generally charged by the affiliated SSP. The disclosures must be on a separate piece of paper and given no later than the time of the referral. A copy of the mandatory affiliated business disclosure statement can be found on HUD's web site at: www.hud.gov/offices/hsg/sfh/res/resappd.cfm.

2. The agent or other person making the referral cannot require any person to use the services of the affiliated SSP. The exceptions to this rule are that a lender may require a party to pay for the services of a specific attorney, credit reporting agency or appraiser, and that an attorney may require the use of a particular title insurance company.

3. The only thing of value that is received from the arrangement is a return on the ownership interest or franchise relationship between the affiliated SSPs. Bona fide dividends or capital or equity distributions related to ownership interest or franchise relationship, and not the number of referrals made, meet this criteria.

For example, a real estate broker who has an interest in a title company, can refer the customer to that entity and not violate RESPA, but only if the broker provides the required ABA disclosure form, the customer is not required to use the affiliated title company's services, and nothing of value other than a possible return on an ownership interest or franchise relationship is paid to the broker in return for the referral.

HUD monitors ABAs to ensure they are simply not "sham companies," that is, SSPs that join together to form companies that do little or no work and are intended to hide the payment of excessive fees or referral fees. If an entity is not a bona fide SSP and serves primarily as a conduit for referral fees, the ABA violates RESPA rules and is illegal.

For example, a company may be formed for the sole purpose of appearing to meet the ABA exception to RESPA's prohibition against referral fees. A lender and a real estate broker may jointly fund a new subsidiary that purports to be a mortgage broker but which has no staff and minimal funding, does no work, receives all business by referrals from the broker, outsources all work to the lender, and pays dividends to both parent companies (the broker and the lender). Such a sham arrangement pays the broker who does no work and bears no business risk in return. Accordingly, it is a disguised referral fee arrangement, it is a sham and it is illegal. See www.hud.gov/offices/hsg/sfh/res/res0607c.cfm for further discussion of sham ABAs.

Penalties for violation of Section 8 of the Act may include a fine of up to $10,000 or up to one year in prison, or both. For more information about RESPA, including a copy of the "Affiliated Business Arrangement Disclosure Form," see the February

2005 *Legal Update*, online at www.wra.org/lu0502, and HUD's RESPA resources at www.hud.gov/offices/hsg/sfh/res/respa_hm.cfm.

Telephone Solicitation Law

Although the topic in this *Update* is federal laws impacting real estate practice, it is almost impossible to discuss federal no-call law without also discussing Wisconsin no-call law as well.

The Role of Federal Law

The Federal Trade Commission (FTC) regulates both interstate telephone solicitations and the national do-not-call registry, while the Federal Communications Commission (FCC) regulates both intrastate and interstate calls including calls made within Wisconsin. Calls to a consumer's residence or cell phone that encourage the purchase, rental or investment in property, goods or services are regulated under federal law. For REALTORS®, this generally includes cold calling, calls to owners with cancelled or expired listings, calls to FSBOs and calls to consumers referred by others. REALTORS® placing these calls should check whether the phone number is on the national registry, if an exception does not apply, in order to avoid potential liability. Penalties for violating federal no-call law include fines of up to $11,000 per violation, lawsuits seeking damages of $500 plus possible attorneys fees and costs, and DRL disciplinary actions.

The exceptions to the federal do-not-call rules include established business relationships, prior written permission and personal relationships. Personal relationships include relationships with family members, friends and acquaintances. The written permission exception requires that the caller have the call recipient's signed written agreement to be called by the caller at a specified telephone number prior to any stated expiration date. An established business relationship arises out of an existing business transaction, a purchase or transaction within the last 18 months or an inquiry or application within the last three months directly from the consumer. If a telephone solicitation call does not fall within any of these exceptions, a caller should check the registry and no-call lists, or decline placing the call in order to avoid the risk of enforcement action or penalty under federal law.

The national registry can be accessed at telemarketing.donotcall.gov. Up to five area codes can be accessed for free. While many of the numbers on the national registry may be duplicative of the numbers on the Wisconsin do-not-call list, do not assume that the numbers are the same. In addition, the national registry may contain cell phone numbers not included on the Wisconsin list. Instructions for accessing the national registry appear at www.wra.org/pdf/resources/AccessNatl Registry.pdf, and the National Registry may be accessed at telemarketing.donotcall.gov/default.aspx.

See NAR's "Field Guide to Anti-Solicitation Laws: Do-Not-Call, Do-Not-Fax, and Do-Not-E-mail" at www.realtor.org/libweb.nsf/pages/fg707 and the WRA REALTOR® No-Call Resource page at www.wra.org/nocalls for additional details of the state and federal telemarketing laws.

Do-Not-Call Updates

FCC Issues Order on FSBOs and Expired Listings

The FCC has issued an order indicating that real estate agents representing buyers may call FSBOs only if the purpose of the call is restricted to the buyer's interest in and purchase of the FSBO property. Agents cannot, however, take advantage of that opportunity to pitch their services or to solicit a listing.

Similarly, there is no special permission to call homeowners with expired listings. There is no exception by the mere fact that the seller's property was at one time listed and entered in the MLS.

Monthly Scrubbing from the Registry

Beginning January 1, 2005, persons who use the national do-not-call registry must update their list of telephone numbers at least every 31 days instead of once every three months as was provided in the original rules. REALTORS® may wish to evaluate whether new systems and procedures are needed for this more frequent scrubbing schedule.

National Registry Fees Increase

The FTC has increased the fees for accessing to the national do-not-call registry. Under the revised fee structure, telemarketers continue to have access to up to five area codes for free, but additional area codes cost $56.00, up from $40.00. The fee for access to all 280 area codes increases to $15,400, up from $11,000. The new fee schedule goes into effect on September 1, 2005. Brokers who call only Wisconsin's five area codes will continue to pay no fees.

DATCP Telephone Solicitation Rules

A "telephone solicitation" is defined by the Department of Agriculture, Trade and Consumer Protection (DATCP) as as an unsolicited telephone call that encourages the consumer to purchase property, goods or services, or a call that is part of a plan or scheme to encourage the consumer to buy property, goods or services. These "telephone solicitation" calls include traditional telemarketing

activity, and may also affect the telephone calls a REALTOR® makes to his or her clients or customers to remind them to order the septic test required by the offer contingency or to obtain an insurance binder for closing.

Telephone Solicitation Exceptions

No agent can legally make a telephone solicitation call to a Wisconsin residence unless the broker is registered with DATCP or unless the purpose of the call is exempt. Accordingly, all REALTORS® should make their calls exempt by taking advantage of one or more of the following exceptions to the definition of telephone solicitation:

- In response to the consumer's affirmative request for that call. A failure to respond to a negative option ("we will call unless you say no") is not an affirmative request under the note to Wis. Admin. Code § ATCP 127.80(10)(c). Although a written request is not specified, prudent practice favors having requests to call in writing. Brokers may, after conferring with legal counsel, consider inserting language into all new and existing agency agreements and agency disclosures to the effect that: "(Seller) (Buyer) requests but does not require broker to telephone (seller) (buyer) at _____ (insert telephone number) 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: this may necessitate specifically listing all goods, services and tasks (telephone calls) that are being provided in the client's agency agreement.]
- 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.
- 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.
- A telephone call made to a number listed in the current local business telephone directory.
- One telephone call to determine whether a former client mistakenly allowed a contractual relationship to lapse.
- 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.
- A telephone call made to a party to an existing contract that is necessary to complete the contract. [Note however that the REALTOR® is not a party to the offer to purchase and therefore this exception does not extend to calls made to complete the terms of an offer to purchase.]

If You Do Cold Calling, Register with DATCP

Brokers who allow or require cold calling will need to comply with DATCP's telephone solicitation registration requirements and fees. Contact DATCP to request a registration packet by e-mail to WINoCall@datcp.state.wi.us, by calling (608) 224-4999, via fax to (608) 224-4939 or by writing to: Wisconsin Department of Agriculture, Trade and Consumer Protection, No Call Registration Packet, 2811 Agriculture Drive, PO Box 8911, Madison WI 53708-8911. If a broker/company is registered with DATCP and pays its fees, then the agents can make telephone solicitation calls as long as the telephone numbers called are not on the do-not-call list.

The Court Decision

The Dane County Circuit Court ruled on June 29, 2004 in favor of the WRA and the other plaintiffs in declaring that key provisions of DATCP's no-call rules were illegal. The court struck down the private cause of action created by DATCP, including the enhanced damage provisions (double damages and attorney fees), which threatened REALTORS® with potential class action lawsuits for violations. The court also struck down the rules that increased the statutory fine of $100 per violation to $10,000. The fine reduction assures REALTORS® that they will not be subject to overly aggressive enforcement actions for inadvertent rule violations.

DATCP Policy Statement

According to DATCP Secretary Rod Nilsestuen's written statement in 2003, the following calls do not require advanced consent under Wisconsin law:

1) **Return calls requested by consumers**. A telephone solicitation call may be legally placed if the telephone solicitation call is made to a recipient in response to the recipient's affirmative request for that call [Wis. Stat. § 100.52(6)(a); Wis. Admin. Code § ATCP 127.80

(10)(c)]. Under federal law, a broker may legally call in response to a direct consumer inquiry or application within the last three months or with prior written permission from the consumer.

2) **Calls to persons referred to a REALTOR® if the person requested the call**. This is not a good idea unless you are positive that the person really asked to be called. Under federal law, the request would have to be in writing.

3) **Calls to a broker's customers or clients to encourage them to purchase any product or service related to the real estate transaction**. This might comply with the administrative code rules if the person is a client and the provision of the product or service is explicitly mentioned in the agency contract. Under federal law, a broker may legally call if there is an established business relationship with the consumer arising from a current business transaction, a purchase or transaction with the consumer within the last 18 months or arising from a direct consumer inquiry or application within the last three months, or with prior written permission from the consumer.

4) **Calls to any party in a transaction in which a broker is providing brokerage services (even if they are not clients or customers of the caller) to encourage them to purchase products or services necessary to complete the real estate transaction**. This does not appear to fall within any exception under the Wisconsin no-call laws or rules. Under federal law, a broker may legally call if there is an established business relationship with the consumer arising from a current business transaction, a purchase or transaction with the consumer within the last 18 months or arising from a direct consumer inquiry or application within the last three months.

5) **Calls to any party in a transaction through the time of closing (even if they are not clients or customers of the caller) to assist the parties in processing the transaction**. This does not appear to fall within any exception under the Wisconsin no-call laws or rules. Under federal law, a broker may legally call if there is an established business relationship with the consumer arising from a current business transaction, a purchase or transaction with the consumer within the last 18 months or arising from a direct consumer inquiry or application within the last three months.

Where Does the Decision Leave Wisconsin REALTORS® Today?

DATCP is now the sole enforcer of the Wisconsin telephone solicitation law. REALTORS® can practice in conformance with DATCP rules and policies without fear of fines of $10,000 per violation or a private action seeking double damages plus attorney fees.

After reviewing DATCP's policy statements and the federal no-call law, REALTORS® may choose to meet with their company attorneys to re-evaluate company policy for obtaining prior written consent before placing certain types of telephone calls to the residences of certain consumers. Each broker may also wish to consider the do-not-fax law, e-mail restrictions, consumer privacy concerns, and potential liability exposure when assessing relative risks associated with the selected office calling policy.

Petition for Preemption of State Telemarketing Laws

The FCC has requested comments on a Joint Petition filed by a coalition of 33 companies, organizations, and non-profits active in interstate telemarketing. This coalition – which includes the American Bankers Association, the American Resort Development Association, the Direct Marketing Association and the American Breast Cancer Foundation – argues that the FCC should either assert exclusive regulatory jurisdiction over interstate telemarketing or preempt all state regulation of interstate telemarketing. Either way, the thrust of the Petition is the same: a state's telemarketing laws should only govern intrastate calls within that state, and should not apply to interstate calls where either the caller or the recipient of the call is located outside that state. The Joint Petition seeks a comprehensive approach and asks the Commission to preempt all state laws with respect to interstate calls. Significantly, the Petition does not request any limits on the application of these state laws to intrastate calls.

This would mean that Wisconsin's no-call law would only apply to intrastate calls. It is expected that this would significantly increase those pesky dinner-hour calls that Wisconsin residents have happily avoided over the past few years. Unfortunately, all REALTORS® wanting to cold call within Wisconsin would still fall under the jurisdiction of the Wisconsin no-call rules. Brokers making calls out of state would benefit because they would only have to follow the FCC rules and would no longer have to worry about the laws for the state being called.

Updates on the Joint Petition will be forthcoming when information is available.

FTC Clarifies CAN-SPAM Rules

The federal CAN-SPAM Act applies to all solicited and unsolicited commercial e-mails, defined as "any electronic mail message the primary pur-

pose of which is the commercial advertisement or promotion of a commercial product or service." This includes e-mails that promote or sell a product or service for a fee, such as association e-mails announcing seminars or products for sale and REALTOR® e-mails offering properties or brokerage services. Other informational e-mails that do not have a primary commercial purpose, for instance, an e-mail newsletter providing only political or legal information, are not subject to the Act. The Act also does not cover transactional or relationship messages relating to an ongoing transaction with a customer involving an identifiable good or product.

CAN-SPAM requires all commercial e-mails to include these elements:

- A legitimate return e-mail address and a valid physical postal address.
- A clear and conspicuous notice of the recipient's opportunity to "opt out" of any future commercial e-mail.
- A mechanism or an active e-mail address that the recipient may be use to ask to not receive further e-mail.
- A clear and conspicuous notice that the message is an advertisement or a solicitation.
- Clear notice in the subject heading if a message includes pornographic or sexual content.

The FTC has issued rules to help determine whether the primary purpose of e-mail is commercial and thus subject to the Act. E-mails sent out by a REALTOR® generally fall into one of the following categories:

1) Pure Ads. If the e-mail is solely an advertisement for a commercial product or service, it must comply with CAN-SPAM. A broker's e-mail message that only promotes brokerage services or newly listed properties to prospective clients and customers or to other REALTORS® must comply with CAN-SPAM. REALTORS® can "cold message" to consumers who have not opted out as long as they include the required elements in the e-mail.

2) Pure Information. Agents' newsletters with only information and no ads are not covered by the Act.

3) Transactional or Relationship Messages. E-mail to a client or customer regarding an ongoing transaction or the broker's agency relationship with a client are transactional or relationship messages that are not subject to the Act. Under the new rules, a transaction or relationship message may also contain an advertisement as long as the commercial material does not appear in the subject line or at the beginning of the message. While the entire transaction or relationship message does not have to appear before any commercial content, the message more clearly avoids the commercial label and the need to include the CAN-SPAM elements the nearer the ads are to the end of the message.

4) Mixed Message. Mixed message e-mails with both commercial and non-commercial content will be considered commercial if the subject line indicates a commercial message or if the predominant content is commercial. Predominant content is determined under a "net impression" standard: is the advertisement at the beginning of the message? What percentage of message is commercial? Do color, graphics, type size, and style focus on the commercial content? Sidebars, graphics, and other methods of setting parts of advertisements within the e-mail and the identity of the sender are also factors to be considered.

Under CAN-SPAM, there is no safe harbor or exemption for failing to comply other than a limited exception if the sender experiences technical difficulties while processing opt outs. Having a recipient's permission to send e-mails eliminates the need to label commercial messages as advertisements, but does not exempt the sender form the other CAN-SPAM required elements. There is no exemption for prior business relationships – commercial messages to contacts from prior transactions must still comply with CAN-SPAM. The penalty for violation of CAN-SPAM is $250 per violation.

CAN-SPAM Rules for Wireless Devices

REALTORS® who send commercial e-mails to wireless devices such as PDAs, pagers and cell phones will need to first check the FCC's list of wireless domain names. The new FCC rules for mobile services commercial messages (MSCM) impose a $250 fine for each commercial e-mail sent to any domain name on the list absent express prior permission from the MSCM recipient. Consent can be obtained verbally or in writing.

These new rules are intended to protect wireless consumers from unwanted service charges associated with the receipt of SPAM. Commercial e-mail senders should check the FCC's wireless domain names list every 30 days because the MSCM rules provide a safe harbor if a domain was not on the FCC list 30 days prior to the e-mail transmission. The FCC list of protected domain names is available at www.fcc.gov/cgb/policy/DomainNameDownload.html.

For further information about these do-not-call and CAN-SPAM regulations, visit NAR's "Field Guide to Do-

Not-Call, Do-Not-Fax, and Do-Not-E-Mail Laws" at www.realtor.org/libweb.nsf/pages/fg707.

No Call, Can-Spam and Faxing Issues – Legal Hotline Questions and Answers

Applicability of Wisconsin and Federal No-Call Laws

A broker has heard conflicting opinions on whether or not the federal do-not-call rules apply to REALTORS® who make cold calls in Wisconsin – some people have insisted that the federal rules do not apply to real estate solicitations. Is that correct? Does ignoring the Wisconsin no-call rules and calling numbers on the no-call list put one's license in jeopardy because he or she is breaking the law while conducting real estate business?

The rules for the use of the national do-not-call registry come from the FTC and the FCC. The FTC rules apply to interstate (between states) calls while the FCC regulations apply to both intrastate (within the state) as well as interstate calls, and include mobile and cell phones, not just residential telephone numbers. Calls to a consumer's residence or cell phone that encourage the purchase, rental or investment in property, goods or services are regulated. For REALTORS®, this generally includes cold calling, calls to owners with cancelled or expired listings, calls to FSBOs, and calls to consumers referred by others. REALTORS® placing these calls should check whether the phone number is on the national do-not-call registry if an exception does not apply. There is no exclusion under federal law for real estate solicitations.

Meanwhile, Wisconsin's do-not-call law and regulations remain in effect in the state because they are more restrictive than the FCC rules. At present, REALTORS® who make calls classified as telephone solicitation calls must comply with both the Wisconsin and the FCC rules for in-state calls, and with the FTC rules, the FCC rules and the rules of the state called for interstate calls. NAR's attorneys recommend that Wisconsin brokers also subscribe to the national do-not-call registry, obtain the Wisconsin numbers from the national registry and follow the federal safe harbor rules. See "Complying with the Telemarketing Sales Rule," at www.ftc.gov/bcp/conline/pubs/buspubs/tsrcomp.htm, and the WRA's No Call REALTOR® Resource page at www.wra.org/nocall for additional resources.

§ RL 24.17(1) provides that, "Licensees may not violate, or aid or abet the violation of, any law the circumstances of which substantially relate to the practices of a real estate broker or salesperson." Licensees convicted of crimes (not including motor vehicle offenses) are to report this to the DRL and the DRL may impose discipline if the crime substantially relates to real estate practice. A crime is conduct prohibited by state law and punishable by fine or imprisonment or both, but does not include conduct punishable only by forfeiture. The penalty for violation of the Wisconsin no-call law is a $100 forfeiture per violation so this would not trigger § RL 24.17.

However, a Wisconsin broker who violates the no-call rules may still be subject to DRL discipline. Wis. Stat. § 452.14(3)(i) indicates that discipline may be imposed upon licensees who "Demonstrated incompetency to act as a broker ... in a manner which safeguards the interest of the public." Deliberate violation of the no-call law is contrary to the public interest, and is related to brokerage practice.

Automated Phone Number Capture System

An agent has an 800 number on his sign followed by a four-digit number identifying the property. A consumer calls in to the 800 number to hear a pre-recorded message about the property. The 800 number source in Texas captures the consumer's telephone number and sends it to the agent's telephone number or pages the agent, all unbeknownst to the consumer calling in on the 800 number. Is the agent violating either state or federal do-not-call rules by calling that party in regard to the property in question?

Under both the FTC and FCC regulations, a telemarketer or seller (company) may call a consumer with whom it has an established business relationship (EBR). An EBR may be based on the consumer's purchase, rental, or lease of the seller's goods or services, or a financial transaction between the consumer and the company, within 18 months preceding a telemarketing call, or based on a consumer's inquiry or application regarding a company's goods or services. The EBR lasts for three months starting from the date the consumer makes the inquiry or application. In addition, a company may call a consumer even if the consumer's number is on the national do-not-call registry if the consumer has given a company express permission in a signed written agreement containing the consumer's consent to be called and the telephone number that may be called.

Under the Wisconsin no-call rules, a company may call a consumer in response to the consumer's request for that call or if the consumer is 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.

A consumer who calls an 800 number to hear a description of a property arguably has not created an EBR – there has been no purchase and the consumer has not asked or applied for anything. The consumer is not a client and has not requested a return call.

Thus, the agent receiving telephone numbers from the automated system is in violation of Wisconsin and/or federal no-call law if the consumer the agent calls is on a state no-call list or on the national do-not-call registry.

How to Contact

If an agent can't call people on the "do-not-call" list how may an agent contact them?

- The agent may call them at home if the agent has their affirmative consent in writing.
- The agent may call them at work.
- The agent may e-mail them provided he or she complies with the CAN-SPAM Act and includes the required information, including the mandatory opt-out information.
- The agent may fax them if he or she complies with the Junk Fax Prevention Act (*i.e.*, has an EBR or express permission to fax and includes the mandatory opt-out information on the first page of the fax).
- The agent may send mailings.
- The agent may meet them in person.

FSBO

If a broker has a buyer agency with a buyer, can the broker contact FSBO seller's numbers that are on the do-not -call list?

A FSBO owner's ad invites buyers and encourages brokers to bring buyers to the owner. A buyer's agent could arguably call the owner if the sole purpose of the call is to inquire for the buyer/client about the property and the agent does not attempt to sell the owner any goods or services. The ad is not an affirmative request for brokers to call and pitch their listing services.

FSBOs and Expired Listings

A licensee sends information, brochures, etc. to FSBOs and expired listings. The licensee would like to call these people to see if they received the information and what they thought of it. Can this licensee do this?

Unless the call meets the exceptions to the federal or state no-call rules, the licensee is prohibited from making the call to a consumer's residence if they are on federal or state no call lists, respectively. Calls to residential phones of sellers with expired listings are subject to the DATCP and the national do-not-call registry telemarketing rules. There is no exception by the mere fact that the seller's property was at one time listed and entered in the MLS.

Referrals

If another broker sends a REALTOR® the name of a prospective buyer as a referral, may the REALTOR® call that prospect?

No, the REALTOR® needs an affirmative request from that prospective buyer. The referral from the other broker does not give this permission. The REALTOR® may call the prospect at work, send e-mail (in compliance with the CAN-SPAM Act), write a letter or knock on the door, but the REALTOR® cannot call the prospect at home or on his or her cell phone if the prospect's numbers are on the do-not-call list, nor transmit a fax – unless the broker has express permission or an EBR.

No EBR Rule in Wisconsin

How long may a broker call back buyers based upon previous inquiries?

Although the DATCP do-not-call rules allow a telephone solicitation call in response to the recipient's affirmative request for a call, the rules do not give a broad window of time when a broker may telephone the call recipient numerous times at his discretion. Brokers should not assume that any inquiry from a buyer prospect about properties constitutes an affirmative request for return telephone calls. This may be sufficient under FCC rules where an inquiry triggers a three-month window when return calls may be placed, but under Wisconsin law any request or consent needs to be specific. Brokers should develop systems to document the scope of the authorization given by the consumer for follow-up calls, including telephone numbers and time limits.

Cell Phones

Can a licensee still call a customer's cell phone or is consent required for that, too?

Under the federal telephone solicitation rules enacted by the FCC, cell phone numbers will be included on the national do-not-call registry. Therefore, signed, written consent is needed if the cell phone number is on the national registry.

E-mail

Since the "do-not-call" list went into effect, an agent started e-mailing FSBOs offering a free home selling consultation along with his résumé. A few have replied saying it is illegal for the agent to do this and if the agent continues, he will be reported, etc. The agent has taken them off his list. Is the agent doing anything wrong?

The federal CAN-SPAM Act applies to all commercial e-mails: "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service." This includes e-mails that promote or sell a product or service for a fee, such as REALTOR® e-mails offering properties or brokerage services. CAN-SPAM requires all commercial emails to include a return e-mail address and a valid physical postal address, a clear and conspicuous "opt-out" notice, a mechanism or active e-mail address that the recipient may use to ask to not receive further e-mail, a clear and conspicuous notice that the message is

an advertisement or a solicitation, and clear notice in the subject heading if a message includes pornographic or sexual content.

Open House

What language should be used on an open house register to get permission to call a prospect back?

Brokers cannot just put a disclaimer on the top of the sign-in sheet and then rely upon the fact that a prospect signed on another page. The prospects must make an affirmative request and this must be an informed consent. The language requesting follow-up calls about the open house property and/or other properties may need to be repeated on each page. It is also recommended that the prospect check a box or circle "yes" or "no" regarding the request for follow-up calls to his or her home.

In this situation, the prospect may indicate, for example, "The open house host or hostess has my permission to call me at home or on my cell phone about the property I have just seen and similar properties on the market," and provide a space for the prospect to write down the numbers that can be called. A procedure for using the language may also be added to the office policy manual. Brokers may also wish to incorporate "consent -to-fax" language as well.

Floor Time

If someone calls in while an agent is on floor time, how does the agent get permission to call the person back and follow up with information about properties?

The agent may verbally ask for permission to call the person back, keep a log of verbal consents, and follow up in writing. If a prospect says the agent may call him or her back with information about certain properties, the agent should record the person's name, telephone number, specific consent and other contact information in a log. The agent's conversation with the prospect must be clear and exact because any consent is limited to the purpose of that request. For example, "If you would like me to keep you up to date on any properties (in that price range, neighborhood, size, etc.), what is the best way for me to contact you? If you want me to call you at home or on your cell phone, the new telephone no-call rules require that I get an affirmative request from you. (Record contact information and purpose for any requested calls to the home in a log.) Let me make sure that I understand: You are giving me permission to call you at home or on your cell phone for the purpose of ____, is that correct?" (Record purpose/limits for residential calls in a log.)

It will be very helpful to get additional contact information such as work telephone numbers, e-mail addresses and mailing addresses. These may all be used to full advantage and will come in handy when the agent follows up to secure a written request for telephone calls.

Cold Calls

Can REALTORS® still do cold calling in Wisconsin if they have signed up and paid for the non-solicitation directory?

Registration is only the first step to compliance with the do-not-call rules and regulations. Agents should check with their broker-owners to see what the office policy for calling activities will be, given the DATCP no-call rules. Cold calling can be done to any residential number not on the do-not-call list. No agent can legally make a telephone solicitation call to a number on the do-not-call list unless the purpose of the call is exempt. The registration fees, as well as an overview of the do-not-call rules, are found on the DATCP Web site at nocall.wisconsin.gov/web/includes/help/telemarketerfaq.asp.

In addition, brokers should access the Wisconsin numbers on the national do-not-call registry and follow the safe-harbor procedures to ensure maximum liability protection under federal law.

Other Federal Laws Impacting Real Estate Practice

There are other federal laws that play an important role in the daily practice of REALTORS®.

Electronic Transactions: E-Sign and E-Commerce

If a broker anticipates using electronic agency disclosure forms or electronic contracts, the consumers in the transaction must consent in advance to the substitution of electronic documents for written documents and to the use of electronic signatures. The E-Sign disclosure is unique in that consumers must consent electronically – written consent is not sufficient. The consumer may give his or her consent via e-mail, with a "click-through" agreement on a Web site or in some other manner whereby the consumer electronically accepts the broker's disclosures and approves the use of electronic documents.

- **REALTOR® Resource Page** – E-Commerce. This resource page includes the applicable state and federal laws, WRA electronic addenda forms, *Legal Updates* and articles pertaining to e-commerce and sample file formats for use in setting up electronic transactions. Visit www.wra.org/e-commerce.

Avoiding Lead-Based Paint Hazards and Liability

To ensure compliance with federal lead based paint (LBP) rules, an agent shall inform the seller of his or her obligations under the rules, ensure that the seller has performed all activities required under the rules, or per-

sonally ensure compliance with the rule requirements. Compliance includes the completion of an LBP addendum such as Addendum S.

Under federal law, a seller may not counter out a buyers' request for a LBP inspection.

A seller may, however, limit a buyer's right to void the sale based on the test results. In other words, the buyer may be given the right to inspect for LBP, but need not be given a contingency that would allow the buyers to void the sale if LBP is found. The federal civil penalties for non-compliance can range up to $10,000 for each violation.

REALTOR® Practice Tips: REALTORS® should always strictly comply with the provisions of the federal LBP disclosure law. Potential environmental hazards should always be disclosed to the parties, and REALTORS® should stand ready to provide a list of competent contractors should the parties need to investigate and eliminate any hazard on the property.

REALTOR® Resource Page – Lead-Based Paint. This resource page emphasizes the importance of REALTOR® members recognizing the complexity of this issue and how it impacts them in their business. This resource page includes *Legal Updates* relating to this topic, Wisconsin lead-based paint litigation, Wisconsin lead-based paint legislation, Wisconsin lead-based paint statutes and rules, the federal disclosure and renovation rules, and information about the training and certification of LBP personnel. You can also find the lead certification requirements and the Department of Health and Family Services (DHFS) lead section contact person, links to a national list of certified LBP contractors, and information from the EPA site that explains some of the procedures certified persons follow. For all of these resources, visit www.wra.org/LBP.

Americans with Disabilities Act (ADA)

The ADA states that individuals with disabilities may not be denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations that a business provides. In other words, whatever type of good or service a business provides to its customers or clients must be accessible to all. Title III of ADA requires the removal of architectural and communication barriers that are structural in nature from existing facilities where removal can be accomplished without much difficulty or expense. It also requires that auxiliary aids and services be provided to ensure effective communication and thus maximize access to offered goods and services. Places of public accommodation include a wide range of private profit and nonprofit businesses, including real estate offices, but do not cover private clubs and religious organizations, private apartments and homes.

The Department of Justice's ADA home page can be found at: www.usdoj.gov/crt/ada/adahom1.htm.

REALTOR® Resource Page – Customers With Disabilities. This resource page provides ample information to help you learn more about working with people with disabilities and special needs issues. A drop-down list of publications and resources specific to this topic includes *Legal Updates*, state statutes, Hottips, federal resources, funding and other home purchase resources, and forms. Visit www.wra.org/disabilities.

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