



Legislative Fiscal Bureau

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TO: Members
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: Senate Bill 99: Expanding the Telephone Solicitation (Do Not Call) Program

Senate Bill 99 would expand the Department of Agriculture, Trade and Consumer Protection's (DATCP) telephone solicitation regulation (No-Call) program to cellular telephones and certain small businesses. The bill would also increase penalties associated with no-call violations. On May 2, 2007, the Senate Committee on Small Business, Emergency Preparedness, Workforce Development, Technical Colleges and Consumer Protection adopted Senate Amendments 1 and 2 on a vote of 5 to 0, and recommended the bill, as amended, for passage on a vote of 3 to 2. On October 29, 2007, the bill was referred to Joint Committee on Finance.

CURRENT LAW

DATCP's no-call program, was created in 2001 Act 16 and requires most telemarketers who sell property, goods or services to register with DATCP and prohibits them from calling, for the purpose of solicitation, consumers who register their phone number on the no-call list maintained by the Department. Businesses are required to purchase this no-call list from DATCP and are not allowed to solicit the phone numbers on the list. This program is administered by DATCP under administrative rule ATCP 127.

The Department is provided 7.0 PR positions and approximately \$700,000 annually to administer and enforce the program. Staff consists of one supervisor, three investigators and three consumer specialists. The specialists handle consumer complaints, mediate problems and educate businesses and consumers about the no-call program. Should the consumer specialists become aware of possible violations, the information is passed along to the investigators, who conduct a formal investigation. Violations are punishable by forfeitures of up to \$100 per violation. In 2003, DATCP received approximately 5,300 written consumer complaints. However, for the last four years the number has been just under 2,000 complaints annually. In the five years since implementation in 2003, DATCP has issued approximately 1,200 warning letters annually. Further,

formal enforcement actions (generally in cooperation with the Department of Justice) have averaged about 10 per year. The Department has administratively revoked or suspended a telemarketer's registration in nine instances.

The Department has contracted out certain responsibilities related to the no-call list at a cost of about \$215,000 annually. The company operates the no-call list registration phone center and web site, and publishes updated no-call lists quarterly (in compact disc or e-mail form, as preferred by each business registrant).

The first no-call list was published on January 1, 2003, and contained 1,013,000 residential telephone numbers. The list is updated and published quarterly, with consumers required to renew their listing every two years. There is no cost to consumers for registration or renewal. The most recent listing (October 1, 2007) contained 931,700 residential telephone numbers.

The funding for the no-call program comes from fees paid by businesses that solicit consumers via telephone, and are listed in ATCP 127. This rule specifies that telemarketers pay an initial registration fee of \$700, with \$500 annual fees thereafter, plus additional annual fees of \$75 per phone line over three used for telemarketing. Other possible fees include \$25 for each additional e-mail or compact disc copy of the no-call list, and \$1,000 for each additional hard copy of the no-call list. Total annual fees are capped at \$20,000 per registrant. Upon registration, the business is sent the no-call list. Under ATCP 127, the Department collects these fees from telephone solicitors in quarterly installments. If the program is producing revenue in excess of 15% above the amount needed to fund the program in a fiscal year, the quarterly solicitor fees are to be uniformly reduced or suspended by DATCP until needed to fund the program again. The revenues are deposited in a program revenue continuing appropriation for administration of the program. Currently, approximately 740 telemarketing firms are registered with DATCP.

SUMMARY OF BILL

Senate Bill 99 would expand the no-call list to include cellular telephone numbers and small businesses. It would also create a private cause of action for violations of the no-call listing and increase penalties for violations from \$100 per violation currently, to not less than \$1,000 nor more than \$10,000 for each violation. Further, the bill would prohibit facsimile solicitations without the consent of the person solicited. Senate Amendment 1 would modify the bill to establish a separate no-call list for small businesses and provide for a delayed effective date for the bill. Senate Amendment 2 makes a technical correction to maintain the current enhanced penalties for facsimile solicitation violations against elderly or disabled persons under certain circumstances.

Following is a summary of the bill as amended (the bill).

The bill would specify that the Joint Committee on Finance may not transfer funds from the DATCP program revenue appropriation for telephone solicitation administration under the Committee's authority under section 13.101 of the statutes.

The definition of a "residential customer" who may sign up for the no-call list would be expanded to include all "telecommunications" services (such as cellular service), rather than only "basic local exchange" service. Further, the current exclusion for an individual who operates a business at their residence would be deleted. In addition, a separate no-call listing would be available for small business customers. A small business would be defined as a business with 25 or fewer employees or gross sales of less than \$5 million. DATCP would maintain two separate directories, one for residential and one for small business telecommunications customers.

Require telemarketers to pay their annual registration fee (either the initial fee or annual renewals) in quarterly installments and to publish an updated no-call directory on a quarterly basis. This is intended to statutorily codify the current Department practice under administrative rule ATCP 127 (this is the intent of the bill, however a technical amendment would be needed to accomplish consistency). The statutes currently call for a semi-annual directory, though DATCP publishes the list quarterly.

Further, require DATCP, by January 1 each year, to reduce or waive one or more quarterly installment payments if the estimated unencumbered balance in the program revenue appropriation for the do not call program exceeds 15% of the estimated expenditures for that year. This would also statutorily codify a similar provision under the current administrative rule.

The bill would specify that telemarketers may not solicit a person who has notified the telemarketer, within two years of receiving notice by mail or in a previous call that the person does not wish to receive telephone solicitations. Currently a time limit is not specified for this provision.

A person who violates the do not call provisions could be required to forfeit not less than \$1,000 nor more than \$10,000 for each violation (\$100 per violation currently).

Further, the bill would create a private cause of action for injunctive relief and to recover damages for violations of the do not call provisions. An injured party may receive actual damages or \$500 for each violation, whichever is greater, in addition to reasonable attorney fees.

Additionally, the bill would specify that a court action under the do not call provisions must be commenced with three years after the violation accrues, or be barred.

The bill would renumber provisions relating to unsolicited facsimile communications from Chapter 134 of the statutes (Miscellaneous Trade Practices) to Chapter 100 (Marketing: Trade Practices) immediately after where the no-call list provisions are located. This renumbering would have the effect of bringing the facsimile solicitation provisions under DATCP administration and enforcement authority (as well as, allowing DATCP to seek formal prosecutions through the Department of Justice or a local District Attorney). Currently facsimile solicitation cases generally must be brought by a District Attorney's office. Further, the bill would prohibit any facsimile solicitation without the consent of the person solicited. Currently, fax solicitations are prohibited unless they are less than one page, the recipient has a business relationship with the solicitor, and

the document contains the name of the solicitor (even these are prohibited if the recipient has notified the solicitor that they do not wish to receive faxed solicitations). Current penalties of up to \$500 per violation, or up to \$10,000 for certain violations against elderly or disabled persons, would remain.

The bill would become effective on the first day of the 12th month after publication.

FISCAL EFFECT

The bill would make no appropriation. In its fiscal note, DATCP estimated that the bill would entail ongoing costs of \$912,800 PR (\$718,000 in contract costs and \$194,800 for salary, fringe benefits and related oversight costs) annually and require 3.0 PR positions. The estimate is based on the volume of telephone numbers on the no-call list increasing under the bill (from 0.93 million currently, to 3.7 million under the bill) and an associated increase in written complaints (from 2,000 annually to 5,000) and enforcement activity. Further, under the bill DATCP would become responsible for enforcing the prohibition on unsolicited facsimile communications.

DATCP officials believe most households will register their cell phones when they renew their fixed line phones. Further, it is anticipated that many small businesses would list their numbers under the bill. While a substantial increase in listings would be expected, it is unclear whether the dramatic increase identified by DATCP would be realized. Telemarketing calls to cell phones does not appear to be as significant a concern at present as fixed line phones have been. Further, given fewer telemarketing calls to cell phones, it is unlikely that complaint and investigation rates would be comparable to the current program.

Therefore, it is unclear to what extent DATCP will incur additional costs under its contract for consumers to sign up for the do not call list. If, for example, the current listing was to double (from approximately one million numbers to two million) the contract costs would be expected to increase by approximately \$170,000. In addition, DATCP staffing related to no-call program enforcement has increased from 5.5 positions under the original legislation in 2003, to 7.0 positions over the past two budgets. Given the uncertainty over the increase in complaints related to facsimile, small business and cellular telephone violations under the bill, it is unclear if, or how many, additional staff may be needed. In addition, given the delayed effective date, the provisions would not become effective before early 2009. If complaints increased significantly DATCP could seek additional staff in future budgets or other legislation (or from the Joint Finance Committee under a 14-day passive review procedure).

Although, the bill would prohibit Joint Finance from transferring PR funds from the no-call appropriation under section 13.101 authority (quarterly meetings for emergency appropriation supplements), the Committee does not currently have general authority to make such transfers. The Joint Committee on Finance, acting under s. 13.101, may transfer funding between appropriations only if "legislative intent will not be changed as a result of such transfers and the purposes for which the transfer is requested have been authorized or directed by the

legislature." Since the PR appropriation for the no-call program specifies all monies received must be used for "establishing and maintaining the nonsolicitation directory" the Committee is not authorized to transfer these fee revenues for other purposes. However, transfers from the no-call appropriation to the general fund have been authorized by the Legislature, and signed into law by the Governor. A \$600,000 transfer to the general fund was specified under the 2003-05 biennial budget and transfers by DATCP and the Department of Administration have occurred as part of the DOA obligation to meet certain all-agency lapse requirements in the past two budget acts (\$66,700 in 2003-04, \$62,000 in 2004-05 and \$402,000 in 2006-07). Further, additional PR transfers may be undertaken this biennium by DATCP and DOA under the 2007 Act 20 provision requiring aggregate lapses and transfers to the general fund totaling \$200 million. Senate Bill 99 would not restrict these types of transfers.

Revenues under administrative rule ATCP 127 were initially estimated at approximately \$550,000 annually. However, the approximately 740 telemarketing firms currently registered would be expected to generate revenues under the rule of perhaps \$1.8 million annually. DATCP officials indicate original estimates assumed only four telemarketers would use more than 100 lines for telemarketing, while DATCP currently has 69 telemarketers that use more than 100 lines. Although the current fee structure generates revenues far in excess of DATCP's program needs, to date the agency has not proposed an administrative rule revision to bring fees in line with required revenues. A fee structure approximately one-third of the current fees would appear adequate to fund existing operations.

ATCP 127 requires DATCP to reduce or waive one or more of the quarterly payments made by telemarketers that fund the program if the Department projects a year-end balance in the telephone solicitation appropriation account that exceeds projected fiscal year expenditures by at least 15%. In June, 2004, in response to a lawsuit filed by a group of businesses, the Dane County Circuit Court stated that DATCP did not have discretion when program revenue balances exceeded projected expenditures by the specified 15%, but rather must reduce or eliminate fee payments when this is the case. Therefore this provision allows DATCP to maintain a year-end balance of approximately \$100,000. However, although DATCP has waived a number of quarterly payments, the account had a July 1, 2007, balance of over \$1.4 million as shown in the following table. Although DATCP officials indicate they are still determining the level of fees to be assessed, and transfers to the general fund to be made during the 2007-09 biennium, revenues listed in the table assume only one quarterly payment is collected each year (and that no general fund transfers are made).

It should be noted DATCP has already collected over \$1.2 million in revenues this fiscal year (for two quarterly payments through December, 2007). However, agency officials indicate the Department may refund some payments in order to limit the excess balance. Although the table assumes one-quarter of payments will be refunded to solicitors and no additional fees will be assessed this fiscal year, as of the end of 2007 no refunds had been issued.

Telephone Solicitation PR Account (Current Law)

	Actual <u>2006-07</u>	Estimated <u>2007-08</u>	Estimated <u>2008-09</u>
Opening Balance	\$748,000	\$1,422,800	\$1,222,800
Revenue	1,771,800	450,000	450,000
Expenditures	<u>-695,000</u>	<u>-650,000</u>	<u>-750,000</u>
Closing Balance	\$1,824,800	\$1,222,800	\$922,800
Lapse to General Fund	-\$402,000	unknown	unknown

As a continuing appropriation DATCP, with the approval of DOA, may expend all monies received by the telephone solicitation appropriation. Additional permanent or project position authority could only be granted in the PR appropriation through an amendment to the bill, or through future legislation or by the Joint Committee on Finance under a 14-day passive review request.

However, under an annual appropriation, DATCP could only expend the amount appropriated under Chapter 20 of the statutes in a given year. Additional expenditures would require the approval of the Legislature (either by bill, or by the Joint Committee on Finance under a 14-day passive review request from DATCP and DOA). If the Legislature wanted greater oversight over expenditure levels, the appropriation could be converted from continuing to annual.

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