

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 315 Telephone Solicitation

SPONSOR(S): Commerce Committee; Careers & Competition Subcommittee; Ausley and others

TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 568

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Careers & Competition Subcommittee	14 Y, 0 N, As CS	Willson	Anstead
2) Commerce Committee	24 Y, 0 N, As CS	Willson	Hamon

SUMMARY ANALYSIS

Residents who do not wish to receive telephonic sales calls may have their residential, mobile, or paging device telephone number included on Florida's "Do Not Call" list. Individuals or entities that wish to make unsolicited telephone calls must acquire the list from the Florida Department of Agriculture and Consumer Services, and unless an exception applies, may not initiate an outbound sales call to a number on the list.

Current law defines "telephonic sales call" as a telephone call or a text message to a consumer for the purpose of soliciting a sale of, or an extension of credit for, consumer goods or services.

The bill expands the definition of "telephonic sales call" to include voicemail transmissions, and defines "voicemail transmission" as technologies that deliver a voice message directly to a voicemail application, service or device.

The bill prohibits a telephone solicitor from sending a voicemail transmission to a number on the Do Not Call list or to consumer who has previously communicated that he or she does not wish to be contacted.

The bill requires telephone solicitors to ensure that the telephone number displayed on the recipient's caller ID, if called back, connects with either the telephone solicitor or the seller on whose behalf the call was placed.

The bill also increases maximum penalties for violations of the Do Not Call Program from up to \$1,000 per violation that is administratively prosecuted to up to \$10,000; and allows increased penalties from up to \$10,000 per violation that is civilly prosecuted to up to \$10,000 or more per civil penalty.

The bill does not appear to have a significant fiscal impact on state or local government.

The bill has an effective date of July 1, 2018.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Background

Florida Do Not Call Registry and Telemarketers

The Florida Telemarketing Act¹ requires non-exempt businesses engaged in telemarketing and their salespeople to be licensed by the Florida Department of Agriculture and Consumer Services (FDACS) before operating in Florida. Certain exempt entities must have a valid affidavit of exemption on file prior to operating in Florida. There are approximately 28 exemptions, including, but not limited to, the following: soliciting for religious, charitable, political or educational purposes, research companies, newspapers, book and video clubs, cable television, and persons or companies with whom the consumer has a prior business relationship.²

FDACS maintains the Florida Do Not Call Act, also known as the "Do Not Call" list, which prohibits unsolicited phone calls and text messages from telemarketers³. Residents who do not wish to receive sales calls may have their residential, mobile, or paging device telephone number included on this list.⁴

In Florida, it is unlawful for telemarketers to:

- Make telephone sales calls before 8 a.m. or after 9 p.m. local time.
- Not provide you with their name and telephone number.
- Use auto dialers with prerecorded messages.
- Call a number on the Do Not Call List.

Currently, telemarketers are required to provide a telephone number for caller ID purposes when placing a call to a consumer but are not required to provide a telephone number that is capable receiving calls.

Telephone solicitors⁵ are prohibited from making telephonic sales calls to consumers who register for the "Do Not Call" program. Section 501.059(1)(g), F.S., defines "telephonic sales call" as a telephone call or text message to a consumer for the purpose of soliciting a sale or extension of credit for consumer goods or services, or obtaining information that may be used for such purposes.

In addition to those consumers registered for the "Do Not Call" program, a telephone solicitor may not call or text a consumer who previously communicated to the telephone solicitor that he or she does not wish to be contacted. Businesses and charities are required to maintain a list of consumers who have made a do-not-call request, and it is a violation to call a consumer who has asked to be placed on the company's do-not-call list.

¹ part IV, ch. 501, F.S.

² s. 501.604, F.S.

³ The Florida Do Not Call List can be found at: <https://www.fldnc.com/>.

⁴ See s. 501.059, F.S., FDACS, *Florida DO NOT CALL Program*, <https://www.fldnc.com/About.aspx> (last visited 1/2/2018). The Florida No Sales Solicitation Act added specific language to prohibit unwanted sales texts.

⁵ Section 501.059(1)(f), F.S., defines "Telephone solicitor" as "a natural person, firm, organization, partnership, association, or corporation, or a subsidiary or affiliate thereof, doing business in this state, who makes or causes to be made a telephonic sales call, including, but not limited to, calls made by use of automated dialing or recorded message devices."

Anyone who receives an unsolicited sales call can report the call to FDACS using the online Do Not Call Complaint Form.⁶

A telephone solicitor who violates the provisions of Florida's "Do Not Call" program are currently subject to an injunction and a civil penalty⁷ with a maximum fine of \$10,000 per violation, or an administrative fine⁸ with a maximum of \$1,000 per violation, in addition to the consumer's attorney fees and costs.

Federal Do Not Call Registry and Telemarketers

Although the states were the first to address consumers' requests to stop unwanted telemarketing calls⁹, the federal government soon followed with a National Do Not Call Registry in 2003.¹⁰ In July 2003, the federal government took action and issued a report and order establishing the National Do Not Call registry. The national registry covers all telemarketers (with the exception of certain nonprofit organizations), and applies to both interstate and intrastate calls. The registry is administered by the FTC. To reduce the number of hang-up and dead air calls consumers experience, the Commission's telemarketing rules also contain restrictions on the use of autodialers and requirements for transmitting caller ID information.

As the National Do Not Call Registry has gained popularity, some states have decided to forego the expense of maintaining their own lists. As of August 2016, only 12 states maintained their own Do Not Call lists: Colorado, Florida, Indiana, Louisiana, Massachusetts, Mississippi, Missouri, Oklahoma, Pennsylvania, Tennessee, Texas and Wyoming.¹¹ Thirty-one states have officially adopted the National Do Not Call Registry as their Do Not Call list.

In an effort to address a growing number of telephone marketing calls, Congress enacted in 1991 the Telephone Consumer Protection Act (TCPA). The TCPA restricts the making of telemarketing calls and the use of automatic telephone dialing systems and artificial or prerecorded voice messages. The rules apply to common carriers as well as to other marketers. In 1992, the Commission adopted rules to implement the TCPA, including the requirement that entities making telephone solicitations institute procedures for maintaining company-specific do-not-call lists.¹²

In July 2015, the FCC established rules indicating that telephone carriers can block unwanted calls at the request of consumers.¹³ Following the FCC's ruling, the National Association of Attorneys General called upon the major telephone carriers to do more to provide these services to consumers.¹⁴ Currently there are a number of call-blocking applications that provide some relief from unwanted and spam calls.¹⁵ The FCC's rules require telemarketers (1) to obtain prior express written consent from consumers before robocalling them, (2) to no longer allow telemarketers to use an "established business relationship" to avoid getting consent from consumers to call their home phones, and (3) to require telemarketers to provide an automated, interactive "opt-out" mechanism during each robocall so consumers can immediately tell the telemarketer to stop calling.

⁶ FDACS, <http://www.freshfromflorida.com/Consumer-Resources/Florida-Do-Not-Call> (last visited January 11, 2017).

⁷ s. 501.059(9)(a), F.S.

⁸ s. 501.059(9)(b), F.S.

⁹ At least 28 states, starting with Florida in 1987, have implemented Do Not Call registries.

¹⁰ The Federal Do Not Call Registry can be found at: <https://donotcall.gov/>.

¹¹ National Association of Attorneys General, Do Not Call: The History of Do Not Call and How Telemarketing Has Evolved, NAGTRI Journal, Vol. 1 No. 4., at Note 5.

¹² The FCC, Telemarketing and Robocalls, (last visited January 11, 2018) <https://www.fcc.gov/general/telemarketing-and-robocalls>.

¹³ Declaratory Ruling and Order, In the Matter of Rules and Regulations Implementing the Telecommunications Consumer Protection Act of 1991, 30 FCC Rcd. 7961 (July 10, 2015).

¹⁴ National Association of Attorneys General, Attorneys General Urge Phone Companies to Offer Technology that Blocks Unwanted Sales Calls or Texts, <http://www.naag.org/naag/media/naag-news/attorneys-general-urge-federal-government-to-allow-phone-companies-to-block-unwanted-sales-calls-to-customers.php> (last visited January 12, 2017).

¹⁵ CTIA, The Wireless Association, How to Stop Robocalls, <https://www.ctia.org/consumer-tips/robocalls>.

On Nov. 16, 2017, the FCC adopted new rules to allow voice service providers to proactively block certain types of robocalls that are likely to be fraudulent because they come from certain types of phone numbers, including those that do not or cannot make outgoing calls. For example, perpetrators have used IRS phone numbers that don't dial out to impersonate the tax agency, informing the people who answer that they are calling to collect money owed to the U.S. government. Such calls appear to be legitimate to those who receive them and can result in fraud or identity theft. Service providers now can block such calls, as well as calls from invalid numbers, like those with area codes that don't exist, from numbers that have not been assigned to a provider, and from numbers allocated to a provider but not currently in use.¹⁶

FCC rule 47 C.F.R. 64.1601, provides that telemarketers must comply with the following:

“(e) Any person or entity that engages in telemarketing, as defined in section 64.1200(f)(10) must transmit caller identification information.

(1) For purposes of this paragraph, caller identification information must include either CPN or ANI, and, when available by the telemarketer's carrier, the name of the telemarketer. It shall not be a violation of this paragraph to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller on behalf of which the telemarketing call is placed and the seller's customer service telephone number. **The telephone number so provided must permit any individual to make a do-not-call request during regular business hours.**

(2) Any person or entity that engages in telemarketing is prohibited from blocking the transmission of caller identification information.

(3) Tax-exempt nonprofit organizations are not required to comply with this paragraph.”

With regard to telephone carriers, the FCC allows carriers to offer their customers external call-blocking apps on their landlines and allows carriers to block certain illegal robocalls directly. A consortium of telecom providers is currently working on a Caller ID authentication program that would provide verification of Caller ID information for call recipients. It is anticipated that this program will be available later in 2018.¹⁷

Constitutionality of Do Not Call Registries

Do Not Call registries have been subject to numerous state and federal lawsuits challenging their constitutionality. These suits have failed and the National Registry upheld. The Courts have found that the Do Not Call Registry is a reasonable restriction on commercial speech and that the FTC is authorized to promulgate rules for the registry. The court stated, “the do-not-call registry prohibits only telemarketing calls aimed at consumers who have affirmatively indicated that they do not want to receive such calls and for whom such calls would constitute and invasion of privacy.” Thus, the government may have a role in restricting the ability of a telemarketer to reach a household via telephone and because the government left the ultimate decision of whether or not to be placed on the registry up to the individual, the government itself did not restrict the First Amendment rights of the solicitor.¹⁸

¹⁶ FCC, Stop Unwanted Calls and Texts, <https://www.fcc.gov/consumers/guides/stop-unwanted-calls-and-texts> (last visited January 11, 2018).

¹⁷Simon van Zuylen-Wood, *How robo-callers outwitted the government and completely wrecked the Do Not Call list*, THE WASHINGTON POST (Jan. 11, 2018), https://www.washingtonpost.com/lifestyle/magazine/how-robo-call-moguls-outwitted-the-government-and-completely-wrecked-the-do-not-call-list/2018/01/09/52c769b6-df7a-11e7-bbd0-9dfb2e37492a_story.html?utm_term=.8a6e6ea55f32.

¹⁸ *Mainstream Marketing Services Inc v. Federal Trade Commission*, 358 F.3d 1228 (10th Cir. 2004).

Claims of preemption have also been unsuccessful. The TCPA's non-preemption clause¹⁹, often referred to as the savings clause, has been relied upon by Courts to uphold state's Do Not Call Registries. The clause reads in part: "Nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulation on, or which prohibits" The clause indicates specific types of actions that a state may prohibit or place more restrictive regulations on, such as sending unsolicited advertisements via fax, regulation of the use of automatic dialing systems and prerecorded messages, and the making of telephone solicitations.²⁰

The TCPA is silent on the states' ability to place regulations that are more stringent than the TCPA requirements for interstate calls.²¹ However, at least one Court has held that state regulations and prohibitions of telemarketing can cross state lines.²²

Caller ID and "Spoofing"

"Spoofing" is the practice of altering or manipulating the caller ID information that is received in conjunction with a telephone call. In the past, caller ID services were not commonplace and spoofing required special equipment or a relatively high degree of technical sophistication. However, advances in technology, such as the proliferation of cellular phones, cell phone applications, and the widespread availability of Voice over Internet Protocol (VoIP) allows anyone to inexpensively spoof their caller ID using the services of a third-party spoofing provider.²³ For example, one such spoofing provider allows a consumer to download an app on their smartphone, purchase credits towards call time, and simply input the number that they want displayed on the receiving end in order to place an untraceable, spoofed call.²⁴

In response to the growing practice of spoofing, Congress amended the TCPA to add the Truth in Caller ID Act of 2009. Under the Act, and Federal Communications Commission rules, any person or entity is prohibited from transmitting false or misleading caller ID information "with the intent to defraud, cause harm, or wrongly obtain anything of value", and carries a penalty of up to \$10,000 for each violation.²⁵ However, spoofing is not illegal when no harm is intended or caused, or if the caller has legitimate reasons to hide their information, such as law enforcement agencies working on cases, victims of domestic abuse or doctors who wish to discuss private medical matters.²⁶

In 2008, Florida passed its own anti-spoofing legislation, The Florida Caller ID Anti-Spoofing Act (2008).²⁷ The Act prohibits **any person** from:

- making a call with knowledge that false information was entered into a telephone caller ID system with the intent to deceive, defraud, or mislead the call's recipient; and
- entering false information into a telephone caller ID system "with the intent to deceive, defraud, or mislead" the call's recipient.

¹⁹ 47 U.S.C. § 227(f)(1).

²⁰ National Association of Attorneys General, *Do Not Call: The History of Do Not Call and How Telemarketing Has Evolved*, NAGTRI Journal, Vol. 1 No. 4.

²¹ s. 47 U.S.C. s. 227 (f)(1).

²² See *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041 at 1044-45 (7th Cir. 2013) and *Patriotic Veterans, Inc. v. State of Indiana*, No. 16-2059 (7th Cir. 2017) ("Preventing automated messages to persons who don't want their peace and quiet disturbed is a valid time, place, and manner restriction.").

²³ See FCC 11-100, *Rules and Regulations Implementing the Truth in Caller ID Act of 2009*, WC Docket No. 11-39, (June 22, 2011), at 9116, available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-100A1_Rcd.pdf.

²⁴ Paul Szoldra, *It's surprisingly easy for a hacker to call anyone from your personal phone number*, BUSINESS INSIDER (March 3, 2016), <http://www.businessinsider.com/phone-number-spoofing-2016-2>.

²⁵ 47 U.S.C. § 227 (e).

²⁶ FCC, *Spoofing and Caller ID*, <https://www.fcc.gov/consumers/guides/spoofing-and-caller-id> (last visited 1/2/2018).

²⁷ s. 817.487, F.S. (2008).

However, a U.S. District Court in Miami found that Florida's Caller ID Anti-Spoofing Act (2008) violated the Commerce Clause of the United State Constitution because it had the effect of controlling spoofing practices that took place entirely outside of the state, wherein individuals or companies could not ascertain what telephone numbers are subject to Florida law, and would have to subject all of their call practices to Florida law to avoid liability.²⁸

The Commerce Clause of the U.S. Constitution bars state laws that control conduct outside the state's boundaries, regardless of whether the Legislature intended the law's extraterritorial reach.²⁹ Similarly, in 2011, a federal court in Mississippi struck Mississippi's anti-spoofing law, which was substantially similar to Florida's.³⁰

Effect of the Bill

The bill expands the definition of "telephonic sales calls" to include voicemail transmissions, and defines "voicemail transmissions" as technologies that deliver a voice message directly to a voicemail application, service or device.

The bill prohibits a telephone solicitor from sending voicemail transmissions to consumers who have previously communicated that they do not wish to be contacted.

The bill specifies that when a telephone number is made available through a caller ID service during a telephonic sales call, the solicitor must ensure that the number is capable of receiving phone calls, and that the dialing of the number will connect the call recipient with the telephone solicitor or the seller on behalf of which the phone call was placed.

The bill increases maximum penalties for violations of the Do Not Call Program from up to \$1,000 per violation that is administratively prosecuted to up to \$10,000; and allows for increased penalties for a violation that is civilly prosecuted from to up to \$10,000 per administrative fine to \$10,000 or more.

B. SECTION DIRECTORY:

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|-----------|---|
| Section 1 | Amends s. 501.059, F.S.; revising the definition of "telephonic sales call" to include voicemail transmissions, prohibiting the transmission of certain voicemails to certain persons and providing for certain requirements. |
| Section 2 | Provides an effective date. |

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

Expenditures:

None.

²⁸ *TelTech Systems, Inc. v. McCollum*, No. 08-61664-CIV-MARTINEZ-BROWN (S.D. Fla. Filed Oct. 16, 2008).

²⁹ *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989).

³⁰ *TelTech Systems, Inc. v. Barbour*, 866 F.Supp.2d 571 (S.D. Miss 2011), *aff'd sub nom Teltech Systems, Inc. v. Bryant*, 702 F. 2d 232 (5th Cir. 2012).

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Telemarketers will be prohibited from sending unsolicited voicemail transmissions to persons who register for the "Do Not Call" program, and to those who have otherwise previously communicated to the telephone solicitor that they do not wish to be contacted. Telemarketers that previously sent unsolicited voicemail transmissions and did not acquire Florida's Do Not Call list may need to acquire the list from the Department, at a maximum cost of \$400 per year for the statewide listing.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill provides:

If a telephone number is made available through a caller identification service as a result of a telephonic sales call, **the solicitor must ensure that telephone number must be capable of receiving phone calls and must connect the original call recipient, upon calling such number, to the telephone solicitor or to the seller on behalf of which a telephonic sales call was placed.**

The bill could be amended to more closely match federal regulations. FCC rule 47 C.F.R. 64.1601, provides that:

(e) Any person or entity that engages in telemarketing, as defined in section 64.1200(f)(10) must transmit caller identification information.

(1) For purposes of this paragraph, caller identification information must include either CPN or ANI, and, when available by the telemarketer's carrier, the name of the telemarketer. It shall not be a violation of this paragraph to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller on behalf of which the telemarketing call is placed and the seller's customer service telephone number. **The telephone number so provided must permit any individual to make a do-not-call request during regular business hours.**

(2) Any person or entity that engages in telemarketing is prohibited from blocking the transmission of caller identification information.

(3) Tax-exempt nonprofit organizations are not required to comply with this paragraph.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 9, 2018, the Careers and Competition Subcommittee adopted two amendments and reported the bill favorably as a committee substitute. The committee substitute:

- Requires individuals who make telephone sales calls to provide a telephone number that is capable of receiving phone calls, and which a telephone sales call recipient may use to dial the sales call initiator back;
- Increases permitted penalties from up to \$1,000 for each administrative violation and up to \$10,000 for each civil violation, to up to \$10,000 and \$10,000 or more, respectively; and
- Makes a technical amendment to clarify that a voicemail transmission is any technology that delivers a voice message directly to a voicemail application, service, or device.

On February 1, 2018, the Commerce Committee adopted one amendment and reported the bill favorably as a committee substitute. The committee substitute clarifies language relating to the responsibilities of telephone solicitors when making telephonic sales calls.

The bill analysis has been updated to reflect the committee substitute.