

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Commerce and Tourism

BILL: SB 1682

INTRODUCER: Senator Gruters

SUBJECT: Telephone Solicitation

DATE: March 26, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harmsen	McKay	CM	Pre-meeting
2.			RI	
3.			RC	

I. Summary:

The bill requires all sales telephone calls, text messages, and direct-to-voicemail transmissions to have the receiving consumer's prior express written consent if the call will (1) be made using an automated machine to dial the recipient's phone number, or (2) play a recorded message upon connection with the recipient.

The bill creates a rebuttable presumption that a telephonic sales call that is made to a Florida area code is made either to a Florida resident or to a person in this state at the time of the call.

The bill creates a private right of action to enforce violations of s. 501.059, F.S.

II. Present Situation:

Unsolicited Phone Calls

Consumers are often inundated with unwanted calls. In fiscal year 2020, the Federal Trade Commission (FTC) received 293,071 complaints from Florida consumers about unwanted telephone calls.¹ The Federal Communications Commission (FCC) reports that unwanted calls constitute their top consumer complaint.² Unwanted calls can come in many forms, including

¹ Federal Trade Commission, *Do Not Call Data Book 2020*, (Oct. 2020), available at https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2020/dnc_data_book_2020.pdf (last visited Mar. 26, 2020).

² Federal Communications Commission, *Stop Unwanted Calls and Texts*, (Mar. 2, 2021) <https://www.fcc.gov/consumers/guides/stop-unwanted-calls-and-texts> (last visited Mar. 26, 2021).

robocalls,³ which use an autodialer⁴ and play a recorded message upon connection with the consumer; spoofed calls, which transmit falsified information to a consumer's caller ID to disguise the solicitor's identity; and unwanted telemarketing calls.

State and federal action is limited to combat these issues because there are legitimate and legal uses of this technology. For example, a doctor's office may legally use a robocall to remind one of an upcoming appointment.⁵ Additionally, some solicitors act outside the scope of federal or state enforcement authority.

Federal Law

*Telephone Consumer Protection Act*⁶

The Telephone Consumer Protection Act of 1991 (TCPA) protects U.S. consumers from unwanted communications by restricting the use of automatic telephone dialing system (autodialers), prerecorded sales messages, and unsolicited sales calls, text messages, or faxes.

The TCPA prohibits telephone solicitations that:

- Are made to residences before 8 am, and after 9 pm;
- Fail to provide the consumer with the solicitor's identity, including his or her true phone number via caller identification service,⁷ and an opportunity to opt out of the current call, and all future calls made by that solicitor;
- Send pre-recorded messages to a residential line without the consumer's prior express consent;⁸ and
- Use an autodialer or pre-recorded messages to a cellular, emergency, or hospital room line without prior express consent. Any telemarketing calls made to a cellular telephone number require *written* prior express consent; all others require either oral or written consent.⁹ This specific provision does not apply to residential phone lines.¹⁰

³ "At the FCC, we use the term 'robocalls' to refer not to just prerecorded calls but also autodialed calls, regardless of whether the call is live or prerecorded." *Stopping Fraudulent Robocall Scams: Can More be Done?*, Hearing Before the S. Subcomm. On Cons. Protection, Product Safety, and Ins. Of the Comm. On Commerce, Science, and Transp., 130th Cong. (July 10, 2013)(Statement of Eric J. Bash, Assoc. Chief, Enforcement Bureau, FCC).

<https://www.govinfo.gov/content/pkg/CHRG-113shrg85765/pdf/CHRG-113shrg85765.pdf> (last visited Mar. 26, 2021).

⁴ An autodialer is equipment that has the capacity to produce or store phone numbers using a random or sequential number generator, and to call those phone numbers. 47 U.S.C. § 227(a)(1).

⁵ FCC, Consumer and Governmental Affairs Bureau, *Report on Robocalls 2-4* (Feb. 2019), CG Docket No. 17-59, available at <https://www.fcc.gov/document/fcc-issues-report-illegal-robocalls> (last visited Mar. 26, 2021). See also, FCC, *Stop Unwanted Calls and Texts--Spoofing*, (Mar. 2, 2021) <https://www.fcc.gov/consumers/guides/stop-unwanted-calls-and-texts> (last visited Mar. 26, 2021).

⁶ 47 U.S.C. § 227. See also, 47 CFR § 64.1200 (2012).

⁷ 47 CFR § 64.1601(e). See also, FCC, *Public Notice: FCC's Caller ID Rules for Telemarketers Become Effective* (Jan. 29, 2004) https://apps.fcc.gov/edocs_public/attachmatch/DA-04-206A1.pdf (last visited Mar. 26, 2021).

⁸ See also, 47 CFR § 64.1200(a)(7)(i)(B), (b)(3). Certain calls made to a residential line, such as those by a tax-exempt nonprofit organization or calls that are subject to HIPPA may be made without prior express consent.

⁹ FCC, *2015 TCPA Declaratory Ruling and Order*, 30 FCC Rcd at 7999, para. 4 (Jun. 18, 2015).

¹⁰ In 2015, language was added to the TCPA to allow robocalls and autodialed calls to cell phones for the purpose of collecting a debt owed to the U.S. government. See 47 U.S.C. § 227(b)(1)(A)(iii). This provision was severed from the by the U.S. Supreme Court in 2020 based on their finding that it was a content-specific speech regulation in violation of the first amendment. The Court left the TCPA's prohibition of robocalls and autodialed calls to cell phones intact. *Barr v. American Assc. Of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020). See also, 47 CFR § 64.1200(f)(8).

The TCPA defines autodialers as “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”¹¹

The TCPA grants a private right of action to pursue actual monetary damages or up to \$500 per violation.¹² State attorneys general and the FCC also have jurisdiction to investigate and file civil claims based on violations of the TCPA.¹³

The TCPA’s protections extend to text messaging in the same manner that they apply to telephone calls.¹⁴

Federal Do Not Call Program¹⁵

The FTC, in concert with the FCC, administers the National Do Not Call Program.¹⁶ Telephone solicitors may not contact a consumer who participates in the National Do Not Call Program, unless the calls are:¹⁷

- Made with a consumer’s prior, express permission;
- Informational in nature, such as those made to convey a utility outage, school closing, or flight information; or
- Made by a tax-exempt organization.

Truth in Caller ID Act¹⁸

The Truth in Caller ID Act of 2009 protects consumers by making it unlawful for any person to transmit misleading or inaccurate caller ID information with the intent to defraud, cause harm, or wrongfully obtain anything of value. The FCC investigates and prosecutes violations of the act under its rules.¹⁹ The FCC has taken enforcement actions totaling \$450 million in recent years against telemarketers for call spoofing violations—of note, the FCC imposed its largest fine ever against a Florida-based timeshare marketing operation.²⁰

To protect individual privacy concerns, an individual caller may still request to hide his or her phone number when making a call.²¹

¹¹ 47 U.S.C. § 227(b)(1)(A).

¹² 47 U.S.C. § 227 (c)(5).

¹³ 47 U.S.C. § 227 (f).

¹⁴ FCC, *2015 TCPA Declaratory Ruling and Order*, 30 FCC Rcd at 7999, para. 2 (Jun. 18, 2015); FCC, *FCC Strengthens Consumer Protections Against Unwanted Calls and Texts* (Jun. 18, 2015)

https://apps.fcc.gov/edocs_public/attachmatch/DOC-333993A1.pdf (last visited Mar. 26, 2021).

¹⁵ *See*, 15 U.S.C. § 6101.

¹⁶ FCC, *Stop Unwanted Calls and Texts—The National Do Not Call List*, (Mar. 2, 2021)

<https://www.fcc.gov/consumers/guides/stop-unwanted-calls-and-texts> (last visited Mar. 26, 2021).

¹⁷ 47 U.S.C. § 227(a)(4); *See also*, 47 C.F.R. § 64.1200 (2012).

¹⁸ 47 U.S.C. § 227 (e).

¹⁹ *See*, 47 CFR § 64.

²⁰ FCC, *The FCC’s Push to Combat Robocalls & Spoofing: Major Fines Against Spoofers* <https://www.fcc.gov/spoofed-robocalls> (last visited Mar. 26, 2021). *See also*, FCC, *FCC Fines Massive Neighbor Spoofing Robocall Operation \$120 Million* (May 10, 2018) <https://www.fcc.gov/document/fcc-fines-massive-neighbor-spoofing-robocall-operation-120-million> (last visited Mar. 26, 2021).

²¹ 47 CFR § 64.1601

Florida Law

Florida Telemarketing Act

The Florida Telemarketing Act (Telemarketing Act), part IV of ch. 501, F.S., requires commercial telephone sellers (usually a business entity) and their individual salespersons to obtain a license from the Department of Agriculture and Consumer Services (Department). An applicant for licensure as a commercial telephone seller must submit, among other information:²²

- Its criminal, civil, and administrative disciplinary background;
- All phone numbers from which the applicant will solicit business and the physical address at which the phones will be located;
- The script it will use during a solicitation, or any informational literature it will provide to a consumer; and
- A bond, letter of credit, or certificate of deposit to serve as security in any future case of fraud, breach of contract, financial failure, or violation by the licensee.

As part of their licensure, individual salespersons (who are hired by commercial telephone sellers to act as their salespersons) undergo a similar review of their criminal, civil, administrative or regulatory disciplinary history, but they are not required to post a bond, letter of credit, or certificate of deposit.²³

Many solicitors are exempt from licensure under the Telemarketing Act, including religious, charitable, political, or educational organizations that have a s. 501(c)(3) or (6) exemption from the Internal Revenue Code; licensed securities, commodities, or investment brokers and dealers; and newspaper or cable television sellers, among others.²⁴

Licensed telephone sellers and solicitors must identify themselves to the consumer within 30 seconds of the beginning of the phone call.²⁵ To ensure that the Department can conduct thorough investigations, when needed, a licensed telephone seller must also maintain copies of their business records for at least 2 years—including all of the names and telephone numbers that they contacted.²⁶

All telephone sellers and solicitors, whether exempt or not, are prohibited from calling consumers outside of the hours of 8:00 a.m. and 9:00 p.m. of the called person's local time.²⁷ Additionally, all solicitors must allow their name or telephone number to be transmitted to the consumer if the equipment they use is capable. This prevents solicitors from 'spoofing' a different number or otherwise blocking their caller identification to induce a consumer to answer the phone.²⁸

²² Section 501.605, F.S.

²³ Section 501.607, F.S.

²⁴ *See*, s. 501.604, F.S.

²⁵ Section 501.613, F.S.

²⁶ Section 501.6175, F.S.

²⁷ Section 501.616(6); *see also*, s. 501.604, F.S., which provides a general exemption from the Telemarketing Act, "except ss. 501.608 and 501.616(6) and (7)."

²⁸ Section 501.616(7), F.S.

Florida Do Not Call Act

Do Not Call List

The Department also administers the Florida Do Not Call Act (also called the “Do Not Call List”), which prohibits unsolicited phone calls and text messages.²⁹ Residents who do not wish to receive sales calls may request to have their residential, mobile, or paging device telephone number included on the Department’s list.³⁰

A communication is unsolicited, and therefore prohibited under the Do Not Call List, unless the contact is made:

- At the consumer’s request;
- By a charitable or political organization that is seeking donations;
- As part of a survey, or for the purpose of research seeking an opinion;
- In connection with an existing debt or contract for which payment is due; or
- By a newspaper publisher, or his or her agent or employee, in connection with the publisher’s business.

Continued Solicitations

Section 501.059(5), F.S., prohibits a telephone solicitor³¹ from calling, text messaging, sending a direct voicemail transmission to contact any consumer who has previously communicated to the solicitor that he or she does not wish to receive a telephone call, whether or not he or she is part of the Do Not Call List. However, this prohibition applies only to calls made by or on behalf of a seller who offers goods or services or a charity that solicits a charitable contribution.

Automated Dialers and Recorded Messages

Section 501.059(8), F.S., prohibits solicitations via telephone calls, text messages, and direct-to-voicemail transmissions if the communication is initiated with an automated system that selects or dials the telephone numbers (autodialer), or if the communication plays a recorded message upon connection with the consumer. Autodialed calls and recorded messages are permitted if (1) they are in response to a call that the consumer initiated, (2) the person initiating the call screens out unlisted telephone numbers and those that are on the “Do Not Call” list, or (3) made regarding goods or services that the consumer previously purchased.

This section also prevents call spoofing (in cases of solicitation calls), wherein a telephone call, text message, or direct-to-voicemail transmission does not transmit the correct originating telephone number; and fraudulent attempts to disguise the caller’s identity in order to defraud, confuse, or otherwise injure the call’s recipient.

Penalties

A telephone solicitor who violates the above provisions is subject to a civil penalty with a maximum fine of \$10,000 per violation, or an administrative fine with a maximum of \$1,000 per

²⁹ See, s. 501.059, F.S. Florida Department of Agriculture and Consumer Services, *Florida Do Not Call*, <https://www.fdacs.gov/Consumer-Resources/Florida-Do-Not-Call> (last visited Mar. 26, 2021).

³⁰ Section 501.059(3)-(4), F.S.

³¹ Section 501.059(1)(f), defines a ‘telephone solicitor’ as a natural person or business that does business in this state by making or causing to be made a telephone sales call.

violation, in addition to attorney's fees and costs.³² This section does not provide for a private cause of action—the Department of Agriculture and Consumer Services and the Office of the Attorney General have exclusive enforcement authority.

III. Effect of Proposed Changes:

A telephonic sales call is a telephone call, text message, or voicemail transmission that will solicit a good or service to a consumer.

The bill requires any person who makes a telephonic sales call with an automated system for the selection or dialing of telephone numbers (autodialer), or who makes a telephonic sales call that will play a recorded message upon connection with the consumer, to obtain signed prior express written consent from the consumer he or she calls.

The bill defines prior express written consent as an agreement that clearly authorizes the person who makes or allows the call, text message, or voicemail transmission, to do so by an autodialer or for the purpose of playing a recorded message or prerecorded voicemail. The agreement must:

- Be signed by the party who is the regular user of the telephone number that will receive the call, text message, or voicemail, and his or her signature may be in any form that federal or state contract law recognizes as valid, which may include an electronic or digital signature;
- Include the telephone number to which the consumer will allow the telephonic phone call to be made; and
- Inform the consumer in a clear and conspicuous manner that he or she is not required to agree to receive calls, text messages, or direct-to-voicemail recordings as a condition of purchasing any property, goods, or services.

This will generally conform Florida's telephone solicitor language to the federal TCPA provisions regarding autodialed calls and calls that will play a prerecorded message. However, this bill applies the requirement for a consumer's prior express consent to all calls equally, and does not follow the TCPA's distinction between residential and cellular telephone calls.

The bill also deletes language that allows telephonic sales calls that are made with an autodialer or that will play a recorded message upon connection with the consumer in the following specific cases: those made in response to a call initiated by the consumer; those made only to persons whose phone numbers are not unlisted or are not on the "Do Not Call" list, and those made regarding goods or services that the consumer previously purchased. Therefore, those telephonic sales calls, text messages, and direct-to voicemail messages are now also prohibited without prior written express consent.

The bill creates a rebuttable presumption under s. 501.059(8), F.S., that a telephonic sales call (which includes telephone calls, text messages, and direct-to-voicemail transmissions) made to a Florida area code is made to a Florida resident or to a person who is in Florida at the time of the call. It is unclear whether this presumption will apply to all telephonic sales call regulations within s. 501.059, F.S., or just those listed under s. 501.059(8), F.S.

³² Section 501.059(9), F.S.

The bill creates a private cause of action to enforce violations of the provision. An aggrieved party may petition a court to enjoin the violating party and may receive an award of either actual damages or \$500, whichever is greater, in addition to attorney fees and costs. A court may increase damages by up to three times if it finds that the defendant willfully or knowingly violated s. 501.059, F.S.

The bill takes effect on July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

Federal Preemption

The TCPA expressly permits state regulations that impose more restrictive *intrastate* requirements or regulations on, or which prohibit:

- The use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
- The use of automatic telephone dialing systems;
- The use of artificial or prerecorded voice messages; or
- The making of telephone solicitations.³³

In fact, it expressly disclaims a complete preemption of state laws that govern the regulation of unsolicited sales calls and the improper use of prerecorded messages claims.³⁴ A Florida district court of appeal determined that Florida's regulation of recorded messages and autodialers, although more stringent than the TCPA, was not preempted by the federal law because Congress had indicated that the TCPA was the "minimum necessary to protect the public against the harm caused by' automated dialing

³³ 47 U.S.C. § 227(e).

³⁴ 47 U.S.C. § 227(g)(6). *See also, TSA Stores, Inc. v. Dep't. of Ag. And Consumer Servs.*, 957 So.2d 25, 28 (Fla. 5th DCA 2007).

machines.”³⁵ The Court further reasoned that “[e]ven though it [Congress] recognized that states might not have jurisdiction over interstate communications, Congress thus provided language that specifically allows states to impose more restrictive measures in this area.”³⁶

Additionally, the TCPA clearly contemplates that state attorneys general or other designated state official has authority to bring civil actions on behalf of the state’s residents to enjoin calls that violate the TCPA and to recover damages.³⁷

Commercial Speech Regulations

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Supreme Court held that commercial speech should receive First Amendment protections.³⁸ The Court based its opinion on the public’s right to receive a free flow of commercial information.³⁹ Although commercial speech does receive protection, it is below the protection provided to completely protected speech, and states retain the ability to regulate commercial speech that is inherently misleading or that has proven to be misleading in practice.⁴⁰

In *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, the Supreme Court established a four-part test for analyzing the limitations of advertising regulations.⁴¹ Under the *Central Hudson* test, a state must show that any commercial speech regulation is aimed at regulating lawful and “non-misleading” commercial speech in service of a substantial state interest, in a manner that directly advances that interest, and that is no more extensive than necessary to serve that interest.⁴² Although commercial speech regulations must meet the *Central Hudson* test, in *Bates v. State Bar of Arizona*, the Supreme Court held that reasonable time, place, and manner restrictions on advertising are authorized if the content or subject matter is not regulated.⁴³

Content-Based Speech Regulations

A government may impose reasonable time, place, and manner restrictions on speech. However, Content-based laws are subject to strict scrutiny.⁴⁴ A law is a content-based regulation of speech if it, on its face, draws distinctions based on the message a speaker conveys or singles out specific subject matter for differential treatment.⁴⁵

³⁵ *TSA Stores, Inc. v. Dep’t. of Ag. And Consumer Servs.*, 957 So.2d 25, 30 (Fla. 5th DCA 2007), quoting S. Rep. No. 102-178 at 5 (1991).

³⁶ *Id.* at 31, citing *FreeEats.Com, Inc. v. Indiana*, 2006 WL 3025810 (S.D.Ind. Oct. 24, 2006).

³⁷ 47 U.S.C. § 227 (g).

³⁸ See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 96 S. Ct. 1817 (1976).

³⁹ *Id.*

⁴⁰ See *In re R.M.J.*, 102 S. Ct. 929 (1982).

⁴¹ See *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 100 S. Ct. 2343 (1980).

⁴² *Id.*

⁴³ See *Bates v. State Bar of Arizona*, 97 S. Ct. 2691 (1977).

⁴⁴ *Id.*

⁴⁵ *Reed v. Town of Gilbert*, 576 U.S. 155, 163-169, 135 S. Ct. 2218 (2015).

A 2015 amendment to the TCPA allowed robocalls and prerecorded messages to be made to cellphone users to collect government debt. The U.S. Supreme Court determined this to be an invalid, content-based regulation of speech. The Court invalidated the 2015 amendment that allowed the government debt collection calls, and left the overall ban on robocalls and prerecorded messages intact.⁴⁶

Commerce Clause

A state law that has the practical effect of regulating commerce that occurs entirely outside of the State's borders is invalid under the Commerce Clause of the of the U.S. Constitution, regardless of its intent to reach outside of the state's borders.⁴⁷ Conversely, the dormant commerce clause prohibits states from enacting laws that unduly burden interstate commerce.⁴⁸

A Florida law that prohibited persons from causing false information to be displayed on the call recipient's caller ID system was found to regulate commerce wholly outside of Florida by making it impossible for parties to use or offer caller ID spoofing services anywhere.⁴⁹ The Court reasoned that the law affected interstate commerce because the increased use of mobile phones and call forwarding make it impossible to be certain where the parties one calls are located.

For example, a business located in New York might place a call, using caller ID spoofing services, to a telephone number with an Ohio area code. Because of call forwarding and the mobility of cellular telephones, the recipient of that call might be present in Florida, and the New York business would be criminally liable for violating [the law] when they called the Ohio telephone number. ... The logical consequence of this impossibility is that Plaintiffs are unable to offer caller ID spoofing services anywhere in the country without risking criminal liability under Florida's statute.⁵⁰

It is unclear whether the bill's presumption regarding Florida area codes will have an effect on interstate commerce to an extent that has the practical effect of regulating commerce outside of Florida's borders.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

⁴⁶ *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335, 2345-2346 (2020).

⁴⁷ *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 332 (1989). *See also*, U.S. CONST. art. 1 § 8, cl. 3.

⁴⁸ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844 (1970).

⁴⁹ *Taltech Systems, Inc. v. McCollum*, 2009 WL 10626585 (S.D. Fla. July 16, 2009).

⁵⁰ *Id.*

B. Private Sector Impact:

Businesses that make telephonic sales calls, text messages, or direct-to-voicemail transmissions either with an autodialer or for the purpose of playing a recorded message to a Florida consumer or to a phone with a Florida-based area code may have to adjust their businesses to accommodate this restriction.

C. Government Sector Impact:

This will likely lead to an increase in the investigations and enforcement actions undertaken by the Department of Agriculture and Consumer Services relating to violations of the provisions of this bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends s. 501.059 of the Florida Statutes:

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.