

**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.)

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

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BILL: SB 1308

INTRODUCER: Senators Yarborough and Rodriguez

SUBJECT: Telephone Solicitation

DATE: April 3, 2023

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Renner	McKay	CM	<b>Pre-meeting</b>
2.			RI	
3.			RC	

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**I. Summary:**

SB 1308 amends s. 501.059, F.S., relating to the Florida Telemarketing Act to:

- Define an automatic telephone dialing system as “equipment using a random or sequential number generator that stores or produces telephone numbers, and dials the stored or produced telephone numbers.”
- Revise the prohibition on telephonic sales calls that use an automated system to specifically include unsolicited calls using an automatic telephone dialing system for the selection and dialing of telephone numbers.
- Clarify what constitutes clear and conspicuous disclosure requirements.
- Clarify that a “signature” includes an affirmative act that demonstrates express consent, such as the checking of a box indicating consent.
- Authorize certain acts to qualify as a signature used to provide prior express written consent by a consumer.

The bill provides that the changes to the statutory sections are remedial in nature and apply retroactively to July 1, 2021, and to any proceeding pending or commenced on or after July 1, 2021.

The bill does not have a fiscal impact on state or local governments.

The bill takes effect July 1, 2023.

**II. Present Situation:**

**Florida Telemarketing Act**

Chapter 501, part IV, F.S., 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 the 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 any parent or affiliate entities 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;<sup>7</sup> and
- A \$1,500 licensing fee.<sup>8</sup>

In Florida, it is unlawful for telemarketers to:<sup>9</sup>

- 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;
- Accept novelty payments;<sup>10</sup>
- Employ or be affiliated with an unlicensed salesperson;
- Be employed by or affiliated with an unlicensed commercial telephone seller; and
- Operate without a license.

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

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

<sup>3</sup> Section 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 DACS for payment on findings of fraud, misrepresentation, breach of contract, or other violation by the applicant.

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

<sup>5</sup> Section 501.605(2)(k), F.S.

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

<sup>7</sup> Section 501.605(2)(k), F.S.

<sup>8</sup> Section 501.605(5)(b), F.S.

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

<sup>10</sup> Section 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.

## *Florida Do Not Call Act*

### *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>11</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. The DACS maintains the DNC list. It is free to register and a registered number remains on the DNC list indefinitely.<sup>12</sup>

An "unsolicited telephonic sales call" does not include calls 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>13</sup>

Telephone solicitors<sup>14</sup> are prohibited from making telephonic sales calls<sup>15</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>16</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 non-profit organizations 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>17</sup>

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<sup>11</sup> See s. 501.059, F.S.

<sup>12</sup> Dept. of Agriculture and Consumer Services, *Florida Do Not Call*, available at <https://www.fdacs.gov/Consumer-Resources/Florida-Do-Not-Call> (last visited April 3, 2023).

<sup>13</sup> Section 501.059(1)(k), F.S.

<sup>14</sup> Section 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>15</sup> Section 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>16</sup> Section 501.059(1)(j), F.S.

<sup>17</sup> Section 501.059(5), F.S.

When a telephone number is made available through a caller ID service during a telephonic sales call, the solicitor must ensure that the number is capable of receiving phone calls, and that the dialing of the number will connect the call recipient with the telephone solicitor or the seller on behalf of which the phone call was placed.<sup>18</sup>

Anyone who receives an unsolicited sales call can report the call to the DACS using the online Do Not Call Complaint Form.<sup>19</sup>

#### *Do Not Call - Consent*

In 2021, the Florida Legislature updated s. 501.059, F.S., to further address unsolicited phone calls.<sup>20</sup> The law governing telephone solicitations also prohibits automated telephonic sales calls without the prior express written consent of the called party. Specifically, the law provides that:

A person may not make or knowingly allow a telephonic sales call to be made if such call involves 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 without the prior express written consent of the called party.<sup>21</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>22</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>23</sup>

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<sup>18</sup> Section 501.059(8)(b), F.S.

<sup>19</sup> Dept. of Agriculture and Consumer Services, *Florida Do Not Call*, available at <https://www.fdacs.gov/Consumer-Resources/Florida-Do-Not-Call> (last visited April 3, 2023).

<sup>20</sup> Chapter 2021-185, s. 1, Laws of Fla.

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

<sup>22</sup> Section 501.059(1)(g), F.S.

<sup>23</sup> Section 501.059(1)(g)4., F.S.

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>24</sup> One entity reports that this 2021 change to the FTA has resulted in at least 100 class action complaints against those who make telephone sales calls since July 2021.<sup>25</sup>

### ***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 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.<sup>26</sup>

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.<sup>27</sup>

### **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. An automatic telephone dialing system is defined 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.”<sup>28</sup> The rules apply to common carriers as well as to other marketers. In 1992, the Federal Communications Commission (FCC) 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>29</sup>

In July 2015, the FCC established rules indicating that telephone carriers can block unwanted calls at the request of consumers.<sup>30</sup> Currently there are a number of call-blocking applications that provide some relief from unwanted calls and spam calls.<sup>31</sup>

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<sup>24</sup> Section 501.059(8)(d), F.S.

<sup>25</sup> Eric Troutman, TCPAWorld, *The FTSA Claims are Still Pouring In: Florida Mini TCPA Continues to Generate Huge Volume of Litigation* (Dec. 13, 2021), available at <https://tcpaworld.com/2021/12/13/the-fts-a-claims-are-still-pouring-in-florida-mini-tcpa-continues-to-generate-huge-volume-of-litigation/> (last visited April 3, 2023).

<sup>26</sup> Section 501.059(9), F.S.

<sup>27</sup> Sections 501.059(10)-(11), F.S.

<sup>28</sup> 47 U.S.C., s. 227(a)(1)

<sup>29</sup> Federal Communications Commission, *FCC Actions on Robocalls, Telemarketing*, available at <https://www.fcc.gov/general/telemarketing-and-robocalls> (last visited April 3, 2023).

<sup>30</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). See Federal Communications Commission, *TCPA Omnibus Declaratory Ruling and Order*, available at <https://www.fcc.gov/document/tcpa-omnibus-declaratory-ruling-and-order> (last visited April 3, 2023).

<sup>31</sup> CTIA, The Wireless Industry, *How to Stop Robocalls*, available at <https://www.ctia.org/consumer-resources/how-to-stop-robocalls/> (last visited April 3, 2023).

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>32</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>33</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. Moreover, 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>34</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>35</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>36</sup>

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>37</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>38</sup> The

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<sup>32</sup> 32 FCC Rcd 9706 (11). See Federal Communications Commission, *FCC Adopts Rules to Help Block Illegal Robocalls*, available at <https://www.fcc.gov/document/fcc-adopts-rules-help-block-illegal-robocalls-0#:~:text=New%20Rules%20Authorize%20Call%20Blocking%20of%20Certain%20Types,FCC%20Record%20Citation%3A%2032%20FCC%20Rcd%209706%20%2811%29> (last visited April 3, 2023).

<sup>33</sup> Federal Communications Commission, *Stop Unwanted Calls and Texts*, available at <https://www.fcc.gov/consumers/guides/stop-unwanted-calls-and-texts> (last visited April 3, 2023).

<sup>34</sup> 47 C.F.R. s. 64.1601.

<sup>35</sup> Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116-105, 133 Stat. 3274 (2019).

<sup>36</sup> USTelecom The Broadband Association, *FCC Names USTelecom’s Industry Traceback Group as Official Robocall Traceback Consortium*, available at <https://www.ustelecom.org/fcc-names-ustelecoms-industry-traceback-group-as-official-robocall-traceback-consortium/> (last visited April 3, 2023).

<sup>37</sup> InsideArm, *The Latest Developments in the World of Call Delivery*, available at <https://www.insidearm.com/news/00047073-latest-developments-world-call-delivery/> (last visited April 3, 2022).

<sup>38</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, available at <https://docs.fcc.gov/public/attachments/DOC-368957A2.pdf> (last visited April 3, 2023).

ITG encouraged the FCC to bring aggressive enforcement against robocallers and voice service providers that routinely refuse to participate in the traceback process.<sup>39</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>40</sup>

The TRACED Act requires the FCC to issue an annual public notice seeking applicants to serve as the registered consortium.<sup>41</sup> On August 22, 2022, the FCC selected the Industry Traceback Group (ITG) to continue to serve as the registered consortium.<sup>42</sup>

On September 12, 2022, the FCC announced the signing of an updated Memorandum of Understanding (MOU) with the Body of European Regulators for Electronic Communications (BEREC) that expands their current partnership, with a new focus on combatting unwanted robocalls and the promotion of 5G, 6G and beyond. One of the major topics of mutual interest includes robocall and other automated calls’ mitigation and prevention.<sup>43</sup>

### **National Do Not Call Registry**

The Federal Trade Commission (FTC), in concert with the FCC, administers the National Do Not Call Registry.<sup>44</sup> Telephone solicitors may not contact a consumer who participates in the National Do Not Call Registry, 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.<sup>45</sup>

### **Constitutionality of Do Not Call Registries**

Do Not Call registries have been subject to numerous state and federal lawsuits challenging their constitutionality. 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 that “the do-not-call registry prohibits only telemarketing calls

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<sup>39</sup> InsideArm, *The Latest Developments in the World of Call Delivery*, available at <https://www.insidearm.com/news/00047073-latest-developments-world-call-delivery/> (last visited April 3, 2022).

<sup>40</sup> Federal Communications Commission, *Report and Order* (Aug. 22, 2022), available at <https://tcpaworld.com/wp-content/uploads/2022/08/RENEWAL-OF-UST-TRACEBACK-GROUP.pdf> (last visited April 3, 2023).

<sup>41</sup> Federal Communications Commission, Public Notice, *Enforcement Bureau Requests Letters of Intent to Become the Registered Industry Consortium for Tracebacks*, available at <https://www.fcc.gov/document/fcc-requests-letters-intent-robocall-tracebacks-consortium> (last visited April 3, 2023).

<sup>42</sup> Federal Communications Commission, *Report and Order DA 21-1047* (Aug. 25, 2021), available at <https://www.fcc.gov/document/fcc-retains-industry-rollback-group-robocall-consortium> (last visited April 3, 2022).

<sup>43</sup> Federal Communications Commission, Press Release, *FCC RENEWS AND EXPANDS PARTNERSHIP WITH EUROPEAN COUNTERPARTS*, Sep. 12, 2022).

<sup>44</sup> Federal Communications Commission, *Stop Unwanted Calls and Texts*, available at <https://www.fcc.gov/consumers/guides/stop-unwanted-robocalls-and-texts> (last visited April 3, 2023).

<sup>45</sup> 47 U.S.C. § 227(a)(4); *See also*, 47 C.F.R. § 64.1200 (2012).

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 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>46</sup>

Claims of preemption have also been unsuccessful. The TCPA’s non-preemption clause,<sup>47</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>48</sup>

The TCPA is silent on a state’s ability to place stricter regulations than the TCPA requires for interstate calls.<sup>49</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>50</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>51</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>52</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>53</sup>

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<sup>46</sup> *Mainstream Marketing Services Inc v. Federal Trade Commission*, 358 F.3d 1228 (10th Cir. 2004).

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

<sup>48</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, available at <https://www.naag.org/attorney-general-journal/do-not-call-the-history-of-do-not-call-and-how-telemarketing-has-evolved/> (last visited April 3, 2023).

<sup>49</sup> 47 U.S.C. s. 227 (f)(1).

<sup>50</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>51</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, available at [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 April 3, 2023).

<sup>52</sup> Business Insider, *It’s Surprisingly Easy for a Hacker to Call Anyone From Your Personal Phone Number* (March 1, 2016), available at <http://www.businessinsider.com/phone-number-spoofing-2016-2> (last visited April 3, 2023).

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



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>54</sup>

In 2008, Florida passed its own anti-spoofing legislation, The Florida Caller ID Anti-Spoofing Act (2008).<sup>55</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.

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>56</sup> Similarly, in 2011, a federal court in Mississippi struck down Mississippi's anti-spoofing law, which was substantially similar to Florida's.<sup>57</sup>

## Spam Robocalls

US consumers received over 50.3 billion robocalls in 2022, only slightly less than the 50.5 billion total robocalls received in 2021 despite widespread enforcement efforts by government regulators and state officials.<sup>58</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>59</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.

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<sup>54</sup> FCC, *Caller ID Spoofing*, <https://www.fcc.gov/consumers/guides/spoofing-and-caller-id> (last visited Mar. 21, 2023).

<sup>55</sup> Section 817.487, F.S. (2008).

<sup>56</sup> *TelTech Systems, Inc. v. McCollum*, No. 08-61664-CIV-MARTINEZ-BROWN (S.D. Fla. Filed Oct. 16, 2008).

<sup>57</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>58</sup> PR Newswire, *Robocalls Top 50.3 Billion in 2022, Matching 2021 Call Volumes Despite Enforcement Efforts*, available at <https://www.prnewswire.com/news-releases/robocalls-top-50-3-billion-in-2022--matching-2021-call-volumes-despite-enforcement-efforts-301714297.html#:~:text=IRVINE%2C%20Calif.%2C%20Jan.,government%20regulators%20and%20state%20officials> (last visited April 3, 2023).

<sup>59</sup> AARP, *Robocalls*, available at [https://www.aarp.org/money/scams-fraud/info-2019/robocalls.html?CMP=KNC-DSO-Adobe-Google-FRD-Ongoing-Robocalls-NonBrand-Exact-Robocalls&gclid=EAIaIQobChMlvmq\\_4Sr7wIVFYvICh2RAwjqEAAYAiAAEgJD4vD\\_BwE&gclsrc=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=EAIaIQobChMlvmq_4Sr7wIVFYvICh2RAwjqEAAYAiAAEgJD4vD_BwE&gclsrc=aw.ds) (last visited April 3, 2022).

Advances in technology have enabled unrelenting robocalls from untraceable origins. As a result, it is 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>60</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>61</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>62</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.
- 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>63</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>64</sup>

Prior express written consent is required for calls or texts to cell phones that introduce an advertisement,<sup>65</sup> or constitute "telemarketing"<sup>66</sup> and are sent using an ATDS. The TCPA's

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<sup>60</sup> *Id.*

<sup>61</sup> 47 U.S.C. s. 227(b)(1)(A)(iii).

<sup>62</sup> The National Law Review, *Consent and Revocation Under the TCPA*, available at <https://www.natlawreview.com/print/article/consent-and-revocation-under-tcpa> (last visited April 3, 2023).

<sup>63</sup> *Id.*

<sup>64</sup> Federal Communications Commission, Rules & Regulations Implementing the TCP Act of 1991 et al., 30 FCC Rcd at 7991-92.

<sup>65</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>66</sup> 47 C.F.R. s. 64.1200(f)(13).

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>67</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>68</sup>

In 2017, the federal Second Circuit Court of Appeals held that a consumer may not unilaterally revoke consent in a bargained-for, bilateral contract.<sup>69</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 Appeals, where consumers retained their ability to revoke consent because it was given in credit applications, rather than as part of a bilateral contract.<sup>70</sup>

In 2018, a United States District Court in Florida also held that consent provided by contract cannot be unilaterally revoked.<sup>71</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>72</sup>

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>73</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>74</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

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<sup>67</sup> The National Law Review, *supra* note 62.

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

<sup>69</sup> *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 53 (2d Cir. 2017).

<sup>70</sup> The National Law Review, *supra* note 62.

<sup>71</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>72</sup> The National Law Review, *supra* note 62.

<sup>73</sup> *Ammons v. Ally Fin., Inc.*, Case No. 3:17-cv-00505, 2018 WL 3134619, at \*15 (M.D. Tenn. June 27, 2018).

<sup>74</sup> *Few v. Receivables Performance Mgmt.*, Case No. 1:17-CV-2038-KOB, 2018 WL 5923765 at \*1 (N.D. Ala. Nov. 13, 2018).

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>75</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>76</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>77</sup>

The TCPA includes a private right of action.<sup>78</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>79</sup>

Specifically, related to consent, the Florida telephone solicitation law:<sup>80</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.

### III. Effect of Proposed Changes:

**Section 1** amends s. 501.059, F.S., to clarify restrictions on unwanted telephone solicitation practices. The bill defines an "automatic telephone dialing system" as equipment using a random or sequential number generator that stores or produces telephone numbers **and** dials the stored or produced telephone numbers. This more closely aligns the definition with that of the federal definition. The bill prohibits unsolicited telephonic sales calls using an automatic telephone dialing 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 without the prior express written consent of the called party.

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<sup>75</sup> *Facebook, Inc., Petitioner vs. Noah Duguid, et al.*, 141 S. Ct. 1163, 1167 (2021).

<sup>76</sup> *Id.*

<sup>77</sup> FCC, *supra* note 29.

<sup>78</sup> 47 U.S.C. s. 227(b)(3).

<sup>79</sup> *Id.* at s. 227(b)(3)(B)-(C).

<sup>80</sup> Section 501.059(8), F.S.

The bill clarifies notice requirements prior to obtaining consent for telephone calls, text messages, or the transmission of prerecorded voicemails.

The bill revises the definition of “prior express written consent” to:

- Replace references to “automated system” with “automatic telephone dialing system.”
- Replace references to “signatory” with “called party.”

The bill revises what qualifies as a “signature” for purposes of consenting to communications to include an act that demonstrates express consent, such as checking a box indicating consent or responding affirmatively to receiving text messages, to an advertising campaign, or to an e-mail solicitation.

**Section 2** states that the changes made therein are remedial in nature and apply retroactively to any proceedings pending or commenced on or after July 1, 2021.

**Section 3** provides an effective date of July 1, 2023.

#### **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:**

#### **Retroactive Application of Law and Expression of Remedial Nature**

Section 2 specifies that it is remedial in nature and, if enacted, will apply retroactively to all proceedings pending or commenced as of July 1, 2021.

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.<sup>81</sup> When expressly retroactive statutes have been litigated and

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<sup>81</sup> *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).

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.”<sup>82</sup> Conversely, a law that affects substantive rights by creating substantive new rights or imposing new legal burdens is presumed to apply prospectively.<sup>83</sup>

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.”<sup>84</sup> The Court further acknowledged that their previous pronouncements regarding the retroactivity of procedural laws have been less than precise and have been unclear.<sup>85</sup>

Courts, however, have invalidated the retroactive application of a statute if the statute impairs vested rights, creates new obligations, or imposes new penalties.<sup>86</sup> Still, in other cases, the courts have permitted statutes to be applied retroactively if they do not create new, or take away, vested rights, but only operate to further a remedy or confirm rights that already exist.<sup>87</sup>

## V. Fiscal Impact Statement:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

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

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

### C. Government Sector Impact:

None.

## VI. Technical Deficiencies:

None.

<sup>82</sup> *Love v. State*, 286 So. 3d 177, 181 (Fla. 2019), citing *Arrow Air, Inc. v. Walsh*, 645 So.2d 422, 424 (Fla. 1994).

<sup>83</sup> *Arrow Air, Inc.*, at 424.

<sup>84</sup> *Love* at 183, quoting *Caple v. Tuttle’s Design-Build, Inc.*, 753 So. 2d 49, 53 (Fa. 2000).

<sup>85</sup> *Love* at 184.

<sup>86</sup> *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So. 2d 1210 (Fla 2004).

<sup>87</sup> *Ziccardi v. Strother*, 570 So. 2d 1319 (Fla. 1990).

**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 Changes:**

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

None.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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