

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/CS/HB 1095 Telephone Solicitation

**SPONSOR(S):** Commerce Committee, Civil Justice & Property Rights Subcommittee, Regulatory Reform Subcommittee, Beltran

**TIED BILLS:**           **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Regulatory Reform Subcommittee	17 Y, 0 N, As CS	Thompson	Anstead
2) Civil Justice & Property Rights Subcommittee	16 Y, 2 N, As CS	Mathews	Jones
3) Commerce Committee	20 Y, 0 N, As CS	Thompson	Hamon

### SUMMARY ANALYSIS

Chapter 501, part IV, the Florida Telemarketing Act (FTA), regulates telemarketers and requires non-exempt businesses engaged in telemarketing and their salespeople to be licensed by the Florida Department of Agriculture and Consumer Services (DACCS) before operating in Florida. Florida law also prohibits telephonic sales calls that use an automated system for the selection **or** dialing of telephone numbers or the playing of a recorded message (robocall) when a connection is completed without the prior express written consent of the called party, with some exceptions. In addition, unsolicited telephonic sales calls and text messages from telemarketers are prohibited. Residents who do not wish to receive such calls may have their residential, mobile, or paging device telephone number included on the Do Not Call List.

The bill:

- Revises the prohibition on telephonic sales calls that use an automated system to specifically include an automated system for the selection **and** dialing of telephone numbers.
- Defines “express request” and revises the definition for “automated system.”
- Specifies that an automated system includes any system which the live caller, or any other person, operates by click-to-call but does not include a live caller manually selecting and calling telephone numbers using only a contact list or telephone log.
- Includes “lease or acquisition” in the definition of telephonic sales call.
- Revises the definition of “unsolicited telephonic sales call” to include a telephonic sales call other than a call made within 120 days after an express request of the called party, made to a caller who has previously given prior express written consent, or made for certain polling purposes.
- Limits calls or messages made in response to an express request or prior express written consent to **three such calls** or messages, unless such request or consent indicates differently.
- Prohibits a merchant, telephone solicitor, live caller, or other person from requiring any consumer or called party to provide an express request or prior express written consent as a condition of any transaction.
- Clarifies that attorney fees and costs awarded to a prevailing party in civil litigation must result **from a violation**, instead of a **transaction involving** a violation, and makes such fees and costs **permissive**.
- Prohibits a telephone solicitor from causing any unsolicited telephonic sales call to be initiated by the use of any automated system.

The bill applies retroactively to July 1, 2021, and to any proceeding pending or commenced on or after July 1, 2021. The bill provides that certain violations and attorney fees are not retroactive.

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

The effective date of the bill is July 1, 2022.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Florida Telemarketing Act

Chapter 501, part IV, the Florida Telemarketing Act (FTA), requires non-exempt businesses engaged in telemarketing and their salespeople to be licensed by the Florida Department of Agriculture and Consumer Services (DACS) 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: 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.<sup>1</sup>

The FTA generally requires businesses that solicit the sale of consumer goods or services to:

- Be licensed;<sup>2</sup>
- Post a form of security;<sup>3</sup>
- License all of their salespeople;<sup>4</sup> and
- Provide DACS with a list of all telephone numbers used to make sales calls.<sup>5</sup>

An application for licensure as a telemarketer must include several pieces of information, including the applicant's identifying information, prior experience in the field, criminal and administrative history (especially relating to fraud, theft, or unfair and deceptive trade practices), phone numbers from which the telemarketer will make sales calls, and parent or affiliate entity under which it will transact business, if applicable.<sup>6</sup>

Additionally, an applicant for licensure as a telemarketer must submit:

- A script that will be used by its salespersons during calls, or other related literature;
- The identity, address, date of birth, and alias of each of the applicant's principal officers, directors, trustees, shareholders, owners, partners, office managers, and salespersons who are employed by or affiliated with the applicant; and
- A \$1,500 licensing fee.<sup>7</sup>

In Florida, it is unlawful for telemarketers to:

- Accept novelty payments.<sup>8</sup>
- Employ or be affiliated with an unlicensed salesperson.
- Be employed by or affiliated with an unlicensed commercial telephone seller.
- Operate without a license.
- Make calls before 8 a.m. or after 8 p.m. local time at the called person's time zone.
- Fail to provide the call recipient with their name and telephone number.<sup>9</sup>

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<sup>1</sup> S. 501.604, F.S.

<sup>2</sup> S. 501.605, F.S.

<sup>3</sup> S. 501.611, F.S., requires a \$50,000 bond, irrevocable letter of credit issued for the applicant, or a certificate of deposit in favor of the Department for payment on findings of fraud, misrepresentation, breach of contract, or other violation by the applicant.

<sup>4</sup> S. 501.607, F.S.

<sup>5</sup> S. 501.605, F.S.

<sup>6</sup> S. 501.605(2), F.S.

<sup>7</sup> S. 501.605(5)(b), F.S.

<sup>8</sup> S. 501.603(8), F.S., defines a "novelty payment" as a payment method that does not have systematic monitoring and includes remotely created checks, remotely created payment orders, cash-to-cash money transfers (such as Western Union) and cash reload mechanisms (such as MoneyPak or ReloadIt). Novelty payment methods are not systematically monitored, have little to no consumer protection in the case of fraud or theft, and are used frequently in scams and other fraudulent activity.

<sup>9</sup> S. 501.616, F.S.

Violations of the FTA are punishable by a civil fine of up to \$10,000 per violation,<sup>10</sup> the imposition of criminal penalties, and up to a third degree felony. Repeat violations are enhanced to a second degree felony.<sup>11</sup> DACS and the office of the state attorney have investigative authority, including the power to subpoena witnesses if a violation occurs.<sup>12</sup> Reasonable attorney fees and costs may be awarded to the prevailing party in a civil action as part of a judgment or administrative order.<sup>13</sup>

## Telephone Solicitations

### *Do Not Call List*

Section 501.059, F.S., governs telephone solicitations. The law includes the Florida Do Not Call Act, also known as the "Do Not Call" list (DNC list), which prohibits unsolicited telephonic sales calls and text messages from telemarketers.<sup>14</sup> Residents who do not wish to receive unsolicited telephonic sales calls may have their residential, mobile, or paging device telephone number included on the DNC list. DACS maintains the DNC list, it is free to register, and a registered number remains on the DNC list indefinitely.<sup>15</sup>

An "unsolicited telephonic sales call" is defined as a telephonic sales call other than a call made:

- In response to an express request of the person called;
- Primarily in connection with an existing debt or contract, if payment or performance of such debt or contract has not been completed at the time of such call;
- To a person with whom the telephone solicitor has a prior or existing business relationship; or
- By a newspaper publisher or his or her agent or employee in connection with his or her business.<sup>16</sup>

Telephone solicitors<sup>17</sup> are prohibited from making telephonic sales calls<sup>18</sup> to consumers who register for the DNC list. A "telephonic sales call" means a telephone call, text message, or voicemail transmission to a consumer for the purpose of soliciting a sale of consumer goods or services, soliciting an extension of credit for consumer goods or services, or obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services or an extension of credit for such purposes.<sup>19</sup>

In addition to those consumers who are registered for the DNC list, 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 registration request. It is a violation of the Florida Do Not Call Act to call a consumer who has requested placement on the company's do-not-call list.<sup>20</sup>

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

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<sup>10</sup> S. 501.619, F.S.

<sup>11</sup> S. 501.623, F.S.

<sup>12</sup> S. 501.617, F.S.

<sup>13</sup> S. 501.621, F.S.

<sup>14</sup> *See* s. 501.059, F.S.

<sup>15</sup> Department of Agriculture and Consumer Services, *Florida Do Not Call*, <https://www.fdacs.gov/Consumer-Resources/Florida-Do-Not-Call> (last visited Feb. 7, 2022).

<sup>16</sup> S. 501.059(1)(k), F.S.

<sup>17</sup> S. 501.059(1)(i), 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."

<sup>18</sup> S. 501.059(1)(j), F.S., defines "telephonic sales call" as a telephone call, text message, or voicemail transmission to a consumer for the purpose of soliciting a sale of any consumer goods or services, soliciting an extension of credit for consumer goods or services, or obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services or an extension of credit for such purposes.

<sup>19</sup> S. 501.059(1)(j), F.S.

<sup>20</sup> S. 501.059(5), F.S.

number will connect the call recipient with the telephone solicitor or the seller on behalf of which the phone call was placed.<sup>21</sup>

Anyone who receives an unsolicited sales call can report the call to DACS using the online Do Not Call Complaint Form.<sup>22</sup>

### *Prior Express Written Consent*

The law governing telephone solicitations also prohibits automated telephonic sales calls without the prior express written consent of the called party.<sup>23</sup>

"Prior express written consent" is defined as a written agreement that:

- Bears the signature of the called party;
- Clearly authorizes the person making or allowing the placement of a telephonic sales call by telephone call, text message, or voicemail transmission to deliver or cause to be delivered to the called party a telephonic sales call using an automated system for the selection or dialing of telephone numbers, the playing of a recorded message when a connection is completed to a number called, or the transmission of a prerecorded voicemail; and
- Includes the telephone number to which the signatory authorizes a telephonic sales call to be delivered.<sup>24</sup>

Prior express written consent must include a clear and conspicuous disclosure informing the called party that:

- By executing the agreement, the called party authorizes the person making or allowing the placement of a telephonic sales call to deliver or cause to be delivered a telephonic sales call to the called party using an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called; and
- He or she is not required to directly or indirectly sign the written agreement or to agree to enter into such an agreement as a condition of purchasing any property, goods, or services.<sup>25</sup>

There is a rebuttable presumption that a telephonic sales call made to any Florida area code is a call made to a Florida resident or to a person in Florida at the time of the call.<sup>26</sup>

### *Violations*

A telephone solicitor who violates the provisions of Florida's "Do Not Call" program is subject to an injunction and a civil penalty<sup>27</sup> with a maximum fine of \$10,000 per violation, or an administrative fine<sup>28</sup> with a maximum of \$1,000 per violation. Additionally, a telephone solicitor may be subject to responsibility for the consumer's attorney fees and costs.<sup>29</sup>

A party who was called in violation of the Do Not Call Act may bring an action for an injunction and actual damages or \$500, whichever is greater.<sup>30</sup>

Courts that find that a defendant willfully or knowingly violated these provisions are authorized to, increase the amount of the award to not more than three times the amount of damages.<sup>31</sup>

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<sup>21</sup> S. 501.059(8)(b), F.S.

<sup>22</sup> DACS, *Florida Do Not Call*, <https://www.fdacs.gov/Consumer-Resources/Florida-Do-Not-Call> (last visited Feb. 7, 2022).

<sup>23</sup> S. 501.059(8)(a), F.S.

<sup>24</sup> S. 501.059(1)(g), F.S.

<sup>25</sup> S. 501.059(1)(g)4., F.S.

<sup>26</sup> S. 501.059(8)(d), F.S.

<sup>27</sup> S. 501.059(9)(a), F.S.

<sup>28</sup> S. 501.059(9)(b), F.S.

<sup>29</sup> S. 501.059(11), F.S.

<sup>30</sup> S. 501.059(10)(a), F.S.

<sup>31</sup> S. 501.059(10)(b), F.S.

## Federal Telephone Consumer Protection Act (TCPA) History

In an effort to address a growing number of telephone marketing calls, Congress enacted the Telephone Consumer Protection Act (TCPA) in 1991. 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.<sup>32</sup>

In July 2015, the Federal Communications Commission (FCC) established rules indicating that telephone carriers can block unwanted calls at the request of consumers.<sup>33</sup> Following the FCC's ruling, the National Association of Attorneys General (NAAG) called upon the major telephone carriers to do more to provide these services to consumers.<sup>34</sup> Currently there are a number of call-blocking applications that provide some relief from unwanted and spam calls.<sup>35</sup>

On November 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.<sup>36</sup> For example, perpetrators have used IRS phone numbers that do not 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 legitimate to the person who receives them and may often result in fraud or identity theft. Service providers can now block such calls, as well as calls from invalid or illegitimate numbers.<sup>37</sup>

The FCC requires telemarketers to transmit caller identification information, including the number and name of the caller. The telephone number provided must permit any individual to make a do-not-call request during regular business hours. It also provides that any person or entity that engages in telemarketing is prohibited from blocking the transmission of caller identification information. However, tax-exempt nonprofit organizations are exempt from compliance with these rules.<sup>38</sup>

With regard to telephone carriers, the FCC allows carriers to offer their customers external call-blocking applications on their landlines and allows carriers to directly block certain illegal robocalls. In December 2019, Congress enacted the "TRACED Act" to aid enforcement efforts between law enforcement agencies and the private sector on traceback issues, and required the FCC to issue rules "for the registration of a single consortium that conducts private-led efforts to trace back the origin of suspected unlawful robocalls."<sup>39</sup> In July of 2020, the FCC designated the US Telecom-led Industry Traceback Group (ITG) as the Official Consortium for coordinating industry-led efforts to trace back the origin of suspected unlawful robocalls.<sup>40</sup>

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<sup>32</sup> Federal Communications Commission, *FCC Actions on Robocalls, Telemarketing*, <https://www.fcc.gov/general/telemarketing-and-robocalls> (last visited Feb. 7, 2022).

<sup>33</sup> 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).

<sup>34</sup> National Association of Attorneys General, *Do Not Call: The History of Do Not Call and How Telemarketing Has Evolved*, <https://www.naag.org/consumer-protection/attorney-general-journal/do-not-call-the-history-of-do-not-call-and-how-telemarketing-has-evolved/> (last visited Feb. 7, 2022).

<sup>35</sup> CTIA, *The Wireless Association, How to Stop Robocalls*, <https://www.ctia.org/consumer-tips/robocalls> (last visited Feb. 7, 2022).

<sup>36</sup> 32 FCC Rcd 9706 (11).

<sup>37</sup> FCC, *Stop Unwanted Calls and Texts*, <https://www.fcc.gov/consumers/guides/stop-unwanted-calls-and-texts> (last visited Feb. 7, 2022).

<sup>38</sup> 47 C.F.R. s. 64.1601.

<sup>39</sup> Pallone-Thune Telephone Robocall Abuse *Criminal Enforcement and Deterrence Act*, Pub. L. No. 116-105, 133 Stat. 3274 (2019).

<sup>40</sup> USTelecom The Broadband Association, *FCC Names USTelecom's Industry Traceback Group as Official Robocall Traceback Consortium*, <https://www.ustelecom.org/fcc-names-ustelecoms-industry-traceback-group-as-official-robocall-traceback-consortium/> (last visited Feb. 7, 2022).

According to the ITG's first annual report, over 100 companies participated in over 1,000 ITG traceback investigations in 2019, identifying more than 10 million illegal robocalls and resulting in more than 20 subpoenas and/or civil investigative demands from federal and state enforcement agencies.<sup>41</sup>

The ITG reported in a letter to the FCC on November 13, 2020, that about 100 providers had failed to cooperate with the ITG, including approximately 30 based in the United States.<sup>42</sup> The ITG encouraged the FCC to bring aggressive enforcement against robocallers and voice service providers that routinely refuse to participate in the traceback process.<sup>43</sup>

In its Fourth Report and Order on Advanced Methods to Target and Eliminate Unlawful Robocalls released on December 30, 2020, the FCC required "all voice service providers to respond to traceback requests from the FCC, civil and criminal law enforcement and the Consortium."<sup>44</sup>

The TRACED Act requires the FCC to issue an annual public notice seeking applicants to serve as the registered consortium.<sup>45</sup> On August 25, 2021, the FCC selected the Traceback Group to continue as the registered consortium.<sup>46</sup>

### National Do Not Call Registry

Although individual states were first to address consumers' requests to stop unwanted telemarketing calls,<sup>47</sup> the federal government soon followed with a National Do Not Call Registry in 2003.<sup>48</sup> In July 2003, the federal government 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 forgo the expense of maintaining their own lists. Currently, only 12 states maintain their own Do Not Call lists: Colorado, Florida, Indiana, Louisiana, Massachusetts, Mississippi, Missouri, Oklahoma, Pennsylvania, Tennessee, Texas and Wyoming.<sup>49</sup>

### Constitutionality of Do Not Call Registries

Do Not Call registries have been subject to numerous state and federal lawsuits challenging their constitutionality. Such lawsuits have been unsuccessful, and the National Registry has been upheld as constitutional. The courts have found 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 Tenth Circuit Court of Appeals 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 an invasion of privacy." Thus, the government has a role in restricting the

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<sup>41</sup> InsideArm, *The Latest Developments in the World of Call Delivery*, <https://www.insidearm.com/news/00047073-latest-developments-world-call-delivery/> (last visited Feb. 7, 2022).

<sup>42</sup> USTelecom, Enforcement Bureau Requests Information on the Status of Private-Led Traceback Efforts of Suspected Unlawful Robocalls, EB Docket No. 20-195, Nov. 13, 2020, <https://docs.fcc.gov/public/attachments/DOC-368957A2.pdf> (last visited Feb. 7, 2022).

<sup>43</sup> InsideArm, *The Latest Developments in the World of Call Delivery*, <https://www.insidearm.com/news/00047073-latest-developments-world-call-delivery/> (last visited Feb. 7, 2022).

<sup>44</sup> FCC, *Fourth Report and Order* (Dec. 29, 2020) <https://docs.fcc.gov/public/attachments/FCC-20-187A1.pdf> (last visited Feb. 7, 2022).

<sup>45</sup> TRACED Act, s. 13(d)(2).

<sup>46</sup> FCC, *Report and Order DA 21-1047* (Aug. 25, 2021) <https://www.fcc.gov/document/fcc-retains-industry-rollback-group-robocall-consortium> (last visited Feb. 7, 2022).

<sup>47</sup> At least 28 states, starting with Florida in 1987, have implemented Do Not Call registries.

<sup>48</sup> Federal Trade Commission, *National Do Not Call Registry*, <https://www.donotcall.gov/> (last visited Feb. 7, 2022).

<sup>49</sup> Contact Compliance Center Corporation, *State Do Not Call Lists*, <https://www.dnc.com/faq/state-do-not-call-lists?page=1> (last visited Feb. 7, 2022).

ability of a telemarketer to reach a household via telephone, and because the government has left the ultimate decision of whether or not to be placed on the registry up to the individual, the government has not restricted the First Amendment rights of the solicitor.<sup>50</sup>

Claims of preemption have also been unsuccessful. The TCPA's non-preemption clause,<sup>51</sup> often referred to as the savings clause, has been relied upon by courts to uphold states' Do Not Call Registries. The clause states that "[n]othing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulation." 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, using of automatic dialing systems and prerecorded messages, and making telephone solicitations.<sup>52</sup>

The TCPA is silent on a state's ability to place regulations that are more stringent than the TCPA requirements for interstate calls.<sup>53</sup> However, at least one federal court of appeals has held that state regulations and prohibitions of telemarketing that cross state boundaries are valid.<sup>54</sup>

### Caller ID and "Spoofing"

"Spoofing" is the practice of altering or manipulating the caller ID information that is received in conjunction with an incoming telephone call. In the past, caller ID services were not common 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 his or her caller ID using the services of a third-party spoofing provider.<sup>55</sup> For example, one such spoofing provider allows a consumer to download an app on his or her smartphone, purchase credits towards call time, and simply input the number that he or she wants displayed on the receiving end in order to place an untraceable, spoofed call.<sup>56</sup>

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 FCC rules, a 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," with a penalty of up to \$10,000 for each violation.<sup>57</sup> However, spoofing is not illegal when no harm is intended or caused, or if the caller has legitimate reasons to hide his or her information. Examples may include law enforcement agencies working on a case, a victim of domestic abuse, or a doctor who wishes to discuss private medical matters with a patient.<sup>58</sup>

In 2008, Florida passed its own anti-spoofing legislation, The Florida Caller ID Anti-Spoofing Act (2008).<sup>59</sup> 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.

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<sup>50</sup> *Mainstream Marketing Services Inc v. Federal Trade Commission*, 358 F.3d 1228 (10th Cir. 2004).

<sup>51</sup> 47 U.S.C. s. 227(f)(1).

<sup>52</sup> 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.

<sup>53</sup> 47 U.S.C. s. 227 (f)(1).

<sup>54</sup> 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.").

<sup>55</sup> 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, [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-11-100A1\\_Rcd.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-100A1_Rcd.pdf) (last visited Feb. 7, 2022).

<sup>56</sup> Business Insider, *It's Surprisingly Easy for a Hacker to Call Anyone From Your Personal Phone Number* (March 1, 2016), <http://www.businessinsider.com/phone-number-spoofing-2016-2> (last visited Feb. 7, 2022).

<sup>57</sup> 47 U.S.C. s. 227(e).

<sup>58</sup> FCC, *Caller ID Spoofing*, <https://www.fcc.gov/consumers/guides/spoofing-and-caller-id> (last visited Feb. 7, 2022).

<sup>59</sup> 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 the state.<sup>60</sup> Similarly, in 2011, a federal court in Mississippi struck down Mississippi's anti-spoofing law, which was substantially similar to Florida's.<sup>61</sup>

## Spam Robocalls

According to the American Association of Retired Persons (AARP), robocalls have become an epidemic. YouMail, a company that provides call-blocking and call-management services, estimates that there were 58.5 billion robocalls in the U.S. in 2019 and that 44% of them were placed by scammers.<sup>62</sup>

A February 2021 survey found that 46% of Americans reported receiving spam phone calls on their cell phone every day, and another 24% receiving them multiple times per week.<sup>63</sup>

Scammers often use caller ID spoofing to mask their true location and make it appear the call is from a legitimate or local number to raise the odds of getting an answer. What follows is a robotic voice on the other end claiming to represent a utility, a name-brand company, or a government agency (such as the Social Security Administration or the Internal Revenue Service). It might offer a free cruise, inexpensive health insurance, or a low-interest loan. Answering or engaging with the call may lead to a live scammer, who realizes he or she has found a "live" number, and thus may call repeatedly.<sup>64</sup>

Many robocalls are legal. The FCC allows such robocalls for informational or noncommercial purposes, such as polling, political campaigning and outreach by nonprofit groups.

Advances in technology have magnified fundamental flaws in the American phone system, enabling unrelenting robocalls from untraceable origins. As a result, it is incredibly profitable to use spam calls to drive business regardless of whether the caller is perpetuating a scam or is a legitimate business using telemarketing to increase sales.<sup>65</sup>

## Consent and Revocation

The TCPA prohibits a telemarketer from using an automatic telephone dialing system (ATDS) to place a call or send a text message to a cell phone without the recipient's "**prior express consent.**"<sup>66</sup> The type of consent depends on the nature of the call or text. Consent generally can be revoked by any reasonable method. However, some courts recently have considered whether revocation may be restricted in circumstances where the consent is included on a bilateral agreement.<sup>67</sup>

There are two types of prior consent provided for under the TCPA:

- Prior express consent is required to place autodialed, non-solicitation calls or texts to a cell phone.

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<sup>60</sup> *TelTech Systems, Inc. v. McCollum*, No. 08-61664-CIV-MARTINEZ-BROWN (S.D. Fla. Filed Oct. 16, 2008).

<sup>61</sup> *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).

<sup>62</sup> AARP, *Robocalls*, [https://www.aarp.org/money/scams-fraud/info-2019/robocalls.html?CMP=KNC-DSO-Adobe-Google-FRD-Ongoing-Robocalls-NonBrand-Exact-Robocalls&gclid=EAJalQobChMIlvmq\\_4Sr7wIVFYvYch2RAwjEAA YA iAAEgJD4vD\\_BwE&gclid=aw.ds](https://www.aarp.org/money/scams-fraud/info-2019/robocalls.html?CMP=KNC-DSO-Adobe-Google-FRD-Ongoing-Robocalls-NonBrand-Exact-Robocalls&gclid=EAJalQobChMIlvmq_4Sr7wIVFYvYch2RAwjEAA YA iAAEgJD4vD_BwE&gclid=aw.ds) (last visited Feb. 7, 2022).

<sup>63</sup> Simon van Zuylen-Wood, *How Robo-Callers Outwitted the Government and Completely Wrecked the Do Not Call List* (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](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) (Last visited Feb. 7, 2022).

<sup>64</sup> AARP, *supra* note 62.

<sup>65</sup> AARP, *supra* note 62.

<sup>66</sup> 47 U.S.C. s. 227(b)(1)(A)(iii).

<sup>67</sup> The National Law Review, *Consent and Revocation Under the TCPA*, <https://www.natlawreview.com/print/article/consent-and-revocation-under-tcpa> (last visited Feb. 7, 2022).

- Prior express written consent is a heightened form of consent, must be evidenced by a written agreement signed by the call recipient, and is required to place autodialed telemarketing or advertising calls or texts to a cell phone. The written agreement must include a clear and conspicuous disclosure informing the consumer signing that:
  - By signing the agreement, the consumer is authorizing autodialed telemarketing or advertising calls or texts; and
  - The consumer is not required to sign the agreement as a condition of purchasing any property, goods, or services.<sup>68</sup>

Prior express consent can be written or verbal. Voluntarily providing one's cellular number also constitutes prior express consent where:

- The individual gives "prior express consent" to be called or texted at the number provided;
- The individual has provided his or her number to the party calling or texting; and
- There is some relation between the communications and the reason for which an individual provided his or her number.<sup>69</sup>

Prior express written consent is required for calls or texts to cell phones that introduce an advertisement,<sup>70</sup> or constitute "telemarketing"<sup>71</sup> and are sent using an ATDS. The TCPA's advertising prong merely requires introducing, at the most basic level, the commercial availability of a service. In similar fashion, telemarketing occurs when the context of a text or call indicates that it was initiated and transmitted to a person for promoting property, goods, or services. Neither the TCPA nor its implementing regulations requires an explicit mention of a good, product, or service where the implication of an improper purpose is clear from the context.<sup>72</sup>

Revocation of consent is controlled by the consenting party, and may be communicated orally or in writing by any reasonable means. However, where consent is contractually provided, as is the case in credit agreements, the parties can bargain to require mutuality or particular revocation methods. Recently, a number of courts have addressed whether a consumer may unilaterally revoke consent when it is a term in a bargained-for contract.<sup>73</sup>

In 2017, the federal Second Circuit Court of Appeal held that a consumer may not unilaterally revoke consent in a bargained-for, bilateral contract.<sup>74</sup> The court based its decision on "black-letter" contract law, referring to a fundamental aspect of contractual relationships that one party may not alter or revoke a term of a bilateral agreement without the other party's consent. The court found that a consumer, having consented to be contacted via an auto-dialer, could not unilaterally revoke consent without the caller's permission. Notably, the court distinguished case law from the Third and Eleventh Circuit Courts of Appeal, where consumers retained their ability to revoke consent because it was given in credit applications, rather than as part of a bilateral contract.<sup>75</sup>

In 2018, a United States District Court in Florida also held that consent provided by contract cannot be unilaterally revoked.<sup>76</sup> The court noted that no provision in the TCPA indicates that contractually-granted consent can be unilaterally revoked where it would contradict black-letter contract law. The court held that a consumer who has consented to auto-dialed communication in a contract for services cannot later revoke such consent.<sup>77</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> Federal Communications Commission, Rules & Regulations Implementing the TCP Act of 1991 et al., 30 FCC Rcd at 7991-92.

<sup>70</sup> 47 C.F.R. s. 64.1200(f)(1), defines an "advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services," and "telemarketing" is defined as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person."

<sup>71</sup> 47 C.F.R. s. 64.1200(f)(12).

<sup>72</sup> The National Law Review, *supra* note 67.

<sup>73</sup> *Id.*

<sup>74</sup> *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 53 (2d Cir. 2017).

<sup>75</sup> The National Law Review, *supra* note 67.

<sup>76</sup> *Medley v. Dish Network, LLC*, Case No. 8:16-cv-2534-T-36TBM, 2018 WL 4092120, at \*10 (M.D. Fla. Aug. 27, 2018).

<sup>77</sup> The National Law Review, *supra* note 67.

However, other courts have disagreed, rejecting the argument that consent is irrevocable. In 2018, a United States District Court in Tennessee adopted the general rule that consumer consent may be revoked at any time by “any reasonable means.”<sup>78</sup> The court held that consumers retain the ability to revoke their prior consent despite having a bilateral agreement with the caller. Other courts have also allowed for revocation of consent by any means in the absence of a contractual restriction on the means by which a consumer may revoke consent.<sup>79</sup>

In December 2020, the U.S. Supreme Court heard oral arguments in a landmark case regarding whether consumers can sue a company for using an ATDS to text or call the consumers at a phone number saved in the company’s system. At issue was the meaning of the TCPA’s prohibition on using an ATDS to transmit communications to cell phones. The question before the Supreme Court was “whether the definition of ATDS in the TCPA encompasses any device that can ‘store’ and ‘automatically dial’ telephone numbers, even if the device does not use a random or sequential number generator.”<sup>80</sup>

On April 1, 2021, the Court ruled that to qualify as an ATDS under the TCPA, a device must have the capacity to either store a telephone number using a random or sequential number generator or produce a telephone number using a random or sequential number generator. The Court concluded that merely having the capacity to store numbers and dial them automatically is not enough to make a device qualify as an ATDS.<sup>81</sup>

Specifically, related to consent, the TCPA rules require telemarketers to:

- Obtain prior express written consent from consumers before robocalling them;
- No longer be able to use an "established business relationship" to bypass the consent requirement; and
- Require an automated, interactive "opt-out" mechanism to be used during each robocall so consumers can immediately tell the telemarketer to stop calling.<sup>82</sup>

The TCPA includes a private right of action.<sup>83</sup> A caller who places a call to a cell phone without consent using an ATDS is subject to \$500 in damages per call. The damages amount is \$1,500 per call if the court finds that the defendant willfully or knowingly committed the violation.<sup>84</sup>

Specifically, related to consent, the Florida telephone solicitation law:<sup>85</sup>

- Prohibits robocalls without the prior express written consent of the called party.
- When the called party has given such consent, only allows robocalls in certain circumstances through the use of an “automated system for the selection **or** dialing of telephone numbers or the playing of a recorded message” when a connection is completed to a number called.

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<sup>78</sup> *Ammons v. Ally Fin., Inc.*, Case No. 3:17-cv-00505, 2018 WL 3134619, at \*15 (M.D. Tenn. June 27, 2018).

<sup>79</sup> *Few v. Receivables Performance Mgmt.*, Case No. 1:17-CV-2038-KOB, 2018 WL 5923765 at \*1 (N.D. Ala. Nov. 13, 2018).

<sup>80</sup> *Facebook, Inc., Petitioner vs. Noah Duguid*, et al., U.S., No. 19-511.

<sup>81</sup> *Id.*

<sup>82</sup> FCC, *supra* note 32.

<sup>83</sup> 47 U.S.C. s. 227(b)(3).

<sup>84</sup> *Id.* at s. 227(b)(3)(B)-(C).

<sup>85</sup> S. 501.059(8), F.S.

## Effect of Proposed Changes

The bill defines an “automated system” as a computerized, mechanical, or other technological system or device that creates a telephone number, or stores or selects any telephone number from any database or list, **and** then causes that telephone number to be called.

The bill specifies that an **automated system** also includes any system which the live caller, or any other person, operates by click-to-call. An automated system does not include a live caller manually selecting and calling telephone numbers using only a contact list or telephone log.

The bill defines “**express request**” as a prior oral or written request, invitation, consent or permission from a called party made directly or indirectly to the live caller or telephone solicitor, for calls or text messages regarding the live caller's or telephone solicitor's goods, services or products.

The bill defines a “live caller” as a natural person who causes a call to be made and who is ready to speak to the called party at the time the call is made. The bill revises references to “caller” to instead refer to a “live caller.”

The bill provides that a signature line with a specified notice to the consumer is presumptively compliant under the requirements established for prior written consent. The notice must be placed directly above the designated signature line and be prominent and robust in at least 12-point bold font, and include the following language:

By signing below, you authorize [NAME] to place a telephonic sales call to you at [TELEPHONE PHONE NUMBER] by way of telephone calls, text messages, or voicemail transmissions using an automated system for the **selection and/or dialing** of telephone numbers or the playing of a recorded message when a connection is completed to your phone number. **YOU ARE NOT REQUIRED TO PROVIDE SUCH AUTHORIZATION AS A CONDITION OF PURCHASING ANY PROPERTY, GOODS, OR SERVICES.**

The bill revises the definition of a “signature” to include agreements obtained via a compliant email, website form, text message, telephone keystroke, or voice recording, or any such signature that is recognized as a valid signature under applicable federal law or state contract law.

The bill revises the definition for “**telephonic sales call**” to include a telephone call, text message, or voicemail transmission, including, but not limited to, calls made by the use of automated systems, or automated dialing or recorded message devices, to a consumer for the purpose of soliciting a “**lease or acquisition**” of any consumer goods or services.

The bill revises the definition of “**unsolicited telephonic sales call**” to exclude:

- Calls made within 120 days after an express request of the called party;
- Calls to a person who has provided prior express written consent; and
- Calls for the purpose of polling or soliciting ideas and opinions when such polling is made by text message.

The bill prohibits a telephone solicitor or live caller from making or knowingly allowing **an unsolicited** telephonic sales call to be made if such call involves an automated system for the selection **and** dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called. The bill also specifically includes the **transmission of a text message, or the transmission of a prerecorded voicemail.**

However, the bill **does not prohibit the use of an automated system** for the selection and dialing of telephone numbers with a live caller or text messages **if** the call or message is made solely in response to an **express request** initiated by the called party, or **prior express written consent** by the called

party, and the live caller or telephone solicitor maintains evidence of the called party's express request or prior express written consent.

The bill limits the number of calls and messages **to three calls or messages** made in response to each express request or prior express written consent, unless such request or consent specifically indicates a different number of calls or messages that are authorized or a specific time period that such calls or messages are authorized to be made.

The bill prohibits a merchant, telephone solicitor, live caller, or other person from requiring any consumer or called party to provide an express request or prior express written consent as a **condition of any transaction**.

The bill prohibits a telephone solicitor from causing any:

- Unsolicited telephonic sales call to be initiated by the use of any automated system; and
- Telephonic sales call to be initiated by any person or device other than a live caller.

The bill provides that in order for a prevailing party to be awarded attorney fees and costs in civil litigation cases, the subject litigation must **result from a violation**, rather than from a transaction involving a violation, and makes attorney fees and costs optional rather than mandatory.

The bill provides that if any of these provisions or their application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this section that can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

The bill provides that it is remedial in nature and applies retroactively to July 1, 2021, and to any proceeding pending or commenced on or after July 1, 2021. However, the bill specifies that the provisions under s. 501.059(8)(e) and (9), F.S., relating to violations, and s. 501.059(12), relating to attorney fees and costs, do not apply retroactively.

#### B. SECTION DIRECTORY:

**Section 1:** Amends s. 501.059, F.S., relating to telephone solicitation.

**Section 2:** Provides for retroactive applicability.

**Section 3:** Provides for severability.

**Section 4:** Provides an effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

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

##### 1. Revenues:

None.

##### 2. Expenditures:

None.

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

##### 1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate negative fiscal impact on legitimate telemarketers to the extent they do not currently engage in business practices consistent with the requirements in the bill.

The bill may protect consumers from unwanted and fraudulent telephone solicitations.

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:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 20, 2022, the Regulatory Reform Subcommittee adopted one strike-all amendment, and one amendment to the strike-all amendment, and reported the bill favorably as a committee substitute. The committee substitute:

- Provided that the bill is remedial in nature and applies retroactively to July 1, 2021, and to any proceeding pending or commenced on or after July 1, 2021.

On February 7, 2022, the Civil Justice and Property Rights Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The committee substitute:

- Provided definitions for the terms “automated system,” “caller,” and “selection” and amended the definition for “signature” to include agreements obtained via a compliant email, text message, telephone keypress, or voice recording.
- Provided that a designated signature line with a specific notice is presumptively satisfactory to meet the requirements of prior express written consent.
- Amended the exceptions to an unsolicited telephonic sales call to include a call to a person who has provided prior express written consent, and to include calls for the purpose of polling or soliciting ideas and opinions when such polling is done by text message.
- Provided that the bill does not prohibit the use of an automated system for the selection and dialing of phone numbers with live messages or live text messages so long as the call or

message is made in response to an inquiry initiated by the called party. Only three such calls or messages may be made in response to each inquiry.

- Prohibited a telephone solicitor from causing any unsolicited telephonic sales call to be initiated by the use of any automated system.
- Prohibited a telephone solicitor from initiating any calls by anyone other than the caller.
- Clarified that the bill is remedial in nature and applies retroactively to July 1, 2021; but, specified that the amendments made to s. 501.059, F.S., relating to attorney fees are prospective only.

On February 23, 2022, the Commerce Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The committee substitute:

- Defined “express request” and revised the definition for “automated system.”
- Clarified the definition for “telephonic sales call.”
- Removed the definition of “selection” from the bill.
- Further clarified the notice required to be given prior to obtaining express written consent.
- Made attorney fees and costs optional rather than mandatory.
- Provided that the provisions in s. 501.059, F.S., if held invalid, are severable.
- Prohibited a merchant, telephone solicitor, live caller, or other person from requiring any consumer or called party to provide an express request or prior express written consent as a condition of any transaction.
- Specified that the limitation on making only three calls or messages applies to each express request or prior express written consent, unless such request or consent indicates a different number of calls or messages or a specific time period.
- Specified that certain violations are not subject to retroactive application.
- Made other clarifying and technical changes.

This analysis is drafted to the committee substitute as passed by the Commerce Committee.