



May 2023

## Florida Legislature Passes Bill that Would Narrow Liability Under Florida Telephone Solicitation Act

### Go-To Guide:

- Florida Legislature passes bill that would limit litigation under state’s Mini-Telephone Consumer Protection Act (TCPA), subject to governor signing bill into law.
- Prohibition on automated calls would be limited to unsolicited calls using devices that select *and* dial telephone numbers.
- Broad range of online actions would qualify as signatures for prior express written consent.
- 15-day notice and cure period would be required for text solicitation claims.

On May 2, 2023, the Florida Legislature passed CS/CS/SB 1310 (the “Amendment”), which, if signed by Florida Gov. Ron DeSantis, would dramatically decrease the scope of liability under the Florida Telephone Solicitation Act, Section 501.059, Florida Statutes (FTSA). The Amendment would significantly narrow the private cause of action for making telephonic sales calls, text messages, and voice messages using automated technology, limit applicable violations to unsolicited calls, authorize a broader array of signatures to evidence a consumer’s prior express written consent to receive telephone and text communications, and institute a 15-day safe harbor for telephone solicitors to remove consumers from texting lists and databases. The Amendment reflects a legislative consensus that there was a need to put

guardrails on the barrage of class action litigation that spawned from the 2021 amendments to the FTSA.<sup>1</sup> Businesses that engage in telemarketing and text marketing to Florida residents and persons with a Florida-based area code should become familiar with these changes.

### Automated System for Selection and Dialing

Under the FTSA's existing text, made effective July 1, 2021, the Legislature created a private right of action if a "person" made or knowingly allowed "a telephonic sales call to be made if such call involve[d] 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>2</sup> A telephonic sales call is "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>3</sup>

The Amendment would change the statutory language to an "automated system for the selection *and* 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."<sup>4</sup> As amended, a violation of the FTSA would only occur where the automated system is used to *both* select and dial telephone numbers.

The original 2021 amendments to the FTSA were enacted in the aftermath of the U.S. Supreme Court's decision in *Facebook, Inc. v. Duguid* to narrow the scope of protections under the federal Telephone Consumer Protection Act (TCPA).<sup>5</sup> The TCPA, among other things, created a civil cause of action where a caller made certain telephone communications "using" an "automatic telephone dialing system" (ATDS) without specified consent of the called party.<sup>6</sup> In *Facebook*, the U.S. Supreme Court held that to qualify as an ATDS, the device must "have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator."<sup>7</sup>

The FTSA's broader language of an "automated system for the selection or dialing of telephone numbers *or* the playing of a recorded message when a connection is completed" ignited a firestorm of class action litigation in Florida because many written consumer consents were either lacking or contained consent to contact by an ATDS under the TCPA, but not the arguably broader language specified under the FTSA.

Section 8(a) of the FTSA was particularly problematic because the Florida Legislature did not include a definition or objective standard as to what constitutes an "automated system for the selection or dialing of telephone numbers."<sup>8</sup> Even so, some courts were not receptive to the argument that the language "automated system for the selection or dialing of telephone numbers" was vague or unconstitutional.<sup>9</sup> Nor have some courts been receptive to the contention that an "automated system for a selection or dialing of telephone numbers" should be interpreted co-extensively with the ATDS language found in the TCPA.<sup>10</sup>

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<sup>1</sup> Statement of Rep. Tom Fabricio (co-introducer of HB 761) (March 27, 2023, Fla. House Subcom. Civ. Just.).

<sup>2</sup> House Bill 761, § 1 (Apr. 27, 2023).

<sup>3</sup> § 501.059(1)(j), Fla. Stat.

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

<sup>5</sup> *Facebook, Inc. v. Duguid*, -- U.S. --, 141 S. Ct. 1163, 209 L. Ed. 2d 272 (2021).

<sup>6</sup> 47 U.S.C. § 227(b)(1)(A)(iii).

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

<sup>8</sup> § 501.059(8)(a), Fla. Stat.

<sup>9</sup> *Zononi v. CHW Group*, 2023 U.S. Dist. 37245, at \*11 (S.D. Fla. Mar. 7, 2023); *Borges v. SmileDirectClub*, Case No. 21-23011, 2022 U.S. Dist. LEXIS 167007, at \* 23 (S.D. Fla. Sept. 15, 2022); *Pariseau v. Built USA, LLC*, Case No. 8-21-2902-SDM-JSS, 2022 U.S. Dist. LEXIS 139321, at \*15 (M.D. Fla. Aug. 5, 2022); *Turizo v. Subway Franchisee Adver. Fund Trust, Ltd.*, Case No. 21-CV-61493, 2022 U.S. Dist. LEXIS 89622, at \*15 (S.D. Fla. May 18, 2022).

<sup>10</sup> *Turizo*, 2022 U.S. Dist. LEXIS 89622, at \*35-36.

The Amendment stops short of adopting the ATDS definition from *Facebook*, but “clarifies” that a calling technology must meet a two-part test to qualify as an automated system by both selecting and dialing telephone numbers.<sup>11</sup>

### Unsolicited

With the addition of a single word “unsolicited,” the Amendment arguably would narrow even further the potential scope of liability for automated communications under the FTSA. FTSA previously applied to “telephonic sales call[s],” regardless of whether the call was solicited or unsolicited.<sup>12</sup>

The Amendment would dramatically alter the statutory text by prohibiting only an “*unsolicited* telephonic sales call” using an automated system for the selection and dialing of telephone numbers. An “unsolicited telephonic sales call” is defined as “a telephonic sales call *other than* a call made” [1] “[i]n response to an express request of the person called,” [2] “[p]rimarily 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,” [3] “[t]o a person with whom the telephone solicitor has a prior or existing business relationship,” or [4] “[b]y a newspaper publisher or his or her agent or employee in connection with his or her business.”<sup>13</sup>

Although the Amendment would introduce four exceptions into the automated system prohibition in Section 8(a) of the FTSA, prior decisions under the FTSA arguably do impose some limits. For instance, Florida courts have construed “an express request of the person called” to require an “express consent” to “make a later telephonic sales call” and more than “[v]oluntarily surrendering one’s telephone number to a sales clerk.”<sup>14</sup> Similarly, although FTSA does not define a “prior or existing business relationship,” Florida courts have construed a “prior or existing business relationship” to require “a voluntary two-way communication” “on the basis of” a “purchase or transaction with the caller within eighteen (18) months immediately preceding the date of the telephone call” or “on the basis of” “an inquiry or application regarding products or services” “within the three months immediately preceding the date of the call.”<sup>15</sup>

### Signature

The Amendment also would broaden the array of actions that would be accepted as a signature for prior express written consent to receive telephone calls, texts, and prerecorded messages using an automated system. The FTSA currently requires a signature to be “an electronic or digital signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.”<sup>16</sup> In the context of the TCPA, some courts have restrictively interpreted the ability to obtain an electronic signature under the federal E-Sign Act.<sup>17</sup> The Amendment would expand the existing signatures to recognize an “act” as a “signature” to “the extent that the act demonstrates express consent, including, but not limited to, checking a box indicating consent or responding affirmatively to text messages, to an advertising campaign, or to an e-mail solicitation.”<sup>18</sup> The impact would be to more clearly encompass online consents that do not contain a physical manifestation of a signature.

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<sup>11</sup> Florida Senate, *Bill Analysis and Economic Impact Statement*, Rules Committee et al., p. 15 (Apr. 25, 2023).

<sup>12</sup> 501.059(8)(a), Fla. Stat.

<sup>13</sup> 501.059(1)(k), Fla. Stat.

<sup>14</sup> *TSA Stores, Inc. v. Dep’t of Agric. & Consumer Servs.*, 957 So. 2d 25, 29 (Fla. 5th DCA 2007).

<sup>15</sup> *TSA Stores, Inc.*, 957 So. 2d at 29 (quoting 47 C.F.R. § 64.1200(f)(4)).

<sup>16</sup> § 501.059(1)(h), Fla. Stat.

<sup>17</sup> *Mantha v. QuoteWizard.com, LLC*, Case 19-12235, 2021 U.S. Dist. LEXIS 245059, at \*24 (D. Mass. Dec. 13, 2021) (quoting 15 U.S.C. § 7001 et seq.), report adopted, 2022 U.S. Dist. LEXIS 19502, at \*2 (D. Mass. Feb. 3, 2022).

<sup>18</sup> House Bill 761, § 1 (Apr. 27, 2023).

## Safe Harbor

The Amendment would further limit class action and individual litigation under the FTSA by creating a 15-day safe harbor for text solicitations. Prior to bringing suit on unsolicited text notifications, if the Amendment becomes law, a “called party” would be required to notify a “telephone solicitor” that the “called party does not wish to receive text messages by replying “STOP” to the number from which the called party received text messages from the telephone solicitor.”<sup>19</sup> Within 15 days of the “receipt of such notice, the telephone solicitor shall cease sending text message solicitations to the called party,” with the exception of a single text message to confirm receipt of the notice. Only if the telephone solicitor sent text messages after expiration of the 15-day safe harbor could the called party bring an action against the telephone solicitor. The net impact of the safe harbor amendment would be to limit class and individual text lawsuits under the FTSA to those telephone solicitors that continued to text consumers even after receiving a STOP opt-out.

The safe harbor is notable for three reasons. First, unlike the other provisions in the Amendment that primarily relate to the automated system provision of the FTSA, the safe harbor would apply to “any action for damages under this section for text message solicitations.”<sup>20</sup> This arguably would extend to actions brought under FTSA for unsolicited telephonic sales calls transmitted by text message to consumers who had registered their number on the Do Not Call list or who previously had communicated to the telephone solicitor that he or she did not wish to be contacted.<sup>21</sup>

Second, the Legislature required a bright-line “STOP” message to trigger the 15-day safe harbor for text messaging and rejected proposed statutory language that would have permitted a simple “ora[l] or text messag[e] that such called party or consumer does not wish to receive any communications from that telephone solicitor.”<sup>22</sup> The bright-line arguably would resolve issues that might arise where a text opt-out used similar words, but not the exact word “STOP.”<sup>23</sup>

Third, although the FTSA’s prohibition on automated calls applied to any “*person*” that makes or knowingly allows such calls to be made,<sup>24</sup> the new safe harbor for text messaging would only be available to a “telephone solicitor.” The FTSA defines a “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.”<sup>25</sup> In turn, “[d]oing business in this state” is defined as “businesses that conduct telephonic sales calls from a location in Florida or from other states or nations to consumers located in Florida.”<sup>26</sup> This raises the question of whether a business that knowingly allowed calls using an automated system to be made, but which did not make or cause the telephonic sales call or whose activities did not arise to the level of “doing business” in Florida, could avail itself of the 15-day safe harbor for text marketing.

## Effective Date

The Amendment has significant implications for pending class actions and other individual FTSA claims. The Amendment takes effect upon becoming a law. The Amendment provides that “[t]he amendments made by this act apply to any suit filed on or after the effective date of this act and to any putative class

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

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

<sup>21</sup> § 501.059(4), Fla. Stat.; § 501.059(5), Fla. Stat.

<sup>22</sup> See SB 1308, Committee Substitute 1, § 1 (Apr. 5, 2023).

<sup>23</sup> *Lantieri v. Credit Prot. Ass’n L.P.*, No. 1:13-cv-1501-WTLMJD, 2017 U.S. Dist. LEXIS 134868, at \*5 (S.D. Ind. Aug. 22, 2017).

<sup>24</sup> § 501.059(8), Fla. Stat.

<sup>25</sup> § 501.059(1)(i), Fla. Stat.

<sup>26</sup> § 501.059(1)(e), Fla. Stat.

action not certified on or before the effective date of this act.”<sup>27</sup> In other words, the new narrow definition of “automated system,” the expanded signature requirements, the 15-day safe harbor, and the new exceptions for an “unsolicited telephonic sales call” would apply to all existing calls and text messages for which suit had not been filed. Even as to those telephone calls on which a class action has been filed, the Amendment would be applicable if no class had been certified. If effective, this provision might help to extinguish the firestorm of class actions that the 2021 amendments to the FTSA ignited.

All businesses that engage in telemarketing and text marketing to Florida residents and persons with a Florida-based area code should ensure that their policies and practices comply with the FTSA. Even if businesses abide by the FTSA’s newly lowered standards as passed by the Legislature, it is also important to keep track of the growing patchwork of stringent state laws imposing stricter standards than the FTSA for communications to residents of their respective states.

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<sup>27</sup> House Bill 761, § 1 (Apr. 27, 2023).