

STORAGE NAME: h3927b.er

DATE: March 25, 1998

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
ELECTION REFORM
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HB 3927 (PCB BRCA 98-04)

RELATING TO: No Telephonic Solicitation List

SPONSOR(S): Committee on Business Regulation & Consumer Affairs and Representative Ogles

COMPANION BILL(S): SB 1594(i)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) BUSINESS REGULATION AND CONSUMER AFFAIRS YEAS 5 NAYS 0
- (2) ELECTION REFORM (GRC) YEAS 7 NAYS 1
- (3) FINANCE AND TAXATION (FRC)
- (4)
- (5)

I. SUMMARY:

This bill expands the "No Sales Solicitation Calls" law by deleting most of the current exemptions and renaming the list the "No Telephonic Solicitation" list. Those brought under the regulations include newspapers, charities, religious organizations, educational and governmental entities, and political candidates. Additionally, those telemarketers who have relied on a prior business relationship that existed in the distant past are barred from calling a telephone number on the list.

Consumers are given the new option of paying \$15 for a three-year subscription or paying at the current rate of \$10 for the first year and \$5 annually thereafter. The cost to solicitors purchasing the list is increased by \$5 annually and changed from a quarterly distribution to a trimester distribution. The bill takes effect January 1 after it is enacted.

The Department of Agriculture and Consumer Services anticipates increased revenues from existing fees due to the number of people who add their number to the list. The DACS estimates the increase will be \$2 M in FY 1998-99 and \$1 M in FY 1999-00. The increased expenditures are estimated at \$390,027 for the second half of FY 1998-99 and \$836,198 for FY 1999-00.

The bill has an effective date of January 1 of the year after which enacted.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Current law allows individuals to assert their right to privacy by placing their home, mobile and pager telephone numbers on a "No Sales Calls" list with the Department of Agriculture and Consumer Services. Telemarketers (those selling consumer goods or services over the telephone) are then prohibited from calling those telephone numbers on the list.

However, certain solicitors are exempt from the law and, therefore, may continue to call the telephone numbers on the list. The exemptions include solicitors:

1. Exercising free speech that does NOT involve the sale of a good or service, i.e., charitable and religious organizations, educational institutions, and political candidates or parties.
2. Calling at the express invitation of the consumer.
3. Calling in connection with an existing debt.
4. Calling in connection with an existing or prior business relationship.
5. Calling on behalf of newspapers.
6. Calling as a realtor in response to a yard sign or advertisement placed by the consumer stating that real property is for sale.

Individuals file complaints with the DACS, their elected officials and generally, through letters to the editors of their newspapers about the increasing numbers of calls they receive from solicitors. These complaints include subscribers dissatisfied with the effectiveness of the list because of the number of calls they receive from entities with exempt status.

Even with these complaints, there are approximately 61,000 current subscribers who paid the DACS a \$10 initial fee and an annual \$5 fee, thereafter, to have their telephone number placed on the list. The DACS updates the list quarterly and sells it to telemarketers for \$100 per copy for all areas codes or for \$30 per copy per area code. Telemarketers are not required to buy the list, but it is the only way they can know the telephone numbers that are illegal for them to call.

The penalty section of the law tracks the penalty provisions in the Deceptive and Unfair Trade Practices Act, Part II, Chapter 501, F.S., making each violation subject to a \$10,000 civil penalty and awarding the prevailing party attorney's fees and costs. The differences between the penalty provisions of the two laws are:

1. DACS may bring only an action under the "No Sales Calls" list where the Department of Legal Affairs may enforce both laws;
2. The Deceptive and Unfair Trade Practices Act makes violations against senior citizens subject to a \$15,000 civil penalty. The "No Sales Calls" list provisions make all violations subject to a \$10,000 civil penalty; and
3. The Deceptive and Unfair Trade Practices Act establishes a private cause of action which is not established in the No Sales Solicitation Calls law.

The federal telemarketing act (47 USC Sec. 227), which restricts solicitation sales calls, in addition to regulating telemarketing activities, establishes a private right of action if state law so permits. The state law does not provide for such an action. Establishing the authority for a citizen to sue under the no solicitation calls statute would create the

problem of determining an appropriate financial remedy since the consumer would have had their privacy invaded instead of suffering a financial loss.

Florida is the only state to have a "No Sales Calls" list which is a limited right to privacy act regarding telephone solicitations. Numerous other states are considering establishing such a list and have inquired about the construction of Florida's law. Additionally, the federal telemarketing act contemplates the establishment of such a list at the national level, though the Federal Communications Commission has yet to initiate development of a list.

Telephone Solicitation & Political Speech

Senate hearings into alleged improprieties involving political telephone solicitations during the final days of the 1994 gubernatorial campaign concluded that there is a need for legislation addressing telephone solicitation. In response, the 1997 Legislature passed comprehensive legislation dealing with political telephone solicitation. Under section 106.147(1)(a), F.S., any telephone call supporting or opposing a candidate, elected public official, or ballot proposal must identify the persons or organizations sponsoring the call by stating either: "paid for by . . ." or "paid for on behalf of . . ." (person or organization would have to authorize the call). An exception is made for those situations where both the individual making the call is not being paid and the individuals participating in the call know each other prior to the call. Legitimate political polling is protected by exempting phone calls that are a part of a series of like telephone calls; consist of fewer than 1,000 completed calls; and average more than two minutes in duration. [s. 106.147(1)(b), F.S. (1997)]. Additionally, misrepresentations of affiliations with real or fictitious organizations or persons is strictly prohibited. [s. 106.147(1)(c)(d), F.S. (1997)].

Under current law, any telephone call, other than those conducted by an independent expenditure, supporting or opposing a candidate or ballot proposal, requires prior written authorization by the candidate or sponsor of the ballot proposal that the call supports. A copy of the authorization must be placed on file with the qualifying officer by the candidate or sponsor of the ballot proposal prior to the time the calls commence. [s. 106.147(2), F.S. (1997)].

Willful failure to comply with any provision of section 106.147, F.S., will subject violators to criminal penalties; a misdemeanor of the first degree. [s. 106.147(3)(a), F.S. (1997)]. For purposes of these provisions, the term "person" is defined to include any candidate; any officer of any political committee, committee of continuous existence, or political party executive committee; any officer, partner, attorney, or other representative of a corporation, partnership, or other business entity; and any agent or other person acting on behalf of a candidate, political committee, committee of continuous existence, political party executive committee, or corporation, partnership, or other business entity. [s. 106.147(3)(b), F.S. (1997)].

In addition, any person or organization that conducts any business in this state, which consists of making paid telephone calls supporting or opposing any candidate or elected public official, must continuously maintain, for at least 180 days following the cessation of such business activities in this state, a registered agent in this state for the purpose of service of process, notice, or demand required or authorized by law. The person or organization must file a notice of such registered agent with the Division of Elections.

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The registered agent must be a resident of this state, a domestic corporation or a foreign corporation authorized to do business in this state. [s. 106.1475(1), F.S. (1997)]. For purposes of this provision, "conducting business in this state" includes both placing telephone calls from a location in this state and placing telephone calls from a location outside this state to individuals located in this state. [s. 106.1475(2), F.S. (1997)]. Any person or organization that violates section 106.1475, F.S., commits a misdemeanor of the first degree.

B. EFFECT OF PROPOSED CHANGES:

This bill removes many of the exemptions to the current "no sales solicitation calls" list making it illegal for newspapers, charities, religious organizations, educational and governmental entities, and political candidates to place solicitation calls to any telephone number on the DACS "no call" list. The list is renamed the "No Telephonic Solicitation" list to make it clear that being on the list restricts all solicitation calls, not just sales solicitations. It establishes legislative intent recognizing not only the right to solicit, but also an individual's basic right to privacy. The language makes it explicit that the law is intended to provide an individual with a means of publicly declaring his or her wish to prohibit uninvited telephone solicitations without restricting all solicitation activities.

The law's definitions are expanded to provide that: (1) telephonic solicitations include all solicitations, except those made at the request of the person being called, made within 6 months of a purchase or the expiration of a warranty, or in connection with an existing debt, and (2) a subscriber is an individual who requests to have his or her telephone number placed on the no telephonic solicitation list and pays the applicable fee.

This bill gives subscribers the option of paying \$15 for a three-year subscription or paying at the current rate of \$10 for the first year and \$5 annually thereafter. The new option reduces the fee by \$5 over the three year period in addition to providing the convenience of a multi-year subscription. The cost to solicitors purchasing the list is increased \$5 annually, from \$100 quarterly to \$135 each trimester for all area codes or from \$30 quarterly to \$45 each trimester for each list of each area code.

The bill makes no changes to the current penalty provisions. The bill takes effect January 1 in the year after it passes to give the DACS and telephone solicitors coming under the regulations for the first time sufficient time to prepare for implementation.

Telephone Solicitation & Political Speech

Including "requests on behalf of political parties, candidates, or ballot proposals" within the definition of "telephonic solicitation", may subject the act to a constitutional challenge on free speech grounds under the First Amendment. (See Comments Section.)

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes. Solicitors for newspapers, charities, religious organizations, educational and governmental entities, and political candidates will have to incorporate the telephone numbers on the no telephonic solicitation with their call list.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

Yes. Some telemarketers will pay an additional \$5 per year to purchase a certain list, but the list will be updated 3 times each year instead of four times annually.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

Yes. Consumers pay to have their telephone numbers placed on the list and solicitors pay for a copy of the list.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

Yes. The bill allows individuals to assert their basic right to privacy and thereby prevent uninvited intrusion into their private lives.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Yes. Certain telephone solicitors would be prohibited from making some telephone solicitations that are now legal.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Section 501.059, Florida Statutes

E. SECTION-BY-SECTION RESEARCH:

Section 1. Amends s. 501.059, F.S., relating to telephonic solicitations, to provide legislative intent, remove certain exemptions, offer a second fee option for subscriptions at a reduced rate, and decrease the number of times each year the "no telephonic solicitation" list is updated.

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Section 2. Makes the bill take effect January 1 of the year after the year in which it passes.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

<u>Expenditures:</u>	1998-99	1999-00
Department of Agriculture & Consumer Services Expense		
13 Standard Pkgs @\$3,215	\$ 41,795	
Operating Capital Outlay		
Subscription Processing Machine w/software	200,000	
Technology upgrade/computer systems	405,000	
Computer upgrade AGMIC	<u>35,000</u>	
General Inspection Trust Fund	\$681,795	

2. Recurring Effects:

<u>Revenues:</u>	1998-99	1999-00
General Inspection Trust Fund	\$2 M	\$1 M
<u>Expenditures:</u>		
Department of Agriculture & Consumer Services		
Salaries and Benefits (13 FTE) General Inspection Trust Fund	\$390,027*	\$836,198

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

<u>Revenues:</u>	1998-99	1999-00
Department of Agriculture & Consumer Services		
General Inspection Trust Fund	\$2 M	\$1 M
<u>Expenditures:</u>		
Department of Agriculture & Consumer Services		
General Inspection Trust Fund	\$1,071,822	\$836,198

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Newspapers, charities, religious organizations, governmental entities, and political candidates that make telephonic solicitations will incur the expense of purchasing the list of telephone numbers they are prohibited from calling. Other telephone solicitors currently must purchase the list, so this bill places no new costs on them.

2. Direct Private Sector Benefits:

Consumers are given the new benefit of subscribing to the no telephonic solicitation list for three years at a cost of \$15 per three-year period, which is \$5 less than the current fee.

3. Effects on Competition, Private Enterprise and Employment Markets:

All solicitors will pay the same amount, so the bill should not effect competition.

D. FISCAL COMMENTS:

*The salaries and benefits for FY 1998-99 are for a six month period since the bill does not take effect until January 1, 1999. Additionally, the DACS calculated the beginning salaries at 10% above the minimum of each pay grade and included a 3% salary increase for the second year. The equipment purchase shown in this document is to make the implementation more effective and cost effective. Without the equipment, the DACS would need 8 additional FTE. Based on the salary projections of the DACS, the cost savings in salaries and benefits for those 8 FTE will pay for the equipment in three years.

The revenue projection is based on an expected increase of 200,000 list subscribers by December 31, 1998, at a rate of \$10 per subscription. The second year revenues are based on 200,000 renewals at \$5 each; no new subscriptions are estimated for FY 1999-00. No revenue is included from the sale of the list to telemarketers since they are not required to purchase the list.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenue in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the authority that counties or municipalities have to raise revenue in the aggregate.

V. COMMENTS:

Telephone Solicitation & Political Speech

The First Amendment provides that "Congress shall make no law. . .abridging the freedom of speech. . ." As the United States Supreme Court held in Thornhill v. Alabama, 310 U.S. 88, 95, 60 S.Ct. 736, 741, 84 L.Ed. 1093 (1940), "[t]he freedom of speech. . .which [is] secured by the First Amendment against abridgment by the United States, [is] among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State." Notwithstanding, the Court has also recognized that there is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right. Burson v. Freeman, 504 U.S. 191, 213, 112 S.Ct. 1846, 119 L.Ed.2d 5, (1992) (Kennedy, J., concurring).

When contemplating First Amendment challenges, the level of judicial scrutiny applied will vary with the type of speech at issue. Classic political expression, or "political speech", has long been recognized as occupying the highest, most protected position. As the Court opined in Buckley v. Valeo, 424 U.S. 1, 14, 96 S.Ct. 612, 632, 46 L.Ed.2d 659 (1976), held:

Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

The government may regulate the time, place, and manner of such expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communications. Burson v. Freeman, 504 U.S. at 197. However, any facially content-based restriction on political speech in a public forum would be subjected to exacting or strict scrutiny: The State must

show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. Id. at 198. A distinguishing factor of the proposed regulation of telephonic request on behalf of political parties, candidates, or ballot proposals is the type of forum involved: nonpublic. Our research was inconclusive as to the effect of this particular factor on a constitutional challenge. However, at least one United States Supreme Court justice has reasoned that a content-based regulation may be constitutional if it is a “reasonable, viewpoint-neutral regulation of a nonpublic forum”. Id. at 213 (Scalia, J., concurring in the judgment).

Content-based restrictions have also been held to raise Fourteenth Amendment equal protection concerns because, in the course of regulating speech, such restrictions differentiate between types of speech. For example, in City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 816, 104 S.Ct. 2118, 2134, 80 L.Ed.2d 772 (1984), it was suggested by the Court that an exception carved out of a general ordinance that prohibited the posting of signs allowing the posting of political campaign signs might entail constitutionally forbidden content discrimination. Therefore, under either a free speech or equal protection theory, a content-based regulation of political speech in a public forum is valid only if it can survive strict scrutiny. Burson v. Freeman, 504 U.S. at 197 n.3. While distinguishing among types of speech would require that the regulation be subjected to strict scrutiny, the failure to regulate all speech would not necessarily render the regulation fatally underinclusive. Id. at 207.

Commercial speech has been characterized as speech which does no more than propose a commercial transaction or as “expression related to the economic interests of the speaker and its audience.” Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346 (1976). First Amendment jurisprudence has created a rough hierarchy in the constitutional protection of speech. Commercial speech has commonly been regarded as a sort of “second-class” expression. R.A.V. v. City of St. Paul, Minn., 504 U.S. 191, 195, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992). Therefore, courts have afforded commercial speech a limited measure of First Amendment protection, allowing regulation that might be impermissible in the realm of noncommercial expression. The test applied to commercial speech is commonly referred to as the Central Hudson test:

For commercial speech to come within [first amendment protection], it must at least concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Electric Corp., 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

The United States Supreme Court has recognized that the immediacy of a particular communication and the imminence of harm are factors that render certain communications less protected than others. Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 457, n.13, 99 S.Ct. 1912, 56 L.Ed.2d 444 (1978)(holding a disciplinary rule prohibiting in-person solicitation of clients constitutional) [See also, May v. The People of the State of Colorado, 636 P.2d 672 (1981)(municipal ordinance banning door-to-door commercial solicitation directly advanced valid governmental interests in maintaining a homeowner’s privacy and in

public safety and thus was a constitutional regulation of commercial speech); Shapero v. Kentucky Bar Association, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988)(holding that the State could not categorically prohibit lawyers from soliciting legal business by sending truthful and nondeceptive letters to potential clients known to face particular legal problems)]. It is important to note that the Court has not allowed door-to-door solicitation ordinances which ban non-commercial speech. [See generally, Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980)].

It has been recognized that “[t]he telephone is unique in its capacity to bring those outside the home into the home for direct verbal interchange--in short, the residential telephone is uniquely intrusive.” Humphrey v. Casino Marketing Group, Inc., 491 N.W.2d 882, 889 (1992). Therefore, under the “captive audience” theory the home is not a public forum and as such, reasonable time, place and manner regulations of unsolicited commercial telephone solicitation ought to be permissible. Id. at 888.

Another important factor to consider in analyzing HB 3927 is the fact that the “consumer” is given a choice of whether to become a subscriber. Therefore, the regulation is not an outright ban on the targeted speech. The importance of this factor can be found in the context of an analogous federal law which gives postal patrons complete discretion to refuse materials they find offensive. [See, Rowan v. United States Post Office Department, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970)].

An argument may also be made that the fee imposed upon any candidate who wishes to engage in phone banks as a means of campaigning, by requiring the candidate to purchase a list of subscribers under the regulation, may impose an undue burden likened to a “filing fee”. If a showing could be made that this fee, by imposing a substantial burden upon a potential candidate to the degree that it prohibited his or her access to the ballot, also had a direct effect on the rights of voters, an argument could be made that the regulation should be subject to a strict scrutiny analysis. [See generally, Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1971); Adams v. Askew, 511 F.2d 700 (5th Cir. 1975); and Fair v. Taylor, 359 F.Supp. 304 (M.D. Fla. 1973)].

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

Amendment No. 1: Clarified the definition of “uninvited telephonic solicitation” to exclude calls made in response to an express request of the person called; in response to a sign or other form of advertisement placed by the person called; or is directed to a person with whom the telephone solicitor has a prior or an existing relationship.

The amendment also clarified what would constitute an “existing relationship”. Under the amendment, an “existing relationship” includes, but is not limited to, an inquiry regarding an existing debt, contract, or warranty, payment or performance which has not been completed at the time the call is made; an inquiry made within 18 months of a contribution to, or a purchase of consumer goods or services from the telephone solicitor by the person called; or within 12 months following the expiration of a contract, warranty, or other written agreement between the telephone solicitor and the person called.

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VII. SIGNATURES:

COMMITTEE ON BUSINESS REGULATION AND CONSUMER AFFAIRS:

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