

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Commerce and Consumer Services Committee

BILL: SB 284

SPONSOR: Senators Aronberg and Fasano

SUBJECT: Consumer Protection

DATE: February 21, 2005 REVISED: 2/23/05

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Siebert	Cooper	CM	Fav/2 amendments
2.			JU	
3.				
4.				
5.				
6.				

Please see last section for Summary of Amendments

- Technical amendments were recommended
- Amendments were recommended
- Significant amendments were recommended

I. Summary:

This bill prohibits the use of deceptive practices or means to obtain certain personal information for commercial solicitation purposes and prohibits the unauthorized sale or disclosure of that information. This bill also prohibits falsely representing oneself as being affiliated with a law enforcement, firefighting agency, or public utility for the purpose of engaging in a deceptive and unfair trade practice. Further, this bill creates a penalty for any person who misrepresents that he is affiliated with a law enforcement agency, a firefighting agency, or public utility.

This bill creates an unnumbered section of the Florida Statutes, creates sections 501.165, 501.166, and 501.2076 of the Florida Statutes, and amends sections 501.2075, 501.203, 501.204, and 501.207 of the Florida Statutes.

II. Present Situation:

Consumer Protection

Part I of ch. 501, F.S., prohibits certain acts that may bring harm to Florida consumers, such as tampering with consumer goods,¹ and regulates various industries that directly interact with

¹ Section 501.001, F.S.

consumers, such as telemarketers² and health studios.³ Part II of ch. 501, F.S., the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), provides remedies and penalties for “[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.”⁴ Remedies for acts prohibited by FDUTPA may include an action to enjoin a person from committing such acts⁵ as well as the imposition of a civil penalty of not more than \$10,000.⁶ Actions may be brought by a state attorney or the Department of Legal Affairs⁷ or by a consumer.⁸

It is also the public policy of this state to protect the public from those impersonating certain public officers. It is a third-degree felony if any person “deliberately impersonates or falsely acts as a public officer or tribunal, public employee or utility employee, including, but not limited to, marshals, judges, prosecutors, sheriffs, deputies, court personnel, or any law enforcement authority in connection with or relating to any legal process affecting persons and property, or otherwise takes any action under color of law against persons or property.”⁹ It is also a third-degree felony if any person “falsely assumes or pretends to be the State Fire Marshal, an agent of the Division of State Fire Marshal, a firefighter as defined in s. 112.81, or a firesafety inspector and ... acts as such to require a person to aid or assist him or her in any matter relating to the duties of the State Fire Marshal, an agent of the division, a firefighter, or a firesafety inspector.”¹⁰

Criminal sanctions also exist for the criminal use of personal identification information, usually called identity theft. Section 817.568, F.S., states that “[a]ny person who willfully and without authorization fraudulently uses, or possesses with intent to fraudulently use, personal identification information concerning an individual without first obtaining that individual’s consent, commits the offense of fraudulent use of personal identification information, which is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.”

Although civil remedies are not available under s. 817.568, F.S., in sentencing a defendant, a court may require a defendant to make restitution to a victim, which may include a victim’s out-of-pocket costs, “including attorney’s fees incurred by the victim in clearing the victim’s credit history or credit rating, or any costs incurred in connection with any civil or administrative proceeding to satisfy any debt, lien, or other obligation of the victim arising as the result of the actions of the defendant.”¹¹

Consumer Protection and Privacy Laws

Federal law provides some privacy protections to individuals. The Gramm-Leach-Bliley Act

² Section 501.059, F.S.

³ Section 501.015, F.S.

⁴ Section 501.204, F.S.

⁵ Section 501.207(1)(b), F.S.

⁶ Section 501.2075, F.S. Violations against a senior citizen or handicapped person may result in a penalty of not more than \$15,000 (s. 501.2077, F.S.).

⁷ Section 501.207, F.S.

⁸ Section 501.207, F.S.

⁹ Section 843.0855(2), F.S.

¹⁰ Section 633.151, F.S.

¹¹ Section 817.568(9)(a), F.S.

covers privacy considerations for customers' personal financial information. Companies involved in financial activities must send their customers privacy notices, including such companies as:¹²

- Banks, savings and loans, and credit unions;
- Insurance companies;
- Securities and commodities brokerage firms;
- Retailers that directly issue their own credit cards;
- Mortgage brokers;
- Automobile dealerships that extend or arrange financing or leasing;
- Check cashers and payday lenders;
- Financial advisors and credit counseling services; and
- Sellers of money orders or travelers checks.

The company must disclose whether, and if so how, it intends to share personal financial information. Federal privacy laws also give a person the right to opt-out of some sharing of personal financial information. A person has the right to opt-out of some information sharing with companies that are part of the same corporate group as the financial company (or affiliates) or not part of the same corporate group as your financial company (or non-affiliates).

A person, however, cannot opt-out and completely stop the flow of all personal financial information. The law permits financial companies to share certain information without giving the person the right to opt out. Among other things, the financial company may provide to non-affiliates information to firms that help promote and market the products, records of transactions to firms that provide data processing and mailing services for your company, information in response to a court order, and payment history on loans and credit cards to credit bureaus.¹³

Florida provides some privacy protections to individuals. The Florida Constitution provides a right to privacy solely from governmental intrusion.¹⁴ The privacy of an insurance consumer's nonpublic personal financial and health information is protected by rules based on the Privacy of Consumer Financial and Health Information Regulation, adopted September 26, 2000, by the National Association of Insurance Commissioners and adopted by the Florida Department of Insurance, now the Florida Department of Financial Services.¹⁵ These rules must be consistent with, and not more restrictive than, the standards contained in Title V of the Gramm-Leach-Bliley Act of 1999. The rules adopted by the department describes an insurance company's privacy obligation to the consumer and how the consumer may opt out of certain disclosures by an insurance company to affiliated and non-affiliated third parties, but it does not address the sale or transfer of the nonpublic personal financial and health information.¹⁶

¹² Federal Trade Commission, *Privacy Choices for Your Personal Financial Information*, available at <http://www.ftc.gov/bcp/online/pubs/credit/privchoices.htm> (last visited February 18, 2004).

¹³ *Id.*

¹⁴ Section 23, Art. I, State Constitution.

¹⁵ Section 626.9651, F.S.

¹⁶ Chapter 4-128, F.A.C., Privacy of Consumer Financial and Health Information.

III. Effect of Proposed Changes:

Section 1 creates s. 501.165, F.S., to provide that any person who intentionally uses a deceptive practice or means to obtain another person's address, telephone number, or social security number and uses it to engage in commercial solicitation, or provides it to another person for purposes of 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., which is the Florida Deceptive and Unfair Trade Practices Act.

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, unless the purchaser or transferee agrees to abide by the contract or published privacy policy. 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, 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.

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., to provide that a 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 a public utility is subject to a penalty of up to \$15,000 for each violation.

Section 5 creates an undesignated provision in law to provide that any violation of s. 817.568, F.S., relating to criminal use of personal identification information, is also a violation of the Florida Deceptive and Unfair Trade Practices Act.

Section 6 amends s. 501.203(3), F.S., to update the year to "2005" in a provision of the Florida Deceptive and Unfair Trade Practices Act to capture within the act any changes made between 2001 and 2005 in any Federal Trade Commission (FTC) rules, any court or FTC interpretations regarding the standards of unfairness and deception, or any changes in law, statute, rule, regulation, or ordinance which proscribe unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices.

Section 7 amends s. 501.204(2), F.S., to update the year to "2005" to capture any federal court or FTC interpretations made between 2001 and 2005 relating to a specific section of the Federal Trade Commission Act.

Section 8 amends s. 501.207, F.S., to allow the court to enter orders "to bring actions in the name of and behalf of the defendant enterprise," thereby allowing receivers to bring actions against other companies that may be involved. In addition, the terms "legal" and "equitable" are deleted from the list of forms of relief a court may grant.

Section 9 creates an undesignated provision in law to provide that if any provision of the act is held invalid, the invalidity shall not affect other provisions of the act.

Section 10 provides an effective date of July 1, 2005.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill restricts Florida citizens' personal customer information from being sold or transferred to a third party unless the purchaser or transferee agrees to abide by the contract or privacy policy of the seller or transferor.

C. Government Sector Impact:

The bill specifies that violations relating to the Florida Deceptive and Unfair Trade Practices Act may be enforced by the Attorney General or the state attorneys. This cost is unable to be determined because the number of cases that may arise is unknown.

VI. Technical Deficiencies:

This 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 an unfair or deceptive act. The term "commercial solicitation" is not defined in the bill or elsewhere in statute. If a term is not defined in statute, a court will first look to its "plain and ordinary meaning."¹⁷

¹⁷ Green v. State, 601 So. 2d 472, 473 (Fla. 1992)("One of the most fundamental tenets of statutory construction requires that we give statutory language its plain and ordinary meaning, unless the words are defined in the statute or by the clear intent of the legislature.").

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

VIII. Summary of Amendments:

Barcode 143706 by Commerce and Consumer Services:

Deletes section 2, which proposed to allow a transfer of personal information if the subsequent company agrees to abide by the original privacy policy. (WITH TITLE AMENDMENT)

Barcode 844206 by Commerce and Consumer Services:

Restores language that was deleted in the bill, which may have limited the type of relief the court is authorized to grant.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
