

**The Florida Senate**  
**PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT**

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

Prepared By: Commerce Committee

BILL: SB 322

INTRODUCER: Senator King

SUBJECT: Telephone Solicitation

DATE: April 19, 2007

REVISED: 04/23/07

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Earlywine/Hinely	Cooper	CM	Fav/2 amendments
2.			EE	
3.			JU	
4.				
5.				
6.				

**I. Summary:**

Senate Bill 322 prohibits autodialed or recorded political telephone calls to numbers on the state’s “Do-Not-Call” listing.

Specifically, this bill prohibits persons on behalf of candidates for federal, state, or local political offices, or on behalf of committees of continuous existence or other political entities, from making or knowingly allowing to be made, an autodialed or recorded call (commonly referred to as “robo-calls”) related to a political office or issue to any number on the state’s “no sales solicitation calls” list.

This bill amends section 501.059 of the Florida Statutes.

**II. Present Situation:**

**Florida’s “Do-Not-Call” Law**

Florida’s “Do-Not-Call” law, 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 on the “Do-Not- Call” or “no sales solicitation calls” listing, administered by the Department of Agriculture and Consumer Services (DACCS).<sup>1</sup> The law prohibits most telephone solicitors from calling consumers who have registered their telephone numbers with 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 5 years in advance. Consumers may subscribe by calling a toll-free telephone

<sup>1</sup> Section 501.059, F.S.

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

number to request an application, or they may download the application from DACS' website and mail it to the department with the appropriate fee. Currently, Florida law does not provide the option to a business to subscribe a business telephone number to the listing.

Currently, there are 8.1 million subscribers to the "Do-Not-Call" list in Florida. Of those 8.1 million subscribers, approximately 125,000 are paid subscribers and the remainder of the subscribers consists of subscribers to the federal "Do-Not-Call" registry. In fiscal year 2005-2006, there were 4,651 complaints logged with the Florida Division of Consumer Services related to the "Do-Not-Call" list.<sup>3</sup>

DACS is responsible for investigating complaints of violations of this restriction. DACS or the Department of Legal Affairs may initiate an action to impose a civil penalty of not more than \$10,000 per violation, or seek other relief.<sup>4</sup>

There are several implicit exemptions to the "Do-Not-Call" law in s. 501.059, F.S. The statute defines "telephonic sales call" as:

a call made by a telephone solicitor to a consumer, for the purpose of soliciting a sale of any consumer goods or services, or for the purpose of soliciting an extension of credit for consumer goods or services, or for the purpose of 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>5</sup>

DACS states that some solicitations do not constitute "telephonic sales calls" as defined by this statute to the extent that the callers do not sell a product or service.<sup>6</sup> Generally, calls from charities seeking donations, political candidates and political parties seeking donations, research or survey companies seeking an opinion, and collection agencies trying to locate a debtor are exempt from provisions of Florida's "Do-Not-Call" law.<sup>7</sup>

### **Florida "Robo-Call" Restrictions**

Section 501.059, F.S., prohibits telephonic sales calls if such calls involve 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. However, there are three significant exemptions:

- Calls initiated using automated telephone dialing systems with live messages may be used if the calls are made or messages given solely in response to calls initiated by the persons to whom the automatic calls or live messages are directed;
- If the telephone numbers selected for automatic dialing have been screened to exclude any telephone subscriber who is included on the department's then-current "no sales solicitation calls" listing or any unlisted telephone number; or

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<sup>3</sup> J.R. Kelly, Director, Division of Consumer Services, (November 2, 2006).

<sup>4</sup> Section 501.059,(8), F.S.

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

<sup>6</sup> Florida "Do-Not-Call" Program: Exemptions to the Florida "Do-Not-Call" Law, <http://www.800helpfla.com/nosales.html#pagecontent> (last visited February 19, 2007).

<sup>7</sup> *Id.*

- If the calls made concern goods or services that have been previously ordered or purchased.

### **Unsolicited Facsimiles**

Unsolicited facsimiles are also unlawful within Florida.<sup>8</sup> Violators are subject to injunctions and fines of \$500 per violation. The Attorney General is the enforcing authority for this statute.

### **Federal “Do-Not-Call” Law**

In January 2003, the Federal Trade Commission (FTC) revised its Telemarketing Sales Rule (TSR) to create a national “Do-Not-Call” registry that prohibits calls to a consumer registered on the registry.<sup>9</sup> On July 7, 2003, consumers were able to register a residential or mobile telephone number with the FTC on the Internet and by telephone.<sup>10</sup> As of June 21, 2006, 125 million phone numbers had been registered with the federal “Do-Not-Call” registry.<sup>11</sup> Registration to the federal “Do-Not-Call” registry is free and is effective for 5 years. The federal “Do-Not-Call” registry does not provide the option for a business to subscribe business telephone numbers.

As with Florida’s “Do-Not-Call” list, there are several implicit exemptions to the types of prohibited calls. Political organizations, charities, telephone surveyors, businesses with which the individual has an existing business relationship, and those the individual provided express permission in writing are permitted to call any individual including those registered on the federal “Do-Not-Call” list.<sup>12</sup>

### **Florida’s Telemarketing Law**

The Florida Telemarketing Act, s. 501.601, F.S., requires non-exempt<sup>13</sup> businesses<sup>14</sup> and their salespersons<sup>15</sup> that engage in the sale of consumer goods or services by telephone in Florida<sup>16</sup> to be licensed by DACS. Along with an application, an applicant must post security (surety bond, certificate of deposit, or letter of credit) of no less than \$50,000.<sup>17</sup> Each license issued is

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<sup>8</sup> Section 365.1657, F.S.

<sup>9</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>10</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 February 19, 2007).

<sup>11</sup> The Truth about Cell Phones and the “Do-Not-Call” Registry (June 21, 2006), available at <http://www.ftc.gov/opa/2006/06/dnccellphones.htm> (last visited February 19, 2007).

<sup>12</sup> Q&A: The National “Do-Not-Call” Registry, Federal Trade Commission, available at <http://www.ftc.gov/bcp/conline/pubs/alerts/alt107.htm> (last visited February 19, 2007).

<sup>13</sup> Section 501.604, F.S., contains the list of exemptions.

<sup>14</sup> Section 501.605, F.S.

<sup>15</sup> Section 501.607, F.S.

<sup>16</sup> Section 501.605(1), F.S., provides that doing business in Florida includes telephone solicitation from a location in Florida or solicitation from other states or nation of purchasers located in Florida.

<sup>17</sup> Section 501.611, F.S.

required to be renewed annually by paying a new fee and submitting a new application to DACS.<sup>18</sup>

DACS is permitted to pursue administrative<sup>19</sup> and civil<sup>20</sup> remedies against persons who violate the Florida Telemarketing Act or rules adopted or orders issued pursuant to the Florida Telemarketing Act. Additionally, any commercial telephone seller or salesperson who solicits purchasers for a commercial telephone seller who is not licensed with DACS commits a third degree felony.<sup>21</sup> Any subsequent violations are punishable as a second degree felony.<sup>22</sup> Further, an injured individual may bring a civil action for recovery of actual damages and/or punitive damages, including costs, court costs, and attorney's fees.<sup>23</sup>

Florida's Telemarketing Act includes several exemptions in s. 501.604, F.S. The provisions in the act do not apply to "a person soliciting for religious, charitable, political, or educational purposes."<sup>24</sup>

### **Federal Telemarketing Law**

The Telephone Consumer Protection Act (TCPA) prohibits autodialed (and artificial or pre-recorded<sup>25</sup>) calls to emergency phone lines, health care facilities, and any service for which the called party is charged for the call such as paging services and cellular phones.<sup>26</sup> The TCPA also prohibits delivery of artificial or prerecorded messages to residences without the prior express consent of the called party except for emergency purposes.<sup>27</sup> The TCPA provides a right of action allowing individuals, businesses, and state officials to bring suit.<sup>28</sup>

The exemptions to the TCPA are established by statute and by the authority of the Federal Communications Commission under 47 U.S.C. § 227(b)(2)(B).<sup>29</sup> The statutory exemption includes calls made either for emergency purposes or with the prior express consent of the party.<sup>30</sup> The FCC has exempted calls not made for commercial purposes.<sup>31</sup> However, this exemption does not apply to any service for which the called party is charged for the call such as paging services and cellular phones.

In addition to the TCPA, the federal government regulates how and when telemarketing occurs. The Telemarketing and Consumer Fraud Abuse Prevention Act empowers the Federal Trade

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<sup>18</sup> Section 501.609(1), F.S.

<sup>19</sup> Section 501.612, F.S.

<sup>20</sup> Section 501.618, F.S.

<sup>21</sup> Section 501.623, F.S.

<sup>22</sup> Section 501.623(6), F.S.

<sup>23</sup> Section 501.625, F.S.

<sup>24</sup> Section 501.604(2), F.S.

<sup>25</sup> 7 FCC Rcd. 8752, 71 Rad. Reg. 2d (1992).

<sup>26</sup> 47 U.S.C. s. 227 (b)(1)(A)(i)-(iii).

<sup>27</sup> 47 U.S.C. s. 227 (b)(1)(B).

<sup>28</sup> 47 U.S.C. s. 227 (b)(3), (f)(1).

<sup>29</sup> 47 U.S.C. s. 227 ((2)(B).

<sup>30</sup> 47 U.S.C. s. 227 (b)(1)(A).

<sup>31</sup> 47 C.F.R. s. 64.1200(a)(2)(ii) (2005).

Commission (FCC) to issue the Telemarketing Sales Rule,<sup>32</sup> which provides details on prohibited telemarketing practices.<sup>33</sup>

### **Other States: General “Robo-Call” Restrictions**

Minnesota law prohibits all autodialed, prerecorded calls – regardless of content – with exceptions for:

- Messages to subscribers with whom the caller has a current business or social relationships;
- Messages from schools for parents, students or employees; and
- Messages to employees advising them of work schedules.<sup>34</sup>

The statute was challenged and upheld in federal court in 1995.<sup>35</sup>

North Dakota law prohibits autodialed, prerecorded calls unless the subscriber “knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber’s consent before the message is delivered.”<sup>36</sup> The statute does not apply to:

- A message from a public safety agency notifying a person of an emergency;
- A message from a school district to a student, a parent, or an employee;
- A message to a subscriber with whom the caller has a current business relationship; or
- A message advising an employee of a work schedule.

In the event the statute is violated, the statute allows for a private right of action, cease and desist orders issued by the attorney general’s office, and civil penalties.<sup>37</sup> The civil penalties may be issued up to \$1,000 for each violation.<sup>38</sup> The North Dakota Supreme Court upheld the application of this law to interstate calls in 2006.<sup>39</sup>

Indiana law prohibits autodialed, prerecorded calls unless:

<sup>32</sup> 15 U.S.C. s. 6102.

<sup>33</sup> 16 C.F.R. Part 310.

<sup>34</sup> Chapter 325E.27, Minnesota Statutes.

<sup>35</sup> *Van Bergen v Minnesota*, 59 F.3d 1541 (8<sup>th</sup> Cir. 1995).

<sup>36</sup> N.D.C.C. s. 51-28-02.

<sup>37</sup> N.D.C.C. s. 51-28-11,13, 14,15.

<sup>38</sup> N.D.C.C. s. 51-15-07.

<sup>39</sup> See *State ex rel. Stenehjem v FreeEats.com, Inc.*, 2006 ND 84 (2006). The case revolved around whether states could regulate interstate calls as well as intrastate calls or whether federal law preempted any state regulation of interstate calls. The TCPA savings clause expressly exempts from preemption state laws that regulate intrastate calls and North Dakota Supreme Court concluded that the savings clause did not preempt interstate regulation either. In contrast, the federal trial court in *Chamber of Commerce v. Lockyer*, 2006 WL 462482 (E.D. Cal. 2006,) ruled that the TCPA’s savings clause did preempt California’s regulation of interstate fax advertising. The U.S. Supreme Court denied FreeEats.com, Inc.’s certiorari petition. (The 8<sup>th</sup> Circuit Court of Appeals upheld Minnesota’s intrastate regulation in *Van Bergen v Minnesota*.) Florida’s Department of Agriculture and Consumer Services currently pursues action against calls that originate outside of Florida.

- The subscriber has knowingly or voluntarily requested, consented to, permitted, or authorized receipt of the message; or
- The message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered.<sup>40</sup>

A violation of this law constitutes a misdemeanor and proscribed penalties include injunctive relief, damages, and penalties not to exceed \$15,000 per violation.<sup>41</sup> This law was upheld in federal court in October 2006.<sup>42</sup>

Montana law prohibits autodialed, prerecorded calls that solicit information, offer goods for sale, or promote a political campaign or anything related to a political campaign unless a live operator obtains permission from the recipient to play the recorded message.<sup>43</sup> Violators may be fined up to \$2,500.<sup>44</sup>

### **Other States: Specific Political “Robo-Call” Restrictions**

In 2003, New Hampshire enacted a law which regulates prerecorded political messages by candidates or political committees or by any person advocating the success or defeat of any party, measure or person, or any message that contains information about any candidate or party.<sup>45</sup> Prerecorded political messages are prohibited unless the message contains, or a live operator provides within the first 30 seconds of the message, the name of the candidate or organization on whose behalf the call is made and the name of the person or organization paying for the call. The statute also prohibits any prerecorded political message to any telephone number on the federal “Do-Not-Call” list. The penalty for violating the statute is \$5,000 per violation. To date, this restriction has not been challenged.

Arkansas law prohibits autodialed, prerecorded calls by anyone in connection with a political campaign unless the political call is made in response to a call initiated by the recipient.<sup>46</sup> Violations constitute a class B misdemeanor.<sup>47</sup>

Wyoming law prohibits autodialed calls in promotion of a political campaign or any use related to a political campaign unless the political call is made in response to an inquiry by the recipient.<sup>48</sup> Violating this statute constitutes a misdemeanor and may bring up to 6 months imprisonment, a fine up to \$750, or both.<sup>49</sup>

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<sup>40</sup> Indiana Code s. 24-5-14-5(b).

<sup>41</sup> Indiana Code s. 24-5-0.5-4(c)-(f).

<sup>42</sup> See *FreeEats.Com, Inc., v. Indiana*, 2006 WL 3025810 (S.D. Ind.).

<sup>43</sup> Section 45-8-216, Mont. Cod. Ann.

<sup>44</sup> *Id.*

<sup>45</sup> N.H. R.S.A. 664:14-a. 2003 Election Law Changes, <http://www.sos.nh.gov/election%20%20law%20changes.htm> (last viewed November 6, 2006).

<sup>46</sup> Section 5-63-204, Ark. Cod. Ann.

<sup>47</sup> *Id.*

<sup>48</sup> 6-6-104, W.S.

<sup>49</sup> *Id.*

### **Committees of Continuous Existence**

In Florida, “Committees of Continuous Existence” (CCE) are organizations that raise and expend funds to influence the political process. CCEs may accept unlimited contributions and expend it as it chooses, provided they do not expend funds on behalf of a candidate or issue, except through the duly appointed campaign treasurer or a candidate. CCEs are certified by the Department of State and are required to file regular reports with the Division of Elections.<sup>50</sup>

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

**Section 1** amends s. 501.059(7), F.S., to prohibit persons on behalf of candidates for federal, state, or local political offices, or on behalf of committees of continuous existence or other political entities, from making or knowingly allowing to be made, a telephone call related to a political office or issue to any number on the state’s “no sales solicitation calls” (or “Do-Not-Call”) listing if the call involves an autodialed or recorded message.

As under current law, DACS is responsible for investigating complaints of violations of this restriction. DACS or the Department of Legal Affairs may initiate an action to impose a civil penalty of not more than \$10,000 per violation or seek injunctive relief.

**Section 2** provides that the act will take effect July 1, 2007.

### **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 First Amendment states that “Congress shall make no law...abridging the freedom of speech.”

Because freedom of speech is a fundamental right, when the government infringes on that right, it bears a heavy burden of demonstrating that its action serves a compelling interest that cannot be achieved by any other less restrictive means. Consequently, any restriction on political speech may have to overcome arguments that the restriction is unconstitutional.

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<sup>50</sup> Section 106.04, F.S.

Laws regulating speech are divided into: (1) laws that regulate the content of the speech and (2) laws that regulate the time, place or manner of speech – regardless of content.<sup>51</sup> This proposed law prohibits all pre-recorded political calls and calls from automatic telephone dialing systems to numbers on the state ““Do-Not-Call”” registry.

If the court determines the restriction to be content based regulation, it would be presumed to be unconstitutional unless the regulation serves a compelling government interest and is the least restrictive means to achieve that purpose.<sup>52</sup> Federal courts have yet to declare “residential privacy” as a compelling government interest,<sup>53</sup> though it has been called a “significant” interest.<sup>54</sup>

If the court determines the restriction to be a “time, place or manner” regulation, to be upheld it must be content neutral, it must be applied even-handedly,<sup>55</sup> and it must be narrowly tailored to serve a compelling state interest.<sup>56</sup> Narrowly tailored means that the regulation is not any broader than necessary to achieve the intended goal, but a regulation will not be held as presumptively unconstitutional merely because the court finds that some less restrictive means to regulate speech is available.<sup>57</sup> Finally, time, place or manner regulation must leave open alternative channels for speech.<sup>58</sup> Time, place and manner regulations apply to three different categories: traditional public forums, designated public forums, and non public forums.<sup>59</sup>

Traditional public forums are areas such as streets, sidewalks, and parks which by long tradition or government fiat have been devoted to assembly and debate. Regulation of speech in traditional public forums must further a compelling state interest and be narrowly tailored.<sup>60</sup>

The second category, designated public forums, includes public property which the state has opened for use by the public as a place for expressive activity.<sup>61</sup> A city owned auditorium<sup>62</sup> and a fund created by a public university<sup>63</sup> are two examples of designated public forums. Speech in designated public forums is protected in the same manner as speech in traditional public forums except that the government is not required to maintain the designated forum, and thus protect speech in the forum, indefinitely.<sup>64</sup>

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<sup>51</sup> *Whether Anti Spam Laws Violate the First Amendment*, R. Jonas Geissler, (2001 J. Online L. art. 8).

<sup>52</sup> *Id.*

<sup>53</sup> *Kirkeby v. Furness*, 92 F.3d 655, 659 (8<sup>th</sup> Cir. 1996).

<sup>54</sup> *See Bland v. Fessler*, 88 F.3d 729 (9<sup>th</sup> Cir. 1996).

<sup>55</sup> *Consolidated Edison Co. v Public Service Comm. of New York*, 447 U.S. 530 (1980).

<sup>56</sup> *Ward v Rock Against Racism*, 491 U.S. 781 (1989).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Perry Education Association v Perry Local Educators Association*, 460 U.S. 37 (1983).

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

<sup>61</sup> *Id.*

<sup>62</sup> *Southeastern Promotions v Conrad*, 420 U.S. 546 (1975).

<sup>63</sup> *Rosenberger v University of Virginia*, 515 U.S. 819 (1995).

<sup>64</sup> *See Perry*.

Expressive activity at a traditional or designated public forum that might ordinarily be protected may be regulated on a case by case basis if the activity causes a material disruption or involves substantial disorder or invades the rights of others.<sup>65</sup>

Non public forums are areas that are not by tradition or designation public forums.<sup>66</sup> Speech regulation in non public forums must be view point neutral<sup>67</sup> and access to the non-public forum may be restricted if the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's views.<sup>68</sup>

While not considered a separate forum, the federal courts have also recognized a category called "private channels" which fall outside non-public forum analysis.<sup>69</sup> Private channels are privately created, owned, and operated entities and the Supreme Court has limited forum analysis to government property only.<sup>70</sup> The 8<sup>th</sup> Circuit Court of Appeals determined that for First Amendment purposes, the telephone system is a private channel of communication.<sup>71</sup> As such, private channels receive intermediate scrutiny and restrictions on private channels are valid if they are content neutral, narrowly tailored to serve a significant governmental interest, and they leave open ample alternative channels for communication.<sup>72</sup>

## V. Economic Impact and Fiscal Note:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

This bill prohibits autodialed or prerecorded political telephone calls to numbers on the state's "Do-Not-Call" registry. To the extent that persons violate this restriction, they will be subject to fines and associated legal costs.

### C. Government Sector Impact:

This bill prohibits autodialed or prerecorded political telephone calls to numbers on the state's "Do-Not-Call" registry. DACS will be responsible for investigating complaints regarding and enforcing this restriction. The Department of Legal Affairs also has authority to bring an action to impose penalties or seek injunctive relief.

<sup>65</sup> *Grayned v Rockford*, 408 U.S. 104 (1972).

<sup>66</sup> See *Perry*.

<sup>67</sup> *Geer v Spock*, 424 U.S. 828 (1976).

<sup>68</sup> *Cornelius v NAACP Legal Defense and Education Fund*, 473 U.S. 788 (1985).

<sup>69</sup> See *Van Bergen*.

<sup>70</sup> *International Soc. For Krishna Consciousness v Lee*, 505 U.S. 672 (1992).

<sup>71</sup> See *Van Bergen*.

<sup>72</sup> *Id.* (The court in *Van Bergen* ruled that residential privacy, the "well being, tranquility and privacy of the home," is a significant government interest. The court also ruled that efficient conduct of business operations, protecting productivity and the expectation of business to expect that they will not be disturbed, is a significant government interest.)

DACS estimates that this bill would not have a fiscal impact on its enforcement of calls prohibited by the “Do-Not-Call” list.<sup>73</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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This Senate Professional Staff Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

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<sup>73</sup> Department of Agriculture and Consumer Services Fiscal Impact Statement for SB 322.

## **VIII. Summary of Amendments:**

**Barcode 790352 by Commerce:**

Creates an exception to allow organizations to make autodialed, recorded calls to their members.

**Barcode 392332 by Commerce:**

Creates an exception to allow political parties to make autodialed, recorded calls to encourage voter turnout within 72 hours of an election.

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