

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 Regulated Industries

BILL: CS/SB 1564

INTRODUCER: Commerce and Tourism Committee and Senator Hutson

SUBJECT: Telephone Solicitation

DATE: February 7, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Harmsen</u>	<u>McKay</u>	<u>CM</u>	<u>Fav/CS</u>
2.	<u>Sharon</u>	<u>Imhof</u>	<u>RI</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1564 amends s. 501.059, F.S., relating to telephone solicitation using an automated system for the selection *or* dialing of telephone numbers.

The bill amends the definition of “prior express written consent” to add transmission of a text message to the methods of telephonic solicitation requiring prior written authorization from the called party.

The bill narrows the scope of telephonic sales calls requiring the called party’s prior express written consent to those that select *and* dial telephone numbers, rather than those that select *or* dial telephone numbers.

The bill amends the term “unsolicited telephonic sales call” to exclude telephonic sales calls:

- Made within 120 days after an express request of the called party, rather than “in response to the request;” and
- Limited to polling or soliciting the expression of ideas, opinions, or votes, including polling or soliciting by text message.

The bill allows the use of an automated telephone dialing system with live messages or text messages if made solely in response to an inquiry initiated by the called party. The bill limits this to two calls or messages in response to each inquiry.

The bill replaces the term “person called” with the term “called party,” consistent with existing law.

The bill clarifies that the award of attorney fees and costs to a prevailing party from a non-prevailing party in a civil case must result from a violation of s. 501.059, F.S., instead of a transaction involving a violation.

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.

The bill takes effect upon becoming law.

II. Present Situation:

Unsolicited Phone Calls

Consumers are often inundated with unwanted calls. In Fiscal Year 2021, the Federal Trade Commission (FTC) received 388,227 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 robocalls,³ which use an “automatic telephone dialing system”⁴ or “autodialer” that plays a recorded message upon connection; “spoofing” or “spoofed calls,” which transmit falsified information to a consumer’s caller ID to disguise the solicitor’s identity; and unwanted telemarketing calls.⁵

State and federal action to combat these issues are limited because there are legitimate and legal uses of this technology. For example, a doctor’s office may legally use a robocall to remind someone of an upcoming appointment.⁶ Additionally, some solicitors act outside the scope of federal or state enforcement authority.

¹ Federal Trade Commission, *Do Not Call Data Book 2020* (Nov. 2021), https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2021/dnc_data_book_2021.pdf (last visited Feb. 4, 2022).

² Federal Communications Commission, *Stop Unwanted Robocalls and Texts* (Mar. 17, 2021), <https://www.fcc.gov/consumers/guides/stop-unwanted-robocalls-and-texts> (last visited Feb. 4, 2022).

³ The FCC uses the term “robocalls” to refer to prerecorded calls and “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 Consumer Protection, Product Safety, and Insurance of the Comm. on Commerce, Science, and Transportation, 130th Cong. (July 10, 2013) (Statement of Eric J. Bash, Associate Chief, Enforcement Bureau, Federal Communications Commission) <https://www.govinfo.gov/content/pkg/CHRG-113shrg85765/pdf/CHRG-113shrg85765.pdf> (last visited Feb. 4, 2022).

⁴ “Automatic telephone dialing system” or “autodialer” refers to equipment capable of producing or storing phone numbers using a random or sequential number generator and can call those numbers. 47 U.S.C. § 227(a)(1).

⁵ “Fraudsters have also further exploited caller ID spoofing, which induces the consumer to pick up the phone, while at the same time enabling the scammer to hide its identity and location.” *Hearing, supra* note 3, at p. 5 (Statement of Lois Greisman, Associate Director, Division of Marketing Practices, Bureau of Consumer Protection).

⁶ Federal Communication Commission, Consumer and Governmental Affairs Bureau, *Report on Robocalls* (Feb. 2019), CG Docket No. 17-59, <https://www.fcc.gov/document/fcc-issues-report-illegal-robocalls> (last visited Feb. 4, 2022). *See also*, FCC, *supra* note 2.

Florida Senate Bill 1120 (2021)

In 2021, the Florida Legislature updated s. 501.059, F.S., and the Florida Telemarketing Act (FTSA)⁷, to further address some of these issues facing consumers.⁸

Current law requires all sales telephone calls, text messages, and direct-to-voicemail transmissions made with an autodialer that is capable of either selecting *or* dialing the recipient's number to have the receiving consumer's prior express written consent.⁹ Additionally, such calls require prior consent if they will play a recorded message upon connection with the recipient. Aggrieved parties can sue to recover actual monetary damages or \$500, plus attorney fees and costs.¹⁰ Additionally, a court may triple these damages if the underlying violation is willfully or knowingly performed.

One entity reports that this 2021 change to the FTSA has resulted in at least 100 class action complaints against those who make telephone sales calls since July 2021.¹¹

Florida Law (Section 501.059, F.S.)

Generally

Section 501.059, F.S., governs telephone solicitors, i.e., persons who make or cause to be made telephonic sales calls in this state.¹² A telephonic sales call includes solicitations via telephone calls, text messages, and direct-to-voicemail transmissions.¹³

For example, s. 501.059, F.S., requires telephone solicitors to:

- Identify themselves and the businesses on whose behalf they make a telephone solicitation call immediately upon making contact with the person called;
- Adhere to the Do Not Call lists maintained by the Florida Department of Agriculture Consumer Services (DACs)¹⁴ and the FTC;¹⁵
- Honor a consumer's request not to receive further telephone calls, text messages, or voice mail transmissions. 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.¹⁶

Additionally, s. 501.059(8), F.S., prohibits telephonic sales calls that:

⁷ Section 501.601, F.S., et. seq.

⁸ Chapter 2021-185, s. 1, Laws of Fla.

⁹ Section 501.059, F.S.

¹⁰ *Id.*

¹¹ Eric Troutman, TCPAWorld, *The FTSA Claims are Still Pouring In: Florida Mini TCPA Continues to Generate Huge Volume of Litigation* (Dec. 13, 2021), <https://tcpaworld.com/2021/12/13/the-fts-claims-are-still-pouring-in-florida-mini-tcpa-continues-to-generate-huge-volume-of-litigation/> (last visited Feb. 4, 2022).

¹² Section 501.059(1)(i), F.S.

¹³ Section 501.059(1)(j), F.S.

¹⁴ Florida Department of Agriculture and Consumer Services, *Florida Do Not Call*, <https://www.fdacs.gov/Consumer-Resources/Florida-Do-Not-Call> (last visited Feb. 4, 2022).

¹⁵ See, ss. 501.059(3)-(4), F.S.; Federal Trade Commission, *National Do Not Call Registry*, <https://www.donotcall.gov/> (last visited Feb. 4, 2022).

¹⁶ Section 501.059(5), F.S.

- Use an automated system for the selection *or* dialing of telephone numbers or playing a recorded message to a number without the prior express written consent¹⁷ of the called party;
- Fail to transmit the originating telephone number and, when possible, name of the solicitor; or
- Alter the voice of the caller in order to defraud, confuse, or injure the telephone call recipient.

Florida Do Not Call Act

Do Not Call List

The DACS also administers the Florida Do Not Call Act or the “Do Not Call List,” which prohibits unsolicited phone calls and text messages.¹⁸ Residents who do not wish to receive sales calls may request to have their residential, mobile, or paging device telephone number included on the DACS list.¹⁹

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;
- To a person with whom the telephone solicitor has a prior existing business relationship;
- 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.²⁰

Continued Solicitations

Section 501.059, F.S., further prohibits a telephone solicitor²¹ from calling, text messaging, sending a direct voicemail transmission, or using automated telephone equipment 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.

Penalties

The DACS or the Office of the Attorney General may bring an action against a telephone solicitor who violates the provisions of s. 501.059, F.S. Each violation is subject to a civil

¹⁷ “Prior express written consent” is defined by s. 501.059(1)(g), F.S., as a written agreement: (1) Bearing the signature of the called party; (2) Clearly authorizing the person making the telephonic sales call to deliver it while using an automated system to select or dial telephone numbers, playing a recorded message, or transmitting a prerecorded voicemail;” (3) Including the authorized telephone number; and (3) Including a clear and conspicuous disclosure statement.

¹⁸ See s. 501.059, F.S.; DACS, *supra*, n.12.

¹⁹ Sections 501.059(3)-(4), F.S.

²⁰ Section 501.059(1)(k), F.S.

²¹ Section 501.059(1)(i), F.S., 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.

penalty with a maximum fine of \$10,000 per violation, or an administrative fine with a maximum of \$1,000 per violation, in addition to attorney's fees and costs.²²

In addition, a private citizen may file a private civil action to either enjoin the violation or recover actual damages, or \$500, whichever is greater, in addition to attorney's fees and costs. This civil penalty may be tripled by the court if it finds that the defendant knowingly or willfully committed the violation.²³

Federal Law

Telephone Consumer Protection Act

The Telephone Consumer Protection Act of 1991²⁴ (TCPA) protects U.S. consumers from unwanted communications by restricting the use of autodialers, prerecorded sales messages, and unsolicited sales calls, text messages, or faxes.

The TCPA prohibits telephone solicitations that:

- Are made to residences before 8 a.m. and after 9 p.m.;
- Fail to provide the consumer with the solicitor's identity, including his or her true phone number via caller identification service,²⁵ and an opportunity to opt out of the current call, and all future calls, made by that solicitor;
- Send prerecorded messages to a residential line without the consumer's prior express consent, which may be on paper or through electronic means, including website forms or a telephone keypress;²⁶ and
- Use an autodialer or prerecorded 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.²⁷ This specific provision does not apply to residential phone lines.²⁸

²² Section 501.059(9), F.S.

²³ Sections 501.059(10)-(11), F.S.

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

²⁵ 47 U.S.C. § 227(b)(2)(d). *See also*, 47 C.F.R. § 64.1601(e). *See also*, Federal Communications Commission, *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 Feb. 4, 2022).

²⁶ FCC, *supra* note 2. *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 Health Insurance Portability and Accountability Act may be made without prior express consent.

²⁷ FCC, *2015 TCPA Declaratory Ruling and Order*, 30 FCC Rcd at 7999, para. 4 (Jun. 18, 2015).

²⁸ 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 law 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's protections extend to text messaging in the same manner that they apply to telephone calls.²⁹

The TCPA defines autodialers as “equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers.”³⁰ The U.S. Supreme Court recently limited the effect of the TCPA by clarifying that it only regulates autodialers that have the capacity either to store, or to produce, a telephone number using a random or sequential number generator.³¹ This limits the TCPA's regulations to the now obsolete sequential number dialer style of autodialer, versus the predictive dialing technology that most businesses use today.³²

The TCPA grants a private right of action to pursue actual monetary damages or up to \$500 per violation.³³ State attorneys general and the FCC also have jurisdiction to investigate and file civil claims based on violations of the TCPA.³⁴

Federal Do Not Call Program

The FTC, in concert with the FCC, administers the National Do Not Call Program.³⁵ Telephone solicitors may not contact a consumer who participates in the National Do Not Call Program, unless the calls are:

- 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.³⁶

Truth in Caller ID Act

The Truth in Caller ID Act of 2009³⁷ protects consumers by prohibiting any person from transmitting misleading or inaccurate caller ID information, known as call spoofing, 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.³⁸ In recent years, the FCC has taken enforcement actions totaling \$450 million in fines against telemarketers for call spoofing violations. Notably, the FCC imposed its largest fine ever against a Florida-based timeshare marketing operation.³⁹

²⁹ 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 Feb. 4, 2022).

³⁰ 47 U.S.C. § 227(b)(1)(A).

³¹ *Facebook, Inc. v. Duguid*, 141 S. Ct. 193 (2020).

³² Amanda Shanor, SCOTUSblog, *Supreme Court Sides with Facebook in Narrowing the Federal Robocall Ban* (Apr. 1, 2021), <https://www.scotusblog.com/2021/04/supreme-court-sides-with-facebook-in-narrowing-the-federal-robocall-ban/> (last visited Feb. 4, 2022).

³³ 47 U.S.C. § 227 (c)(5).

³⁴ 47 U.S.C. § 227 (f). *See*, 15 U.S.C. § 6101.

³⁵ Federal Communications Commission, *Stop Unwanted Calls and Texts* (Mar. 2, 2021), <https://www.fcc.gov/consumers/guides/stop-unwanted-calls-and-texts> (last visited Feb. 4, 2022).

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

³⁷ 47 U.S.C. § 227 (e).

³⁸ *See*, 47 CFR § 64.1604.

³⁹ Federal Communications Commission, *The FCC's Push to Combat Robocalls & Spoofing*, <https://www.fcc.gov/spoofed-robocalls> (last visited Feb. 4, 2022). *See also*, Federal Communications Commission, *FCC Fines Massive Neighbor Spoofing*

To protect individual privacy concerns, an individual caller may request to hide his or her phone number when making a call.⁴⁰

III. Effect of Proposed Changes:

The bill amends the definition of “prior express written consent,” in s. 501.059(1)(g), F.S., to add transmission of a text message to the methods of telephonic solicitation requiring prior written authorization from the called party.

The bill narrows the scope of telephonic sales calls requiring the called party’s prior express written consent to those that select *and* dial telephone numbers, rather than those that select *or* dial telephone numbers.

The bill amends the term “unsolicited telephonic sales call,” s. 501.059(1)(k), F.S., to exclude telephonic sales calls:

- Made within 120 days after an express request of the called party, rather than “in response to the request;” and
- Limited to polling or soliciting the expression of ideas, opinions, or votes, including polling or soliciting by text message.

The bill allows the use of an automated telephone dialing system with live messages or text messages if made solely in response to an inquiry initiated by the called party. The bill limits this to two calls or messages in response to each inquiry.

The bill replaces the term “person called” with the term “called party,” consistent with existing law.

The bill clarifies that the award of attorney fees and costs to a prevailing party from a non-prevailing party in a civil case must result from a violation of s. 501.059, F.S., instead of a transaction involving a violation.

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.

The bill takes effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

Robocall Operation \$120 Million (May 10, 2018) <https://www.fcc.gov/document/fcc-fines-massive-neighbor-spoofing-robocall-operation-120-million> (last visited Feb. 4, 2022).

⁴⁰ 47 CFR § 64.1601.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

Retroactive Application of Law and Expression of Remedial Nature

Under Florida law, statutes are presumed to operate prospectively, not retroactively. Statutes generally apply only to actions that occur on or after the effective date of the legislation, not before the legislation becomes effective.

The Florida Supreme Court has noted that, under the rules of statutory construction, if statutes are to operate retroactively, the Legislature must clearly express that intent for the statute to be valid.⁴¹ When expressly retroactive statutes have been litigated and appealed, the courts have been asked to determine whether the statute is remedial in nature so as to require application to cases that were pending at the time the statute went into effect. Generally, “the presumption applied to procedural and remedial statutes is that they are to apply to pending cases.”⁴² Conversely, a law that affects substantive rights by creating substantive new rights or imposing new legal burdens is presumed to apply prospectively.⁴³

In a recent Florida Supreme Court case, the Court acknowledged that “[t]he distinction between substantive and procedural (remedial) law is neither simple nor certain.”⁴⁴ The Court further acknowledged that their previous pronouncements regarding the retroactivity of procedural laws have been less than precise and have been unclear.⁴⁵

Courts, however, have invalidated the retroactive application of a statute if the statute impairs vested rights, creates new obligations, or imposes new penalties.⁴⁶ Still, in other cases, the courts have permitted statutes to be applied retroactively if they do not create

⁴¹ *Walker & LaBerge, Inc., v. Halligan*, 344 So. 2d 239 (Fla. 1977). *See also, Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So.2d 1352 (Fla. 1994). “Just because the Legislature labels something as being remedial, however, does not make it so.” *See also, State v. Smith*, 547 So2d 613 (Fla. 1989); *State, Dep’t of Transp. v. Knowles*, 402 So.2d 1155 (Fla. 1981).

⁴² *Love v. State*, 286 So. 3d 177, 181 (Fla. 2019), *citing Arrow Air, Inc. v. Walsh*, 645 So.2d 422, 424 (Fla. 1994).

⁴³ *Arrow Air, Inc.*, at 424.

⁴⁴ *Love* at 183, *quoting Caple v. Tuttle’s Design-Build, Inc.*, 753 So. 2d 49, 53 (Fa. 2000).

⁴⁵ *Love* at 184.

⁴⁶ *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So. 2d 1210 (Fla 2004).

new, or take away, vested rights, but only operate to further a remedy or confirm rights that already exist.⁴⁷

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The bill amends s. 501.059(8)(e), F.S., which permits the use of “automated telephone dialing system with live messages or text messages” in specific instances. It is unclear how the bill will affect similar terminology found in s. 501.059(8)(a), F.S., which requires prior express written consent to make a telephonic sales call using an “automated system for the selection and dialing of telephone numbers or the playing of a recorded message”

The bill clarifies that prior express written consent means an agreement that authorizes the person to place a telephonic sales call using an automated system for transmissions of *text messages*, in addition to dialing telephone numbers, playing a recorded message, or transmitting prerecorded voicemails. However, when the same reference to an automated system is used elsewhere in s. 501.059, F.S., it does not make the same clarification.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 501.059 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

CS by Commerce and Tourism on January 24, 2022:

- Adds clarifying language that “prior express written consent” is an agreement that authorizes a telephonic sales call, which includes text messages;

⁴⁷ *Ziccardi v. Strother*, 570 So. 2d 1319 (Fla. 1990).

- Exempts from the definition of an “unsolicited telephonic sales call” those calls and text messages that are made to poll or solicit the expression of ideas, opinions, or votes;
- Re-instates the 2021 requirement that a consumer’s prior express written consent is needed to place a telephonic sales call that uses an automated system for the selection and dialing of telephone numbers, or playing of a recorded message;
- Expresses that s. 501.059(8), F.S.’s prohibited actions do not prohibit the use of an automated telephone dialing system with live messages or text messages if the call or message is made solely in response to an inquiry initiated by the called party. However, only two calls or messages are permitted in response to each inquiry;
- Narrows the provision that permits an award of attorney fees and costs from those civil actions “resulting from a transaction involving a violation of this section” to those “resulting from a violation of this section;” and
- Makes the proposed language retroactive to July 1, 2021, and specifically applies to “any proceeding pending or commenced on or after July 1, 2021.”

B. Amendments:

None.