

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 393 w/CS Consumer Protection  
**SPONSOR(S):** Vana  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 482

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Commerce	20 Y, 0 N w/CS	Sheheane	Billmeier
2) Public Safety & Crime Prevention	15 Y, 0 N	Kramer	De La Paz
3) Public Safety Appropriations (Sub)			
4) Appropriations			
5)			

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### SUMMARY ANALYSIS

CS/HB 393 creates civil penalties and remedies for certain deceptive or unfair trade acts under the Florida Deceptive and Unfair Trade Practices Act. The bill provides that the following activities are violations of that act:

- Engaging in a deceptive and unfair trade practice with the intent to deceive another person into believing that he or she is affiliated with a law enforcement agency, firefighting agency, or public utility;
- Using deceptive practices to obtain another person's address, telephone number or social security number and using it to engage in commercial solicitation;
- Selling or transferring personal customer information to a third party if the information is protected from disclosure by law, contract, or a published privacy policy, unless the purchaser or transferee agrees to abide by the contract or published privacy policy and the purchaser or transferee is in the same or similar business as the business that last owned the personal customer information.
- Violating or failing to comply with the identity theft provisions under s. 817.568, F.S.

The bill provides greater protections for consumers relating to the privacy of personal customer information and deceptive solicitation practices and provides penalties for persons engaging in committing unfair or deceptive acts. There is no expected fiscal impact for local governments. Please see "Fiscal Analysis and Economic Impact Statement" for state government impact discussion.

This bill will take effect July 1, 2004.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

**STORAGE NAME:** h0393c.ps  
**DATE:** March 31, 2004

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |                              |                                        |                                         |
|--------------------------------------|------------------------------|----------------------------------------|-----------------------------------------|
| 1. Reduce government?                | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/>            |
| 2. Lower taxes?                      | Yes <input type="checkbox"/> | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/> | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 5. Empower families?                 | Yes <input type="checkbox"/> | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

The bill provides civil penalties for conduct which is currently unregulated.

#### B. EFFECT OF PROPOSED CHANGES:

Part II of Chapter 501, F.S., is known as the Florida Deceptive and Unfair Trade Practices Act (FDUPTA).<sup>1</sup> Section 501.204, F.S., provides that "unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce<sup>2</sup> are hereby declared unlawful." The section also provides that in constructing this act, "due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. s. 45(a)(1)."<sup>3</sup>

Willful violations occur when the person knew or should have known that his or her conduct was unfair or deceptive.<sup>4</sup> A person willfully violating the provisions of the FDUPTA is liable for a civil penalty of not more than \$10,000 per violation. This penalty is increased to \$15,000 for each violation if the willful violation victimizes or attempts to victimize senior citizens or handicapped persons. Individuals aggrieved by a violation of this act may seek to obtain a declaratory judgment that an act or practice violates this act and to enjoin a person from continuing the deceptive or unfair act. An individual harmed by a person who has violated this act may also seek actual damages from that person, plus attorney's fees and court costs.<sup>5</sup> The state attorneys and the Department of Legal Affairs are the enforcing authorities for the FDUPTA. Section 501.207, F.S., specifies the actions that the enforcing authority may bring.

The First District Court of Appeal has described the FDUTPA as follows:

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<sup>1</sup> See s. 501.201, F.S.

<sup>2</sup> Section 501.203(8) provides the following definition: "'Trade or commerce' means the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated. 'Trade or commerce' shall include the conduct of any trade or commerce, however denominated, including any nonprofit or not-for-profit person or activity."

<sup>3</sup> The term "violation of this part" is defined to mean any violation of this act or the rules adopted under this act and may be based upon any of the following as of July 1, 2001:

(a) Any rules promulgated pursuant to the Federal Trade Commission Act, 15 U.S.C. ss. 41 et seq.;

(b) The standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the federal courts;

(c) Any law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices.

<sup>4</sup> See s. 501.2075, F.S.

<sup>5</sup> See s. 501.211(1) and (2), F.S.

[The act] is designed to protect not only the rights of litigants, but also the rights of the consuming public at large." When addressing a deceptive or unfair trade practice claim, the issue is not whether the plaintiff actually relied on the alleged practice, but whether the practice was likely to deceive a consumer acting reasonably in the same circumstances. A deceptive or unfair trade practice constitutes a somewhat unique tortious act because, although it is similar to a claim of fraud, it is different in that, unlike fraud, a party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue.

State Office of Atty. Gen. v. Wyndham Intern, Inc., 29 Fla.L. Weekly 489 (Fla. 1<sup>st</sup> DCA February 26, 2004). "An unfair practice under the federal statute has been defined as one that 'offends established public policy' and one that is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" Samuels v. King Motor Co. of Fort Lauderdale, 782 So.2d 489, 499 (Fla. 4<sup>th</sup> DCA 2001)(citations omitted); Davis v. Powertel, Inc. 776 So.2d 971, 974 (Fla. 1<sup>st</sup> DCA 2000)("According to the federal decisions, a deceptive practice is one that is 'likely to mislead' consumers.); Cummings v. Warren Henry Motors, Inc., 648 So.2d 1230 (Fla. 4th DCA 1995)(holding that plaintiff who alleges that a dealership intentionally concealed he was entering a lease agreement rather than a sales agreement and that as a consequence he was deprived of his trade-in vehicle states a cause of action under FDUPTA); Latman v. Costa Cruise Lines, N.V., 758 So.2d 699, 703 (Fla. 3<sup>rd</sup> DCA 2000)(holding that deceptive practice under the FDUPTA occurred where a cruise line billed a passenger for port charges but kept part of the money for itself).

Federal law provides some privacy protections to individuals. The Gramm-Leach-Bliley Financial Services Act<sup>6</sup> covers privacy considerations for customers' personal financial information applicable to all financial companies. These laws balance the right to privacy with a financial company's need to provide information for normal business purposes. Companies involved in financial activities must send their customers privacy notices.

The federal act requires financial institutions to provide clear disclosure at the beginning of a customer relationship and not less than annually thereafter, of their privacy policy regarding sharing of nonpublic personal information with affiliates and third parties. The company must disclose how or whether it intends to share personal financial information. The act also gives a person the right to stop (opt out of) some sharing of nonpublic personal information. The act prohibits disclosures of account numbers or credit card account information to third parties for use in telemarketing, direct mail marketing or other marketing through electronic mail and provides criminal penalties. A person has the right to opt out of some information sharing with companies that are part of the same corporate group as the person's financial company (or affiliates), or not part of the same corporate group as the person's financial company (or non-affiliates).

HB 393 creates s. 501.165, F.S., to provide that any person who uses deceptive practices or means to obtain another person's address, telephone number, or social security number and uses it to engage in "commercial solicitation" commits an unfair or deceptive act or practice or unfair method of competition in violation of part II of ch. 501, F.S., and is subject to the penalties and remedies provided for such violation, in addition to remedies otherwise available for such conduct.

HB 393 creates s. 501.166, F.S. which prohibits the sale or transfer of "personal customer information" to a third party if the information is protected from disclosure by law, contract, or a published privacy policy, unless the purchaser or transferee agrees to abide by the contract or published privacy policy and the purchaser or transferee is in the same or similar business as the business that last owned the personal customer information. The purchaser or transferee may only use the personal customer information to solicit a transaction for that business or to effect, administer, or enforce a transaction as requested or authorized by that customer. The prohibition applies to any customer who resides in this state at the time of the sale or transfer. A violation of this prohibition is a violation of part II of ch. 501,

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<sup>6</sup> See 15 U.S.C ss. 6821-6827

F.S., the Florida Deceptive and Unfair Trade Practices Act, and is subject to the penalties and remedies of that act, in addition to remedies otherwise available by law.

HB 393 creates s. 501.2076, F.S., which provides a \$15,000 civil penalty per violation for engaging in a deceptive and unfair trade practice with the intent to deceive another person into believing that he or she is affiliated with a law enforcement agency, firefighting agency, or public utility.

Currently, section 817.568, F.S., provides that a person using personal identification information, such as social security numbers, driver's license numbers, passport numbers, and credit card numbers, for fraudulent purposes, commits a third degree felony, punishable by up to five years in prison. The bill creates a new and unnumbered section providing that a person who violates or fails to comply with any provision of s. 817.568, F.S., commits an unfair or deceptive act or practice or unfair method of competition in violation of part II of ch. 501, F.S., and is subject to the penalties and remedies provided for such violation, in addition to remedies otherwise available for such conduct.

#### C. SECTION DIRECTORY:

Section 1. Creates s. 501.165, F.S., to provide that any person who uses deceptive practices or means to obtain another person's address, telephone number, or social security number and uses it to engage in commercial solicitation commits an unfair or deceptive act or practice.

Section 2. Creates s. 501.166, F.S., to prohibit the sale or transfer of personal customer information to a third party if the information is protected from disclosure by law, contract, or a published privacy policy, provides exceptions and limitations.

Section 3. Amends s. 501.2075, F.S., to provide an exception to the maximum penalty of \$10,000 allowable per violation under part II of ch. 501, F.S. for violations of s. 501.2076, F.S.

Section 4. Creates s. 501.2076, F.S., prohibits person who engages in a deceptive and unfair trade practice with the intent to deceive another person into believing that he or she is affiliated with a law enforcement agency, firefighter agency, or public utility; provides penalty of up to \$15,000 for each violation.

Section 5. Creates a new and unnumbered section providing that a person who violates or fails to comply with any provision of s. 817.568, F.S., commits an unfair or deceptive act or practice or unfair method of competition.

Section 6. Updates obsolete date references to various federal and state laws in s. 501.203, F.S., (definitions) relevant to the Florida Deceptive and Unfair Trade Practices Act.

Section 7. Updates obsolete date references to various federal and state laws in s. 501.204, F.S., (unlawful acts and practices) relevant to the Florida Deceptive and Unfair Trade Practices Act.

Section 8. Provides effective date of July 1, 2004.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

This bill is not expected to impact state government revenue.

2. Expenditures:

The bill specifies violations relating to the Florida Deceptive and Unfair Trade Practices Act which may be enforced by the Attorney General. The cost is indeterminate because the number of cases that may arise is not known.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill is not expected to have a fiscal impact on local governments.

2. Expenditures:

This bill is not expected to have a fiscal impact on local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill provides greater protections for consumers relating to the privacy of personal customer information and deceptive solicitation practices and provides penalties for persons engaging in committing unfair or deceptive acts.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The legislation does not require expenditure of funds by local governments, does not reduce the authority to raise revenue, nor reduce the percentage of state tax shared with local governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

*Comments of staff of Committee on Public Safety & Crime Prevention:* The bill provides that a person who uses deceptive practices or means to obtain another person's address, telephone or social security number and uses it to engage in commercial solicitation commits a unfair or deceptive act. The term "commercial solicitation" is not defined in the bill or elsewhere in statute.

The bill provides that a person who violates or "fails to comply" with any provision of s. 817.568, F.S. commits a unfair or deceptive act or practice. Section 817.568, F.S. makes it unlawful to commit identity theft. It does not provide any affirmative duties but rather, prohibits certain activities. As a result it is not clear how a person could "fail to comply" with the section. Further, part II of chapter 501 applies to unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices *in the conduct of any trade or commerce*. Trade or commerce is defined to apply to acts relating to the advertising, soliciting, providing, offering or distributing of any good or service.

Generally, the FDUPTA is used to penalize business entities for deceptive activities. As a result, it is not clear that violation of a statute which prohibits identity theft, which would not be related to the advertising, soliciting, providing, offering or distributing of a good or service and would not be committed by a business entity, would fit in to the overall scope of the act.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

On March 17, 2004, the Commerce Committee adopted one amendment and reported the bill favorably as a committee substitute. The amendment removed language pertaining to selling personal information of a bankrupt person and incorporated language prohibiting the sale or transfer of personal customer information to a third party if the information is protected from disclosure by law, contract, or a published privacy policy, unless the purchaser or transferee agrees to abide by the contract or published privacy policy and the purchaser or transferee is in the same or similar business as the business that last owned the personal customer information.