

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 Rules

BILL: CS/CS/SB 568

INTRODUCER: Rules Committee, Commerce and Tourism Committee, and Senator Young

SUBJECT: Telephone Solicitation

DATE: January 11, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Harmsen</u>	<u>McKay</u>	<u>CM</u>	Fav/CS
2.	<u>Harmsen</u>	<u>Phelps</u>	<u>RC</u>	Fav/CS

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 568 expands the Florida Do Not Call Act to:

- Prohibit the unsolicited ringless delivery of voicemail messages into consumers' voicemail boxes, in addition to phone calls and text messages; and
- Require a telephone sales call solicitor to provide on the call recipient's caller ID, a telephone number that is capable of receiving calls and that can connect the call recipient to the telephone solicitor.

The bill also increases permitted penalties for violations of the Do Not Call Act to up to \$10,000 for violations prosecuted administratively, and \$10,000 or more for those prosecuted civilly.

II. Present Situation:

During 2017, the Federal Communications Commission (FCC) received 155,282 consumer complaints about robocalls, including federal Do Not Call List violations, call spoofing, and solicitations made by an automated recording.¹ One organization estimates that in December 2017, 2.8 billion robocalls were made to U.S. consumers.^{2, 3}

¹ Federal Communications Commission, *Consumer Complaints Data- Unwanted Calls*, <https://opendata.fcc.gov/Consumer/Consumer-Complaints-Data-Unwanted-Calls/vakf-fz8e> (last visited Jan. 11, 2018).

² YouMail, *Robocall Index*, <https://robocallindex.com/> (last visited Jan. 11, 2018).

³ A "robocall" is an unsolicited sales call, fax, or text message. A robocall can manifest as a prerecorded message played to a consumer once he or she accepts a call; a phone call made via a "spoofed" or falsified phone number, usually intended to trick the consumer into accepting the call; or an autodialed sales solicitation.

One form of telephone marketing is direct-to-voicemail transmissions, which deposit a message into consumers' voicemail boxes without ringing as a traditional phone call would.⁴ Current law does not expressly address direct-to-voicemail transmissions.

Call spoofing is the provision of a false phone number on a call recipient's caller ID service, generally done to trick the recipient into picking up the phone call.⁵ Legitimate uses of call spoofing include:⁶

- Hiding a professional's (e.g., doctor's) home phone number when he or she returns client calls;
- Law enforcement, including attempting to find those who are delinquent on child support payments;
- Allowing privacy to whistleblowers who call to make disclosures; and
- Providing protection to domestic violence shelters and victims.

Illegitimate uses can be as extreme as causing a phone call to an emergency line that appears to be from another's home, resulting in a storming of that home by emergency personnel.⁷ The most common use, however, is to induce a consumer to pick up a phone call so that a sales pitch can be made.

Federal Law

Telephone Consumer Protection Act

The Telephone Consumer Protection Act of 1991 (TCPA) protects U.S. consumers from unwanted communications by restricting the use of autodialers,⁸ prerecorded sales messages, and unsolicited sales calls, text messages, or faxes.

The TCPA prohibits telephone solicitations that:⁹

- Are made to residences before 8 am, and after 9 pm;
- Fail to provide the consumer with the solicitor's identity, including his or her true phone number via caller identification service,¹⁰ and an opportunity to opt out of the call, and all future calls made by that solicitor;
- Send artificial or pre-recorded messages to a residential line; and

⁴ Kaitlyn Johnson and Anne Lockner, *I'm Unavailable to Take Your Advertisement Right Now: FCC Regulation of Direct-To-Voicemail Marketing* (Oct. 11, 2017) <https://www.jdsupra.com/legalnews/i-m-unavailable-to-take-your-32721/> (last visited Jan. 11, 2018).

⁵ Federal Communications Commission, *Spoofing and Caller ID*, (Sept. 26, 2017) <https://www.fcc.gov/consumers/guides/spoofing-and-caller-id> (last visited Jan. 11, 2018).

⁶ Alicia Hatfield, *Phoney Business: Successful Caller ID Spoofing Regulation Requires More Than the Truth in Caller ID Act of 2009*, 19 J. Law & Policy 827, 833 (2011).

⁷ This practice is also known as "Swatting." *Id* at 827.

⁸ An autodialer is equipment that has the capacity to produce or store phone numbers using a random or sequential number generator, and to call those phone numbers. 47 U.S.C. § 227(a)(1).

⁹ 47 U.S.C. § 227(b). *See also*, 47 C.F.R. § 64.1200(8)(c) (2012).

¹⁰ 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 Jan. 11, 2018).

- Use an autodialer, artificial message, or pre-recorded messages to a cellular, emergency, or hospital room line.

The Federal Trade Commission (FTC), in concert with the FCC, administers the National Do Not Call Program as part of the TCPA's requirements.¹¹ Telephone solicitors may not contact a consumer who participates in the National Do Not Call Program, unless the calls are:¹²

- 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.

The TCPA grants a private right of action to pursue actual monetary damages or up to \$500 per violation.¹³ State attorneys general and the FCC also have jurisdiction to investigate and file civil claims based on violations of the TCPA.¹⁴

In 2015, the FCC confirmed that the TCPA's protections extend to text messaging in the same manner that they apply to telephone calls.¹⁵ In March 2017, a company that provides direct-to-voicemail transmissions submitted a request for waiver under federal law to clarify the legality of the practice, but withdrew its request before the FCC made any determination.¹⁶ Members of a class filed suit against a Florida car dealership, based on the dealership's alleged violation of the TCPA for its use of direct-to-voicemail transmissions.¹⁷ However, the case was settled before the Court made a final determination.

Truth in Caller ID Act

The Truth in Caller ID Act of 2009 protects consumers by making it unlawful for any person to cause to be transmitted, or to knowingly transmit misleading or inaccurate caller ID information with the intent to defraud, cause harm, or wrongfully obtain anything of value.¹⁸ The FCC investigates and prosecutes violations of the act under its rules.¹⁹ The FCC recently proposed fines of \$82 million and \$120 million to settle investigations against two call spoofers that allegedly made upwards of \$21 million telemarketing spoofed calls.²⁰

¹¹ Federal Communications Commission, *Stop Unwanted Calls and Texts—The National Do Not Call List*, (Dec. 5, 2017) <https://www.fcc.gov/consumers/guides/stop-unwanted-calls-and-texts> (last visited Jan. 11, 2018).

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

¹³ 47 U.S.C. § 227 (c)(5).

¹⁴ 47 U.S.C. § 227 (f).

¹⁵ Federal Communications Commission, *FCC Strengthens Consumer Protections Against Unwanted Calls and Texts* (Jun. 18, 2015) https://apps.fcc.gov/edocs_public/attachmatch/DOC-333993A1.pdf (last visited Jan. 11, 2018).

¹⁶ All About the Message, LLC Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Mar. 31, 2017) *available at* <https://ecfsapi.fcc.gov/file/104010829816078/Petition%20for%20Declaratory%20Ruling%20of%20All%20About%20the%20Message%20LLC.pdf> (last visited Jan. 11, 2018).

¹⁷ *Tom Mahoney v. TT of Pine Ridge, Inc.*, No. 17-80029-CV-DMM (S.D. Fla. Filed Jan. 9, 2017). *See also*, <https://www.nntcpasettlement.com/> (last visited Jan. 11, 2018).

¹⁸ 47 U.S.C. § 227 (e),

¹⁹ *See*, 47 C.F.R. § 64.

²⁰ Federal Communications Commission, *FCC Proposes \$82 Million Fine for Spoofed Robocalls* (Aug 3, 2017) <https://www.fcc.gov/document/fcc-proposes-82-million-fine-spoofed-telemarketing-robocalls> (last visited Jan. 11, 2018); *FCC Proposes \$120 Million Fine of Massive Caller ID Spoofing Operation* (June 22, 2017)

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

Florida Law

The Department of Agriculture and Consumer Services (Department) administers the Florida Do Not Call Act (also called the “Do Not Call List”), which prohibits unsolicited phone calls and text messages.²² Residents who do not wish to receive sales calls may request to have their residential, mobile, or paging device telephone number included on the Department’s list.²³

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

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

Section 501.059(5), F.S., also prohibits a telephone solicitor from calling, text messaging, or using automated telephone equipment to contact any consumer, whether or not he or she is part of the Do Not Call List, who has previously communicated to the solicitor that he or she does not wish to receive a telephone call that is:

- Made by or on behalf of the seller who offers goods or services; or
- Made on behalf of a charity that is soliciting a charitable contribution.

A telephone solicitor who violates the provisions of the Do Not Call Act 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.²⁴

III. Effect of Proposed Changes:

Section 1 expands the definition of a “telephonic sales call” to include a voicemail transmission, in addition to a telephone call and text message for purposes of the Do Not Call Program.

The bill makes conforming changes throughout the Florida Do Not Call Act to prohibit:

- Direct-to-voicemail transmissions to any consumer’s residential, mobile, or telephonic paging device, if the consumer previously requested to opt-out of such calls by inclusion on the Do Not Call List; and

<https://www.fcc.gov/document/fcc-proposes-120-million-fine-massive-caller-id-spoofing-operation> (last visited Jan. 11, 2018).

²¹ 47 C.F.R. § 64.1601

²² See, s. 501.059, F.S.. Florida Department of Agriculture and Consumer Services, *Florida Do Not Call*, <http://www.freshfromflorida.com/Consumer-Resources/Florida-Do-Not-Call> (last visited Jan. 11, 2018).

²³ Section 501.059(3)-(4), F.S.

²⁴ Section 501.059(9), F.S.

- Direct-to-voicemail transmissions to any consumer who has previously communicated that he or she does not wish to receive further sales calls made on behalf of the seller or charitable organization.

The bill also requires any telephone number reflected on a call recipient's caller ID service as the result of a telephone sales call to be capable of receiving phone calls, and able to connect the call recipient with the telephone solicitor or the seller on behalf of which the phone call was made.

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

Section 2 of the bill provides an effective date of July 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The Florida Caller ID Anti-Spoofing Act (2008)²⁵ prohibited persons 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.

The Commerce Clause of the U.S. Constitution bars state laws that control conduct outside the state's boundaries, regardless of whether the Legislature intended the law's extraterritorial reach.²⁶ A U.S. District Court found that Florida's Caller ID Anti-Spoofing Act (2008) violated the Commerce Clause because it had the effect of controlling spoofing practices that took place entirely outside of the state, wherein individuals or companies could not ascertain what telephone numbers are subject to

²⁵ Section 817.487, F.S. (2008).

²⁶ *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989).

Florida law, and would have to subject all of their call practices to Florida law to avoid liability.²⁷

In 2011, a Mississippi court struck its anti-spoofing law, which was substantially similar to Florida's.²⁸

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Companies that provide voicemail transmission services may see a reduction in revenue.

C. Government Sector Impact:

The Department may see an increase in prosecutions for violations of the Florida Do Not Call Program, but this will not increase the Department's expenditures.²⁹

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

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

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Rules Committee on January 11, 2018:

- Clarifies that a telephone solicitor is responsible for any incorrect phone number made available to a subscriber on his or her caller identification service.

²⁷ *TelTech Systems, Inc. v. McCollum*, No. 08-61664-CIV-MARTINEZ-BROWN (S.D. Fla. Filed Oct. 16, 2008).

²⁸ *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).

²⁹ Florida Department of Agriculture and Consumer Services, *SB 568 Agency Bill Analysis*, (Oct. 26, 2017) (on file with the Senate Committee on Commerce and Tourism).

CS by Commerce and Tourism Committee on November 13, 2017:

- Requires individuals who make telephone sales calls to provide a telephone number that is capable of receiving phone calls, and which a telephone sales call recipient may use to dial the sales call initiator back;
- Increases permitted penalties from up to \$1,000 for each administrative violations and up to \$10,000 for each civil violations to up to \$10,000 and \$10,000 or more, respectively; and

Makes a technical amendment to clarify that a voicemail transmission is any technology that delivers a voice message directly to a voicemail application, service, or device.

B. Amendments:

None.