

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 781 Direct-Mail Marketing Solicitations

SPONSOR(S): Brandenburg

TIED BILLS: IDEN./SIM. BILLS: SB 1324

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Agriculture & Natural Resources Policy Committee		Thompson	Reese
2) General Government Policy Council			
3) Natural Resources Appropriations Committee			
4) Full Appropriations Council on General Government & Health Care			
5)			

SUMMARY ANALYSIS

HB 781 creates a "do not mail" (DNM) registry to protect consumers from direct mail marketing solicitations and directs the Department of Agriculture and Consumer Services (DOACS) to administer the program and have the registry in operation by July 1, 2010.

The bill prohibits a direct-mail marketer who conducts business in this state from mailing or causing to be mailed any solicitation to a consumer more than 30 days after the consumer's name and address appear on the DNM registry. Consumers who wish to be listed must pay an initial fee of \$10 and a renewal fee of \$5 and may notify the DOACS by calling a toll free number or visiting the DOACS website.

The bill requires direct mail marketers to annually register with the DOACS for a fee that is not to exceed \$500 and is calculated on a sliding scale. Non-profit corporations are not assessed a fee. The DOACS is required to update the registry quarterly and marketers would be prohibited from sending solicitations, with certain exceptions, to consumers listed on the registry.

The bill directs the DOACS to investigate complaints and along with the Department of Legal Affairs (DLA) to bring a civil action against persons in violation. In the case of a civil action, costs and attorneys' fees are awarded to the prevailing party. The DOACS or the DLA are only required to pay costs and attorneys' fees if the defendant prevails, and the court finds that there was "a complete absence of a justiciable issue of law or fact" or the action was brought "in bad faith".

Violations may be deemed a deceptive or unfair trade practice and subject to penalties up to \$10,000 per violation. This penalty increases to \$15,000 for each violation if the willful violation victimizes or attempts to victimize senior citizens or handicapped persons<sup>1</sup>.

The bill appears to have significant fiscal impacts on state government and the private sector (see FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT for details).

The bill takes effect July 1, 2009.

<sup>1</sup> s. 501.2077, F.S.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Present Situation**

##### Direct-Mail Marketing

Direct mail is a marketing technique in which the seller sends marketing messages directly through the mail to the buyer.<sup>2</sup> Direct-mail marketing is generally used for direct delivery of promotional items and messages in order to create sales for businesses.<sup>3</sup> In 2007, U.S. businesses spent \$61 billion on direct-mail marketing.<sup>4</sup> As a result, direct-mail marketing accounts for more than 50 percent of mail delivered by the United States Postal Service (USPS). According to the U.S. Forest Service, more than 100 million trees worth of bulk mail arrives in American mail boxes each year.<sup>5</sup>

According to the Congressional Research Service, the activity of direct-mail marketing may harm the environment and create identity theft and consumer fraud.<sup>6</sup> However, the USPS and direct-mail marketers argue that the environmental impact from advertising is minimal and that fraud or identity theft linked to mailings is rare. Also, in response, direct-mail marketers and the USPS have offered alternative solutions to the outright banning of direct-mail marketing. Additionally, there are options available to individuals that may reduce the amount of advertising mail delivered to them.<sup>7</sup>

##### Consumer Protection

Some companies offer mail preference suppression services, enabling consumers to opt out of certain advertising mail deliveries. Similarly, some private organizations host "do not mail" registries. The Direct Marketing Association maintains a Mail Preference Service, which functions similarly to a DNM registry.<sup>8</sup> Other private companies, like GreenDimes, DirectMail.com and CatalogChoice.org, offer

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<sup>2</sup> <http://www.smallbusinessnotes.com/operating/marketing/directmail.html>

<sup>3</sup> *Id.*

<sup>4</sup> National Association of Letter Carriers Fact Sheet, 2009

<sup>5</sup> New American Dream calculation from Conservatree and U.S. Forest Service statistics;

<http://www.newdream.org/junkmail/facts.php>

<sup>6</sup> Congressional Research Service; Order Code RL34643 - Do Not Mail Initiatives and Their Potential Effects: Possible Issues for Congress; Updated September 24, 2008; Wendy Ginsberg.

<sup>7</sup> *Id.*

<sup>8</sup> <http://www.the-dma.org/index.php>

services that remove a consumer's name from a variety of direct mail marketing lists.<sup>9</sup> By directly subscribing to a Do-Not-Mail (DNM) registry or contacting companies directly, unsolicited advertising mail delivery may be controlled.<sup>10</sup> Other ways to reduce unsolicited advertising mail include refusing to receive the mail at the time of delivery, and avoiding solicitations that request personal information.<sup>11</sup>

## Federal

The National Do-Not-Call Registry (Registry) administered by the Federal Trade Commission (FTC), imposes fines on telemarketers who call phone numbers that are on the Registry.<sup>12</sup> The service is free of charge and there are more than 157 million phone numbers on the Registry.<sup>13</sup> Annual fees for telemarketers are \$54 for each area code of data accessed or \$14,850 for access to every area code in the registry, whichever is less.<sup>14</sup> The FTC maintains the registry by removing telephone numbers that have been disconnected and reassigned to other customers. Additionally, consumers may delete their telephone numbers from the registry at any time by calling a toll free number.<sup>15</sup>

Federal law provides some privacy protections to consumers. The Gramm-Leach-Bliley Financial Services Act covers privacy considerations for customers' personal financial information applicable to all financial companies<sup>16</sup>. 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).

## States

According to the Congressional Research Service, in 2007, 15 states had legislation pending to create a DNM registry. None of the bills became law. States with DNM legislation pending in 2007 that did not reintroduce or carry over similar legislation in 2008 are Arkansas, Colorado, Connecticut, Missouri, Montana, New Jersey, and Texas. In 2008, at least 12 states had pending legislation to require the creation of a DNM registry.<sup>17</sup>

A search conducted by the National Conference of State Legislatures detected 4 states that have laws regulating direct-mail marketing. Hawaii, Michigan, Nebraska and New York all restrict the practice of sharing personal financial information for marketing purposes. Furthermore, Michigan limits selling or distributing tobacco products through direct-mail.

## Florida

The Florida Deceptive and Unfair Trade Practices Act (FDUPTA)<sup>18</sup> 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 are hereby declared unlawful." A person willfully violating the provisions of the FDUPTA is liable for a civil penalty of not more than \$10,000 per violation<sup>19</sup>. This penalty increases to \$15,000 for each violation if the willful violation victimizes or attempts to victimize senior citizens or

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<sup>9</sup> Congressional Research Service; Order Code RL34643 - Do Not Mail Initiatives and Their Potential Effects: Possible Issues for Congress; Updated September 24, 2008; Wendy Ginsberg.

<sup>10</sup> Mail Moves America: Small Businesses and Advertising Mail; <http://www.mailmovesamerica.org/facts/php>

<sup>11</sup> *Id.*

<sup>12</sup> <http://www.ftc.gov/opa/2008/04/dncfyi.shtm>

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> 15 U.S.C. ss. 6821-6827

<sup>17</sup> Congressional Research Service; Order Code RL34643 - Do Not Mail Initiatives and Their Potential Effects: Possible Issues for Congress; Updated September 24, 2008; Wendy Ginsberg.

<sup>18</sup> s. 501.201, F.S.

<sup>19</sup> *Id.*

handicapped persons<sup>20</sup>. 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<sup>21</sup>. 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>22</sup>. The state attorneys and the Department of Legal Affairs are the enforcing authorities for the FDUPTA<sup>23</sup> and the act specifies the actions that the enforcing authority may bring<sup>24</sup>.

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

[The FDUTPA] 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 tortuous 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.

Current Florida law does not provide for a DNM registry. There is a Florida law that restricts unsolicited telephone sales calls known as the state Do-Not-Call List (List).<sup>25</sup> The Florida Department of Agriculture and Consumer Services (DOACS), maintains the List. According to the DOACS, the statute prohibits telephone sales calls before 8:00 a.m. or after 9:00 p.m. local time and prevents transmission of the solicitor's name or telephone number to the party called. Florida residents who do not wish to receive sales calls may have their residential, mobile or paging device telephone number included on this list. Business numbers may not be included and there is an initial fee of \$10 with an annual \$5 renewal fee.

### **Proposed Changes**

The bill establishes a state DNM registry for consumers who do not wish to receive direct-mail marketing solicitations. The bill prohibits a direct-mail marketer who conducts business in this state from mailing or causing to be mailed any solicitation to a consumer more than 30 days after the consumer's name and address appear on the DNM registry. The bill requires the DOACS to maintain the registry and to have the registry in service by July 1, 2010.

The bill provides that consumers who wish to be placed on the registry may notify the DOACS by toll free number or by visiting the DOACS website. The initial fee for the consumer is \$10 and renewals are \$5 upon receipt of a renewal notice from DOACS. Consumers will be deleted from the registry upon request and the DOACS is required to update the registry quarterly.

The bill requires the DOACS to provide the registry to any direct-mail marketer upon request. Subsequently, access to the registry requires the direct-mail marketer to register a current business name, business address, e-mail address if available, and telephone number and notify the DOACS of any change in that information. An annual registration fee of \$500, which is to be calculated on a sliding scale, must be paid to the DOACS. Additionally, the bill waives the \$500 fee for not for profit organizations and directs proceeds from fees imposed under this provision to be deposited in the General Inspection Trust Fund and used to administer the DNM registry.

The bill requires the DOACS to investigate complaints concerning violations. The DOACS and the Department of Legal Affairs (DLA) are authorized to impose a civil penalty and to seek injunctive relief from the court. Violations are deemed a deceptive or unfair trade practice and subject to penalties of

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<sup>20</sup> s. 501.2077, F.S.

<sup>21</sup> s. 501.211, F.S.

<sup>22</sup> Id.

<sup>23</sup> s. 501.203(3), F.S.

<sup>24</sup> s. 501.207, F.S.

<sup>25</sup> s. 501.059, F.S.

up to \$10,000 per violation. Under the Deceptive and Unfair Trade Practice Act<sup>26</sup> this penalty increases to \$15,000 for each violation if the willful violation victimizes or attempts to victimize senior citizens or handicapped persons<sup>27</sup>.

The bill directs proceeds from penalties to be deposited in the General Inspection Trust Fund if the violation is brought by the DOACS. If the violation is brought by the DLA, proceeds from penalties are to be deposited in the Legal Affairs Revolving Trust Fund.

The bill allows the DOACS to recover civil penalties and to terminate an investigation or action upon an agreement by the person in violation to pay the civil penalty. In addition, the bill allows the DOACS or the court to waive the civil penalty if such person makes full restitution or reimbursement or pays actual damages to the actual consumers who were injured.

The bill provides that a consumer on the DNM list who receives more than one solicitation by the same direct-mail marketer within any 12-month period may bring a civil action in circuit court for damages, injunctive relief, punitive damages (in the case of a willful violation), and reasonable costs and attorney's fees. In addition, the court is allowed to issue an award for the person's actual damages or \$500 for a first violation or \$1,000 for each subsequent violation, whichever is greater. This provision does not limit a direct-mail marketer's liability under any other civil or criminal law.

The bill provides that in civil litigation under the do not mail law, the prevailing party is to be paid reasonable costs and attorney's fees from the nonprevailing party. The attorney for the prevailing party is required to submit to the presiding judge, a sworn affidavit of his or her time spent on the case that includes the costs incurred. Subsequently, the trial judge is required to award the prevailing party all reasonable costs incurred in the action plus a reasonable legal fee for the hours actually spent on the case as sworn to in the affidavit. Such attorney's fees or costs are considered a part of the judgment and subject to execution as the law allows. Furthermore, in any civil litigation initiated by the DOACS or DLA, the court may award to the prevailing party, reasonable costs and attorney's fees if the court finds a complete absence of a justiciable issue of law or fact raised by the nonprevailing party or if the court finds bad faith on the part of the non prevailing party. The DOACS is required to adopt rules to administer the registry.<sup>28</sup>

The bill provides definitions for the following terms:

- Consumer
- Consumer goods and services
- Department
- Direct-mail marketer,
- Direct-mail marketing,
- Doing business in the state, and
- Solicitation<sup>29</sup>

The bill excludes the following from regulation under the DNM registry:

- Any resident that has given prior express invitation or permission;
- Any person with whom a resident had a business contact within the past 180 days, unless the consumer expresses to the direct-mail marketer that he or she no longer wishes to receive any more direct-mail marketing from the direct-mail marketer;
- A charitable organization organized under s. 78 501(c)(3) of the Internal Revenue Code while fundraising and if a bona fide member of the exempt organization makes the communication;
- A newspaper publisher or his or her agent or employee in connection with his or her business;

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<sup>26</sup> Ch. 501, Part II, F.S.

<sup>27</sup> s. 501.2077, F.S.

<sup>28</sup> ss. 120.536(1) 190 and 120.54, F.S.

<sup>29</sup> The term solicitation as provided for in the bill, does not include certain communications by mail.

- A person responding to a referral or working from his or her primary residence or a person licensed by this state to carry out a trade, occupation, or profession who is setting or attempting to set an appointment for actions relating to the licensed trade, occupation, or profession within this state or a county contiguous to the state; or
- A political party, political committee, campaign committee, candidate committee, or entity organized under s. 527 of the Internal Revenue Code while the entity is engaged in political speech or fundraising for political purposes.

**B. SECTION DIRECTORY:**

**Section 1.** Creates s. 501.0585, F.S.; providing definitions, providing for the establishment of a statewide "do not mail" registry by a certain date, providing requirements for consumers, providing requirements for the DOACS, providing requirements for direct mail marketers, requiring the DOACS to investigate complaints, authorizing the DOACS or the Department of Legal Affairs to impose a civil penalty and to seek relief, limiting the civil penalty imposed, providing that a violation is a deceptive or unfair trade practice, providing penalties, providing that a person who receives certain solicitations may bring a civil action in circuit court for damages, injunctive relief, punitive damages, and reasonable costs and attorney's fees, providing for attorney's fees under certain circumstances, requiring the DOACS to adopt rules.

**Section 2.** Provides an effective date of July 1, 2009.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

To the extent that direct mail marketers will register for access to the "do not mail list" and pay the annual registration fee of \$500, an indeterminate amount of revenue will be collected by the DOACS.

Also, an indeterminate amount of revenue will be collected from consumers wishing to be placed on the registry (\$10 initially and \$5 for renewals). The DOACS estimates that 90,000 consumers will initially register. Based on this figure, revenues for fiscal years 2010-11 will be \$900,000; 2011-12 will be \$450,000; and 2012-13 will be \$450,000.

2. Expenditures:

	FY 10-11)	(FY 11-12)	(FY 12-13)
	Amount / FTE	Amount / FTE	Amount / FTE
1. Recurring			
a. Positions – GITF			
3 - 0442 Regulatory consultant	157,689	160,843	164,060
2 - 8351 senior financial Investigator	120,640	123,053	125,514
1 - 7738 Senior Attorney	<u>74,325</u>	<u>75,812</u>	<u>77,328</u>
TOTAL SALARIES	352,654	359,708	366,902
b. Expenses – GITF			
6 - Professional expense package	40,200	40,200	40,200
c. Contracted Service - GITF			
E-Commerce Development	48,025	10,200	10,200
565 Hrs @85.00 initial developments 1st year			
120 Hrs @85.00 maintenance 2nd year forward			
d. Special Category			
6 - Human Resources Allocation	2,406	2,406	2,406

e. AGMIC Budget Entity – GITF (Contracted Services)			
6 - PC Maintenance		750	750
6 - Additional Siemens System Maintenance		1,170	1,170
6 – PC data communication access (internet/intranet)		<u>1,800</u>	<u>1,800</u>
	TOTAL AGMIC COST	3,720	3,720
TOTAL RECURRING COSTS:	443,285	416,234	423,428
2. Non-Recurring			
a. Expenses			
Professional Package	20,472		
b. OCO			
Professional Package	6,000		
c. Contracted Services			
Siemens – reprogramming & additional card	8,000		
In telephone system			
AGMIC Budget Entity (Contracted Services)			
Software application & DOCS Integration	10,000		
TOTAL NON-RECURRING COSTS – GITF	44,472		
Non-Operating Costs (GITF)			
Administrative/Indirect Non-operating costs	42,828	42,828	42,828
General Revenue Service Charge	<u>65,700</u>	<u>32,850</u>	<u>32,850</u>
TOTAL NON-OPERATING COST	108,528	75,678	75,678
GRAND TOTAL OF COSTS (GITF)	\$596,285	\$491,912	\$499,106

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

To the extent that direct mail marketers will register and pay the annual registration fee of \$500, there may be a significant negative fiscal impact on the private sector.

Also, direct-mail marketing provides the business community with an effective way to advertise. Without mail marketing, some members of the business community may not be able to afford advertising. To the extent that a do not mail registry would curtail direct-mail advertising, some businesses may be negatively affected.

**D. FISCAL COMMENTS:**

None.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

##### 2. Other:

The bill provides that "doing business in this state" includes mailing from another state or nation to a consumer who resides in this state. To the extent the direct mail marketers located outside Florida will send mail solicitations to consumers in Florida, regulation may impact federal jurisdiction of the Interstate Commerce Clause of the U.S. Constitution.<sup>30</sup>

#### B. RULE-MAKING AUTHORITY:

The bill authorizes the DOACS to adopt rules relating to administering the DNM registry.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill provides that consumers who wish to be placed on the registry must pay an initial fee of \$10 and a subsequent renewal fee of \$5 upon receipt of a renewal notice from DOACS. The bill fails to provide an expiration date, which may cause speculation as to the date that renewal fees will be expected by the DOACS.

The bill excludes a person working from his or her primary residence from the restrictions of the DNM registry law. To the extent that direct-mail marketers may hire or subcontract with persons who work exclusively from their homes, such people will not be prevented from sending direct-mail marketing solicitations to consumers who have placed themselves on the DNM list.

### IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

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<sup>30</sup> Article 1, Section 8, Clause 3, of the Constitution empowers Congress "to regulate Commerce with foreign Nations, and among several States, and with the Indian Tribes." The term commerce as used in the Constitution means business or commercial exchanges in any and all of its forms between citizens of different states, including purely social communications between citizens of different states by telegraph, telephone, or radio, and the mere passage of persons from one state to another for either business or pleasure. Intrastate, or domestic, commerce is trade that occurs solely within the geographic borders of one state. Since it does not move across state lines, intrastate commerce is subject to the exclusive control of the state.