

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 Commerce and Tourism

BILL: SB 1564

INTRODUCER: Senator Hutson

SUBJECT: Telephone Solicitation

DATE: January 21, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harmsen	McKay	CM	Pre-meeting
2.			RI	
3.			RC	

I. Summary:

Section 501.059, F.S., prohibits telephonic sales calls that:

- 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 consent 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.

SB 1564 limits the requirement for prior express written consent of the called party to only unsolicited calls that use an automated system for the selection and dialing of a telephone number or to play a recorded message. Therefore, the following types of telephonic sales calls will no longer require prior express written consent of the called party:

- Those made within 120 days after an express request of the called party;
- Those made in connection with an existing debt or contract, if payment or performance is not yet completed;
- Those made to a person with whom the caller has a prior or existing business relationship; or
- Those made by a newspaper publisher in connection with its business.

All other unsolicited telephonic sales calls that use an automated system will require prior express written consent.

Additionally, the bill amends the definition of an “automated [telephone dialing] system” that is subject to s. 501.059, F.S., to include only those that select *and* dial telephone numbers or play a recorded message, rather than those that select *or* dial telephone numbers.

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 robocalls³, which use an “automatic telephone dialing system,”⁴ referred to as an autodialer, and play a recorded message upon connection with the consumer; “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 one of an upcoming appointment.⁶ Additionally, some solicitors act outside the scope of federal or state enforcement authority.

Florida’s SB 1120 (2021)

In 2021, the Florida Legislature updated s. 501.059, F.S., and the Florida Telemarketing Act, s. 501.601, F.S., et. seq. to further address some of these issues facing consumers.⁷

Section 501.059, F.S., currently 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. Additionally, such calls require prior consent if they will play a recorded message upon connection with the recipient. Aggrieved parties can sue under this section to recover actual monetary damages or

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 Jan. 21, 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 Jan. 21, 2022).

³ “At the FCC, we use the term ‘robocalls’ to refer not to just prerecorded calls but also autodialed calls, regardless of whether the call is live or prerecorded.” *Stopping Fraudulent Robocall Scams: Can More Be Done?*, Hearing Before the Senate Subcomm. on Cons. Protect., Product Safety, and Ins. 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 Jan. 21, 2022).

⁴ An “automatic telephone dialing system” or “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).

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.” *Stopping Fraudulent Robocall Scams*, Hearing, *supra* note 3 (Statement of Lois Greisman, Associate Director, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission).

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 Jan. 21, 2022). *See also*, Federal Communications Commission, *Stop Unwanted Calls and Texts--Spoofing*, *supra* note 2. (Mar. 2, 2021) <https://www.fcc.gov/consumers/guides/stop-unwanted-calls-and-texts> (last visited Jan. 21, 2022).

⁷ Chapter 2021-185, s. 1, Laws of Fla.

\$500, plus attorney fees and costs. 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 2021.⁸

Florida Law (Section 501.059, F.S.)

Generally

Section 501.059, F.S., governs telephone solicitors—those who make or cause to be made telephonic sales calls in this state.⁹ A telephonic sales call includes solicitations via telephone calls, text messages, and direct-to-voicemail transmissions.¹⁰

For example, the section 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 Services¹¹ and the Federal Trade Commission;^{12,13}
- Honor consumers' requests to not receive any 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.¹⁴

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

- 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 consent¹⁵ 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.

Penalties

Either the Department of Agriculture and Consumer Services and the Office of the Attorney General may bring an action against a telephone solicitor who violates the provisions of s,

⁸ 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-a-claims-are-still-pouring-in-florida-mini-tcpa-continues-to-generate-huge-volume-of-litigation/> (last visited Jan. 21, 2022).

⁹ Section 501.059(1)(i), F.S.

¹⁰ Section 501.059(1)(j), F.S.

¹¹ Florida Department of Agriculture and Consumer Services, *Florida Do Not Call*, <https://www.fdacs.gov/Consumer-Resources/Florida-Do-Not-Call> (last visited Jan. 21, 2022).

¹² Federal Trade Commission, *National Do Not Call Registry*, <https://www.donotcall.gov/> (last visited Jan. 21, 2022).

¹³ *See*, ss. 501.059(3)-(4), F.S.

¹⁴ Section 501.059(5), F.S.

¹⁵ “Prior express written consent” is defined by s. 501.059(1)(g) as “a written agreement that bears the signature of the called party; clearly authorizes receipt of a telephonic sales call made using an automated system to selected or dial the telephone numbers, or to play a recorded message; includes the telephone number authorized to be called; and includes a specific informed disclosure statement.”

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.¹⁶

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.¹⁷

Federal Law

*Telephone Consumer Protection Act*¹⁸

The Telephone Consumer Protection Act of 1991 (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,¹⁹ and an opportunity to opt out of the current call, and all future calls, made by that solicitor;
- Send pre-recorded 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;²⁰ and
- Use an autodialer or pre-recorded 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.²¹ This specific provision does not apply to residential phone lines.²²

¹⁶ Section 501.059(9), F.S.

¹⁷ Sections 501.059(10)-(11), F.S.

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

¹⁹ 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 Jan. 21, 2022).

²⁰ Federal Communication Commission, *Stop Unwanted Robocalls and Texts*, *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 HIPAA may be made without prior express consent.

²¹ FCC, *2015 TCPA Declaratory Ruling and Order*, 30 FCC Rcd at 7999, para. 4 (Jun. 18, 2015).

²² 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.²³

The TCPA defines autodialers as “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”²⁴ 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.²⁵ 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.²⁶

The TCPA grants a private right of action to pursue actual monetary damages or up to \$500 per violation.²⁷ State attorneys general and the FCC also have jurisdiction to investigate and file civil claims based on violations of the TCPA.²⁸

Federal Do Not Call Program²⁹

The FTC, in concert with the FCC, administers the National Do Not Call Program.³⁰ Telephone solicitors may not contact a consumer who participates in the National Do Not Call Program, unless the calls are:³¹

- 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.

Truth in Caller ID Act³²

The Truth in Caller ID Act of 2009 protects consumers by prohibiting any person from transmitting misleading or inaccurate caller ID information (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.³³ The FCC has taken enforcement actions totaling

²³ 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 Jan. 21, 2022).

²⁴ 47 U.S.C. § 227(b)(1)(A).

²⁵ *Facebook, Inc. v. Duguid*, 141 S. Ct. 193 (2020).

²⁶ 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 Jan. 21, 2022).

²⁷ 47 U.S.C. § 227 (c)(5).

²⁸ 47 U.S.C. § 227 (f).

²⁹ *See*, 15 U.S.C. § 6101.

³⁰ Federal Communications Commission, *Stop Unwanted Calls and Texts* (Mar. 2, 2021), <https://www.fcc.gov/consumers/guides/stop-unwanted-calls-and-texts> (last visited Jan. 21, 2022).

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

³² 47 U.S.C. § 227 (e).

³³ *See*, 47 CFR § 64.1604.

\$450 million in fines, in recent years against telemarketers for call spoofing violations—of note, the FCC imposed its largest fine ever against a Florida-based timeshare marketing operation.³⁴

To protect individual privacy concerns, an individual caller may still request to hide his or her phone number when making a call.³⁵

III. Effect of Proposed Changes:

The 2021 changes to s. 501.059, F.S., required prior express written consent to place any telephonic sales call to any consumer, if the call would be made using an automated system to select or dial the telephone number, or to play a recorded message. This consent was required whether or not the caller and consumer had a prior business relationship.

SB 1564 no longer requires a consumer's prior express written consent to place a telephonic sales call via an automated system. Section 1 amends s. 501.059, F.S., to instead require prior express written consent of the called party only for *unsolicited* telephonic sales calls that use an automated system for the selection *and* dialing of telephone numbers or to play a recorded message. An unsolicited telephonic sales call is any telephonic sales call, except for the following:

- One made within 120 days after an express request of the called party;
- One made in connection with an existing debt or contract, if payment or performance is not yet completed;
- One made to a person with whom the solicitor has a prior or existing business relationship; or
- One made by a newspaper publisher in connection with its business.

Therefore, a person who makes a telephonic sales call that falls into one of the above four categories that are excluded from the definition of an “unsolicited telephonic sales call” is no longer required to have prior express written consent to place the call using an automated system for the selection and dialing of telephone numbers or for the playing of a recorded message. All other telephonic sales calls will be required to have obtained prior express written consent.

The bill also now requires a person who makes a telephonic sales call to a consumer who has requested such a call to do so within 120 days after the request, rather than “in response to the request.” This will classify certain calls as unsolicited calls that were not previously classified as such.

The bill changes the definition of an automated system used to select *or* dial a telephone number or play a recorded message upon connection with the called party to a system that selects *and* dials a telephone number.³⁶

³⁴ Federal Communications Commission, *The FCC's Push to Combat Robocalls & Spoofing*, <https://www.fcc.gov/spoofed-robocalls> (last visited Jan. 21, 2022). *See also*, Federal Communications Commission, *FCC Fines Massive Neighbor Spoofing Robocall Operation \$120 Million* (May 10, 2018) <https://www.fcc.gov/document/fcc-fines-massive-neighbor-spoofing-robocall-operation-120-million> (last visited Jan. 21, 2022).

³⁵ 47 CFR § 64.1601.

³⁶ According to one article, the “or” definition is less likely to capture automated systems that select telephone numbers and then allow a human to dial the number. *See* Daniel Blynn and Liz Clark Rinehart, *Florida Legislature to the Rescue? House*

The bill also clarifies a term by substituting “person called” with the defined term, “called party.”

The bill takes effect upon becoming law.

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:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Businesses that use automated systems to conduct telephone solicitation calls via phone call, text message, or direct-to-voicemail transmission, may feel more certain about the legality of their practices as a result of the change of the definition of an automated system that is subject to s. 501.059, F.S. This may result in more telephonic solicitations made to Florida-based phone numbers by entities who seek to comply with existing state and federal laws. This change will likely not impact the number and frequency of illegal robocalls made into the state.

Private individuals will have fewer grounds on which to file a private civil claim against entities they feel have violated s. 501.059, F.S.

C. Government Sector Impact:

The courts may see a decrease in civil actions filed pursuant to s. 501.059, F.S. Additionally, the Florida Department of Agriculture and Consumer Services and the Office of the Attorney General may see a decrease in investigations of violations of s. 501.059, F.S.

VI. Technical Deficiencies:

None.

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.