

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/CS/SB 1408

SPONSOR: Agriculture Committee, Commerce, Economic Opportunities, and Consumer Services Committee, and Senators Garcia and Lynn

SUBJECT: Telephone Solicitation

DATE: March 30, 2004 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Kruse</u>	<u>Maclure</u>	<u>CM</u>	<u>Fav/CS</u>
2.	<u>Weidenbenner</u>	<u>Poole</u>	<u>AG</u>	<u>Fav/CS</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
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6.	_____	_____	_____	_____

## I. Summary:

The Committee Substitute for committee substitute for Senate Bill 1408 requires the Department of Agriculture and Consumer Services (DACS) to prepare and submit a report by December 1, 2004, that evaluates the operation and assesses the continued viability of the state's "no sales solicitation calls" listing, established under section 501.059, Florida Statutes. The Committee Substitute for committee substitute requires DACS to, among other things, report on data such as the number of consumer subscriptions to the state's listing during the period of November 1, 2003, to November 1, 2004, and to evaluate the effect of the new federal Do-Not-Call program on the state's listing. This part of the Committee Substitute for committee substitute is based upon the recommendations of Interim Project Report 2004-117 by the Committee on Commerce, Economic Opportunities, and Consumer Services, which is a review of the effect of the federal Do-Not-Call program on Florida's "no sales solicitation calls" program and the state agencies that enforce it.

## II. Present Situation:

### *Florida's Do-Not-Call Registry*

Florida's Do-Not-Call (DNC) law, s. 501.059, F.S., established in 1990, provides Florida consumers who pay an initial \$10 per telephone number the opportunity to place a residential, mobile, or pager telephone number<sup>1</sup> on the "no sales solicitation calls" listing, administered by the Department of Agriculture and Consumer Services (DACS). The law prohibits most telephone solicitors from calling consumers who have registered their telephone numbers with

<sup>1</sup> Section 501.059(3)(a), F.S.

the state to sell items normally used for personal, family, or household purposes. An annual renewal subscription fee of \$5 per telephone number is required each year thereafter.<sup>2</sup> Consumers may subscribe up to five years in advance. Consumers may subscribe by calling a toll-free telephone number to request an application, or they may download the application from DACS' website and mail it to the department with the appropriate fee.

DACS updates the DNC listing quarterly. Except for certain groups, any telephone solicitor who offers for sale any consumer information which includes residential, mobile, or telephonic paging device telephone numbers must screen and exclude those numbers that appear on the "no sales solicitation calls" list.<sup>3</sup> The listing is published approximately four weeks prior to the beginning of each quarter and made available for sale to telephone solicitors, providing them an opportunity to update their current customer lists before the next quarter begins. The cost to purchase the listing is \$30 per area code per quarter, or \$100 for the statewide listing per quarter. DACS may provide the listing by e-mail delivery or printed text. As of Fall 2003, the listing contained 171,000 consumer telephone numbers, but, because of federal rule requirements (see "Federal Do-Not-Call Registry" discussion below), DACS downloaded 3.5 million Florida consumer telephone numbers that were registered with the federal program into the state's listing. The department has stated that the download of additional telephone numbers has created more staff work and taken up additional computer resources at DACS. The department also periodically uploads Florida's DNC listing to the federal DNC registry.

Florida's DNC law has several exemptions that allow certain telemarketing calls to consumers, including:

- Real estate agent calls in response to a "For Sale" sign;<sup>4</sup>
- Calls by newspaper publishers;<sup>5</sup>
- Calls in response to a consumer's request to be contacted;<sup>6</sup>
- Calls to enforce a contract or a debt;<sup>7</sup>
- Calls because of a previous business relationship with the consumer;<sup>8</sup>
- Calls by bona fide charitable organizations;
- Calls by a telephone surveyor; and
- Calls by political organizations/candidates.<sup>9</sup>

Consumer complaints regarding violations of the DNC listing are investigated by DACS. Consumers may file complaints with DACS by mail or by the Internet. Upon receipt, DACS verifies a consumer complaint first by confirming that the consumer was on the DNC listing at the time the call was made to the consumer. The name of the company is determined, if not provided by the consumer, which may require research and the issuance of subpoenas for records

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<sup>2</sup> *Id.*

<sup>3</sup> Section 501.059(4), F.S.

<sup>4</sup> *Id.*

<sup>5</sup> Section 501.059(1)(c)4., F.S.

<sup>6</sup> Section 501.059(1)(c)1., F.S.

<sup>7</sup> Section 501.059(1)(c)2., F.S.

<sup>8</sup> Section 501.059(1)(c)3., F.S.

<sup>9</sup> "Telephonic sales call," as defined in s. 501.059(1)(a), F.S., does not include calls by charities, telephone surveyors, or political organizations/candidates.

from the telephone company. The complaint is then forwarded to the business, along with a reply form. The company may use the reply form to explain why the call was allowed under an existing exemption or to indicate that the company has removed the consumer from its list. Once five or more verified complaints about a company are received by DACS within a six-month period, a warning letter is issued to the company. Upon receipt of five more verified complaints, a case is prepared and forwarded to DACS' legal office for an enforcement action. DACS may fine a company up to \$10,000 per violation.<sup>10</sup>

All funds collected by DACS for subscriptions, renewals, purchases of the listing, and fines are deposited in the department's General Inspection Trust Fund. In the past, the state's listing has generated enough revenue to fund the equivalent of nine FTE positions within DACS' Bureau of Compliance and the Bureau of Mediation and Enforcement. The listing has also generated enough revenue over expenditures to help fund other DACS programs. In fiscal year 2002-2003, the listing generated almost \$1.6 million in revenue.<sup>11</sup>

On its own initiative, DACS began an internal review of the operation of the state's listing. Due mainly to the implementation of the new federal program (see "Federal Do-Not-Call Registry" discussion below), DACS' preliminary estimates for fiscal year 2003-2004 are a reduction in initial subscription and renewal subscription fees from \$1.3 million to \$563,000, and a reduction in solicitor fees from \$230,510 to \$50,000.<sup>12</sup>

### ***Federal Do-Not-Call Registry***

In January 2003, the Federal Trade Commission (FTC) revised its Telemarketing Sales Rule (TSR) to create a national Do-Not-Call (DNC) registry that prohibits calls to a consumer registered on the registry.<sup>13</sup> On July 7, 2003, consumers were able to register with the FTC on the Internet and by telephone a residential or mobile telephone number.<sup>14</sup> As of October 21, 2003, 53.7 million consumers had signed up for the federal DNC registry. Registration to the federal DNC registry is free and is effective for five years.

The Federal Communications Commission (FCC) adopted the FTC registry as its national DNC registry in June 2003, and its rule<sup>15</sup> has the same implementation dates and also has closely aligned administrative procedures to the FTC's process. The FCC's jurisdiction includes entities not covered by the FTC and also includes intrastate and interstate calls.<sup>16</sup> Although the FCC rule does not generally preempt a state's DNC law, the FCC rule requires any state operating a DNC listing to download all telephone numbers related to that state from the federal DNC registry into that state's DNC listing.<sup>17</sup> However, both the FTC and FCC rules do preempt state exemptions

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<sup>10</sup> Section 501.059(8), F.S.

<sup>11</sup> Data provided by the Department of Agriculture and Consumer Services.

<sup>12</sup> *Id.*

<sup>13</sup> See *Telemarketing Sales Rule, Final Amended Rule*, Federal Trade Commission, 68 Fed. Reg. 4580 (Jan. 29, 2003) (*FTC Order*); authorized under 47 U.S.C. s. 227 (2000).

<sup>14</sup> Press Release, FTC and FCC, "National Do Not Call Registry Opens," (June 27, 2003), available at <http://www.ftc.gov/opa/2003/06/donotcall.htm> (last visited November 25, 2003).

<sup>15</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, Final Rule*, Federal Communications Commission, 68 Fed. Reg. 44144 (July 25, 2003).

<sup>16</sup> 47 U.S.C. s. 152 (2000).

<sup>17</sup> 68 Fed. Reg. 44144, 44154.

that are less restrictive than the federal rules. At least two of Florida's exemptions, the real estate agent and newspaper publisher exemptions, may be preempted by the federal rules because the federal rules do not contain those exemptions.

The federal program's implementation date for consumers who registered by August 31, 2003, was October 1, 2003. After August 31, 2003, telephone solicitors have up to three months to download new registrations. The cost to telephone solicitors is \$25 per area code, up to a maximum of \$7,375 for the entire U.S. database. However, up to five area codes may be downloaded for free.<sup>18</sup>

The federal DNC rules, in general, provide exemptions that allow some types of telephone solicitors to make calls, including:

- Calls by organizations that the consumer has a prior business relationship with or has made an inquiry to;
- Calls by tax-exempt non-profit organizations;
- Calls by companies that have the consumer's written permission;<sup>19</sup>
- Calls by political organizations; and
- Calls by telephone surveyors.<sup>20</sup>

The FTC and FCC have enforcement responsibilities for the federal DNC registry but are looking to the states to play a role. A consumer may file a complaint regarding a violation of the federal DNC registry on the Internet. This information is then entered into a program called Consumer Sentinel, which may be accessed by both federal and state agencies. A state agency may download the information and use it in a case that must be filed in federal court. If the FCC or FTC succeed in an enforcement action in federal court, violations may be punished by fines up to \$11,000.<sup>21</sup> If a state agency wins a case in federal court, violations may be punished by a fine up to \$500 and may be tripled if the violation was knowing and willful.<sup>22</sup> Under the FCC and FTC rules, an individual consumer may also bring a case in federal court with the possibility of collecting the same amount that a state agency might collect. The FTC and FCC have stated that those agencies will not enforce individual consumer complaints but, instead, will look for patterns of violations. The FCC has formed an enforcement team for the federal registry, but neither the FCC nor the FTC have made clear to what degree these agencies expect states to enforce the federal registry. So far, these agencies have strongly encouraged states to take enforcement actions, but the states appear to have discretion whether to access the information in Consumer Sentinel to pursue a case in federal court.

### ***Federal Litigation***

The federal DNC rules were being litigated in a case in which the First Amendment right of some types of telemarketing organizations to make telephone calls was at issue.<sup>23</sup> The litigation

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<sup>18</sup> *Id.* at 44151.

<sup>19</sup> *Id.* at 44148.

<sup>20</sup> *Id.* at 44147.

<sup>21</sup> 15 U.S.C. s. 45(m)(1)(A) (2000); Congress later raised the upper threshold of fines to up to \$11,000.

<sup>22</sup> 47 U.S.C. s. 227(f)(1) (2000).

<sup>23</sup> *Mainstream Marketing Services, Inc. v. FTC*, 283 F. Supp. 2d 1151 (D. Colo. 2003).

actually delayed the implementation of the federal program to October 17, 2003. The central issue was whether or not the government could treat charitable speech differently than commercial speech. The federal program allows calls from charitable organizations but prohibits calls from commercial organizations to consumers registered with the federal program. The federal trial court ruled against the government and found that charitable speech could not be treated differently. Recently, a federal appeals court overruled the trial court and found that the federal DNC registry could treat charitable speech differently because the registry advanced the substantial government interests of maintaining consumer privacy and protecting consumers from the risk of fraudulent and abusive solicitation.<sup>24</sup> Unless the federal appeals court decision is appealed and reversed, the decision is final and the federal DNC law is considered constitutional.

Parallels from the federal DNC rules to Florida's DNC law can be drawn because Florida's DNC law creates a similar mechanism for Florida consumers to choose to limit telemarketing calls. Once a Florida consumer signs up to the state DNC listing, the consumer will receive fewer telemarketing calls, but not all telemarketing calls are eliminated. Florida's law provides an exemption for charitable organizations that make telemarketing calls and prohibits calls from commercial organizations.

### ***DACS Preliminary Report***

The Department of Agriculture and Consumer Services issued a preliminary report on March 1, 2004, regarding the current status of the state's "no sales solicitation calls" listing. The report found for the first seven months of the 2003-2004 fiscal year, as compared to the 2002-2003 fiscal year, a 44-percent decrease in initial subscriptions, a 13.6-percent decrease in subscription renewals, an increase in the purchases of the listing by telephone solicitors, and a 27-percent decrease in complaints by consumers. Although the federal DNC program and the associated litigation have caused some uncertainty over the last seven months, DACS stated it believes Florida's citizens value the service provided by DACS through the listing and that an 87-percent renewal rate indicated the value of the listing to citizens in maintaining their privacy.<sup>25</sup>

## **III. Effect of Proposed Changes:**

### **DACS Report to Governor and Legislature**

The Committee Substitute for committee substitute requires the Department of Agriculture and Consumer Services to prepare and submit a report on the state's "no sales solicitation calls" listing under s. 501.059, F.S., to the Governor, the President of the Senate, and the Speaker of the House of Representatives by December 1, 2004. The report required by the Committee Substitute for committee substitute is based upon the findings and recommendations of Interim Project Report 2004-117 by the Committee on Commerce, Economic Opportunities, and Consumer Services. The interim project was conducted to explore the effects of the new, free federal Do-Not-Call (DNC) program on Florida's program, because the federal DNC program envisions working with states on certain aspects of the federal program, such as enforcement,

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<sup>24</sup> *Mainstream Marketing Services, Inc. v. FTC*, 2004 WL 296980, at \*5 (10<sup>th</sup> Cir. Feb. 17, 2004).

<sup>25</sup> Department of Agriculture and Consumer Services, *Interim Report on Effect of Federal Do Not Call Registry on Florida's Do Not Call Law*, at 3-5, 8 (March 1, 2004).

and because of the legal issues raised by the federal litigation. (See the “Present Situation” section of this staff analysis.)

The Committee Substitute for committee substitute requires the department to provide certain information gathered between November 1, 2003, and November 1, 2004, and compare it to same time period the year before. The Committee Substitute for committee substitute requires that the following data be collected and reported:

- The number of consumer initial subscriptions and renewal subscriptions to the state listing, and the associated fees collected, per month, with an explanation of any factors that affected consumer subscriptions during the evaluation period;
- The number of purchases of the state listing by solicitors and the amount of fees generated from the purchases;
- The number of complaints received by the department related to the state listing per month; and
- The number of enforcement actions taken by the department per month, the amount of fines imposed per month, and a description of any settlements reached.

The Committee Substitute for committee substitute also requires the department to provide recommendations on the continued viability of the state’s listing. The items to be reported include:

- The status of the federal litigation and an evaluation of the litigation’s effect on the department’s management of the state listing.
- A recommendation of whether it is feasible to continue operation of the state listing, based upon, among other factors, the effects of the federal program, the associated litigation, and the amount of revenue collected from subscriptions, renewals, solicitor fees, and enforcement actions.
- If the report recommends the continued operation of the state listing, the report must also include a recommendation of, and the rationale for, the resources necessary for the department to continue to manage the listing at its current level of consumer protection.
- A description of how the federal program’s preemption of less restrictive state exemptions affects any exemptions allowed under the state’s “no sales solicitation calls” listing and a recommendation of legislative action, if any, that may be necessary to address this issue.
- A description of any activities by the department related to enforcement of the federal DNC program.
- The number of listings of Florida consumers registered with the federal DNC program that have been downloaded by the department and subscribed to the state listing, as well as the number of listings uploaded to the federal program.
- If Florida consumers registered with the commission’s DNC program have been downloaded to the state listing, an evaluation of whether those consumers have filed complaints with the department, and, if so, the nature of those complaints and what action was taken, if any, by the department to address those complaints.

The Committee Substitute for committee substitute also gives the department discretion to include any additional information the department believes may assist the Legislature in evaluating the state's listing and any potential changes to the state listing.

**Effective Date:** The Committee Substitute for committee substitute takes effect July 1, 2004.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Department of Agriculture and Consumer Services (DACS) has stated that no additional funds will be necessary to produce the report required by the Committee Substitute for committee substitute.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.