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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of)
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NATIONAL CITY MORTGAGE CO.)
)
)
Petition for Expedited Declaratory Ruling with)
Respect to Certain Provisions of the Florida)
Statutes)

Federal Communications Commission
Office of Secretary

CG Docket No. 02-278

PETITION FOR EXPEDITED DECLARATORY RULING

National City Mortgage Co. ("NCMC"), pursuant to section 554(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e), and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, respectfully requests the Commission to issue, on an expedited basis, a declaratory ruling that section 501.059, Florida Statutes, is preempted as applied to interstate telephone calls made to residential lines using a prerecorded voice, where the call is made to a person with whom the caller has an established business relationship at the time the call is made. As explained further herein, the subject section of the Florida statute is preempted by section 227 of the Telephone Consumer Protection Act ("TCPA") and the implementing regulations of this Commission. The requested relief is necessary in order to terminate a controversy and remove uncertainty concerning NCMC's conflicting obligations under state and federal law, and should be granted on an expedited basis in order prevent continued enforcement action against NCMC by the State of Florida.

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DISCUSSION

On or about September 7, 2004, NCMC received the attached notice from Deborah M. McFadden, Senior Consumer Complaint Analyst for the Florida Department of Agriculture and Consumer Services (the "Department").¹ According to the notice, the Department had received a complaint that NCMC had "played a pre-recorded sales message, without their express consent, to telephone number 305-740-7515."² According to the notice, this call violated Florida's statutory prohibitions concerning prerecorded calls.³ All sales calls made by NCMC into Florida are interstate calls.

In its response to the Department's notice, NCMC pointed out that the cited portion of the Florida statute is in direct conflict with the Commission's regulations implementing the TCPA.⁴ Specifically, section 501.059(7)(a) of the Florida statute states that "[n]o person shall make or knowingly allow a telephonic sales call to be made if such call involves 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."⁵ The Florida statute makes no exception to this requirement for calls that are placed to persons with whom the caller has an established business relationship. By contrast, the Commission's rules provide that a person or entity may initiate a telephone call to a residential line "using an artificial or prerecorded voice to deliver a message

¹ See Attachment 1.

² *Id.*, citing Fla. Stat. § 501.059.

³ *Id.*

⁴ See Attachment 2, letter from Jennifer Malkin, National City Corporation, to Deborah M. McFadden, Florida Department of Agriculture & Consumer Services (Nov. 5, 2004).

⁵ *Id.* Relevant provisions of the Florida statutes are appended as Attachment 3.

without the express prior consent of the called party . . .” if the call is made “to any person with whom the caller has an established business relationship at the time the call is made.”⁶

In telephone conversations on or about November 16 and 17, 2004 between legal counsel of NCMC and a representative of the Department, the Department representative expressed disagreement with NCMC’s response, including NCMC’s preemption claim, and declined to terminate the Department’s inquiry into the consumer complaint. Accordingly, that complaint still is pending and might become the basis for further enforcement proceedings against NCMC.⁷

In its *TCPA Order* released July 3, 2003, the Commission invited “any party that believes a state law is inconsistent with section 227 of our rules [to] seek a declaratory ruling.”⁸ In that same Order, the Commission described the principles that would guide its resolution of such petitions:

Although section 227(e) gives states authority to impose more restrictive *intrastate* regulations, we believe that it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations. We conclude that inconsistent *interstate* rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion. The record in this proceeding supports the finding that application of inconsistent rules for those that telemarket on a nationwide or multi-state basis creates a substantial compliance burden for those entities.⁹

⁶ 47 C.F.R. § 64.1200(a)(2), (a)(2)(iv).

⁷ Under Florida law, the Department may bring a complaint demanding injunctive relief, civil penalties of up to \$10,000 per violation, attorneys’ fees and costs. Fla. Stat. § 501.059(8)-(9).

⁸ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14064-65 ¶ 84 (2003) (“*TCPA Order*”).

⁹ *Id.* at 14064 ¶ 83 (emphasis added).

The provisions of the Florida statute that restrict the use of prerecorded messages, without creating an “established business relationship” exception, are inconsistent with the Commission’s rules when applied to interstate calls. The State of Florida’s apparent intention to enforce that prohibition as to interstate calls subjects NCMC to the “multiple, conflicting regulations” that the Commission has declared its intention to avoid.¹⁰ Specifically, in order to comply with Florida’s law, NCMC must block all interstate calls to Florida residents with whom it has an EBR, or must arrange not to use prerecorded messages in connection with those calls.

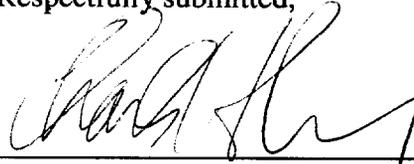
The State of Florida’s action also creates a controversy and subjects NCMC to uncertainty concerning its obligations, thereby satisfying the standard for declaratory relief under the Administrative Procedure Act and the Commission’s rules.¹¹ Accordingly, NCMC requests that this Commission declare that section 501.059(7)(a) of the Florida statute is preempted. Because interruption of NCMC’s ability to leave prerecorded messages in Florida will disrupt NCMC’s operations and is likely to cause significant loss of revenue, and because the State of

¹⁰ The Florida statute applies to “telephone solicitors,” which are defined to include “any natural person, firm, organization, partnership, association, or a subsidiary or affiliate thereof, *doing business in this state*, who makes or causes to be made a telephonic sales call, including, but not limited to, calls made by use of automatic dialing or recorded message devices.” Fla. Stat. § 501.059(1)(e) (emphasis added). “Doing business in this state,” in turn, is defined by the statute as “businesses who conduct telephonic sales calls from a location in Florida *or from other states or nations* to consumers located in Florida.” *Id.* § 501.059(1)(h) (emphasis added). By pursuing a complaint concerning an interstate call placed to a Florida resident, the Department has signaled its intention to rely upon this statutory grant of interstate authority to prohibit conduct that is lawful under the TCPA, contrary to congressional intent and this Commission’s announced policy.

¹¹ “The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.” 47 C.F.R. § 1.2.

Florida may take further enforcement action at any time, NCMC asks that the requested relief be granted on an expedited basis.

Respectfully submitted,



Charles H. Kennedy
Morrison & Foerster LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1888
(202) 887-1500

Counsel for National City Mortgage Co.

Dated: November 22, 2004

CERTIFICATE OF SERVICE

I, Theresa Rollins, do hereby certify that I have on this 22nd day of November, 2004, had copies of the foregoing delivered to the following, via First Class U.S. mail and electronic mail, as indicated:

Deborah M. McFadden
Florida Department of Agriculture &
Consumer Services
Division of Consumer Services
2005 Apalachee Parkway
Tallahassee, FL 32399-6500

Jay Keithley, Deputy Chief
Erica McMahon
Consumer & Governmental Affairs
Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Via Email: Jay.Keithley@fcc.gov
Erica.McMahon@fcc.gov

Best Copy and Printing, Inc.
Portals II
445 12th Street, SW, Room CY-B402
Washington, DC 20554

Via Email: FCC@BCPIWEB.COM



Theresa Rollins



Florida Department of Agriculture & Consumer Services
CHARLES H. BRONSON, Commissioner
Tallahassee, Florida

July 21, 2004

Division of Consumer Services
2005 Apalachee Pkwy
Tallahassee, Florida 32399-6500
Phone: 1-800-HELP-FLA
URL: <http://www.800helpfla.com>

Refer To: 0407-15947 / DMM

NATIONAL CITY MORTGAGE
3232 NEWMARK DR
MIAMISBURG, OH 45342-5421

Subject: Florida Do Not Call Law

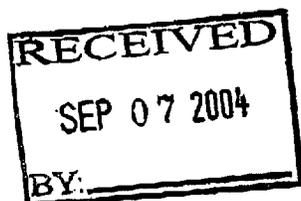
The Division of Consumer Services, Bureau of Mediation & Enforcement, has received the enclosed complaint against your business regarding a telephonic sales call in apparent violation of Section 501.059, Florida Statutes, the Florida Do Not Call (DNC) law. This law defines what types of calls are a violation, grants the Department authority to investigate complaints and may subject you to financial penalties for non-compliance.

The complainant claims your company played a pre-recorded sales message, without their express consent, to telephone number 305-740-7515. Calls of this nature are a violation, irregardless of whether the consumer's telephone number is on the Florida DNC list. You should immediately take steps to ensure that your business makes no calls in violation of this law.

Please complete and return the enclosed business reply form in response to this complaint. Include in your response any information or documentation you feel would establish a reason why the contact is not a violation.

You may visit the Department's website at www.800helpfla.com to review Section 501.059, Florida Statutes. Should you have any questions, please contact this office.

Enclosure



Sincerely,

Deborah M McFadden

Deborah M McFadden
Senior Consumer Complaint Analyst
850-410-3685 / 1-800-435-7352 (Florida Only)
E-mail: mcfadd@doacs.state.fl.us

Attachment 1

Complainant:
BEATTY, DORA L
5939 SW 34TH ST
MIAMI, FL 33155-4916

Case Number **0407-15947**
Date Received **07 16 2004**
Input By **SW**
Analyst **DMM**
Subject: E = 0403-06779

Business: *National City Mortgage*
*MORTGAGE
UNKNOWN
UNKNOWN, UNKNOWN 11111

Amount Paid: \$ _____
SSN: _____
Description: _____

Code: 800 - 517 - 865 - 040 - 807

Traveled Y/N: _____

Action Number	Item	To:	Copy To:	Date Ordered	Date Sent	By

www.800HELPFLA.com

CHARLES H. BRONSON, COMMISSIONER
Florida Department of Agriculture and Consumer Services

1-800-HELPFLA (800-435-7352)

My telephone number appears on the "Florida No Sales Solicitation List." I received the following call and want you to take appropriate action. I understand your ability to successfully pursue my complaint depends on the accuracy and timeliness of the information I provide.

Florida law requires callers to first identify themselves and the business they represent.

CONSUMER INFORMATION

Your Name: DORA L. BEATTY
 Address: 5939 SW 34th
 City, State, Zip: MIAMI FL 33155
 Telephone Number: 305 740-7515

CALLER INFORMATION

Name of Business: NATIONAL City mortgage
 Date of Call (month/day/year): July, 09, 2004
 Telephone Number: 888, 533-5363 #1 EXT: 653
 Caller's First & Last Name: Roxanne, called on behalf of Robert Odell
 Goods or Service Offered: mortgage financing
 Business Address: UNKNOWN

Please remember that certain calls may not be a violation of law. Some calls are not telephonic sales calls, such as calls from charitable organizations and political parties. Also, certain calls are exempt under the law, even though they may be telephonic sales calls, when: 1 a prior or existing business relationship exists, 2 in response to an express request of the person called, 3 from a newspaper publisher, 4 in connection with an existing debt or contract.

Comments: they in the past have called several times a week. I want ACTION TAKE

Yes No 1 The call was a recorded message. There was no "live operator" to greet me.
 Yes No 2 The solicitor's telephone number was obtained electronically by Caller ID or other service.
 Yes No 3 I have a prior or existing business relationship with the company. I am complaining against _____
 Yes No 4 I would be willing to testify in court or a hearing, if necessary

FOR OFFICE USE ONLY
DACS Complaint # 0407-15947
Quarter Year _____ Page 5 DACS-10402 (5/01)

FLORIDA DEPARTMENT OF AGRICULTURE & CONSUMER SERVICES
Consumer Complaints
BUSINESS REPLY FORM

Complaint Of:
DORA L BEATTY
5939 Sw 34th St
Miami, FL 33155-4916

Reference No: 0407-15947 / DMM

Complete Name of Firm Name or Individual: _____

Address: _____

Telephone: _____

Name of President or General Manager: _____

Name of Owner: _____

Consumer Services Registration Number, if applicable: _____

Name, address and telephone number of person to contact for additional information, if necessary:

Please state your position, giving action taken or planned: (Continue on back if needed.)

Please return completed form to:

Florida Department of Agriculture & Consumer Services
Division of Consumer Services
Rhodes Building
Tallahassee, Florida 32399-6500

(Signature)

(Title)

(Date)

National City

National City Corporation
1900 East Ninth Street
Cleveland, OH 44114-3484
216-222-3443
Fax: 216-222-9219
Email: jennifer.malkin@nationalcity.com

Jennifer R. Malkin
Vice President and Senior Attorney
Law Division

VIA: FED-EX

November 5, 2004

Deborah M. McFadden
Senior Consumer Complaint Analyst
Florida Department of Agriculture &
Consumer Services
2005 Apalachee Parkway
Tallahassee, FL 32399-6500

Re: Your Reference No. 0407-15947/DMM

Dear Ms. McFadden:

This is in response to your letter of July 21, 2004, received on September 7, 2004, concerning the complaint submitted to your office by Dora Beatty of Miami, Florida. As set forth below, National City Mortgage Co. ("NCMC") believes that the sales calls made to Ms. Beatty were permissible under federal law, with which Florida law conflicts in part. Nonetheless, NCMC will respect Ms. Beatty's preference not to receive sales calls and has added her telephone number to its internal do-not-call list.

NCMC has reviewed its records and found that prerecorded messages were left by NCMC for Ms. Beatty on June 21, 2004 and July 8, 2004. The calls were interstate communications that a third-party telemarketer, acting on behalf of NCMC, originated at its call center in California.

NCMC makes every effort to ensure that its marketing and customer relations activities comply with applicable law. Under the Telephone Consumer Protection Act ("TCPA") and the regulations implementing that statute, calls that include prerecorded messages may be placed to persons with whom the caller has an existing business relationship; accordingly, the call in question was lawful under federal law.

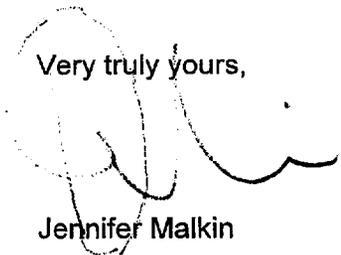
NCMC recognizes that intrastate calls to Florida telephone numbers may be subject to Florida's statutory prohibition against the use of prerecorded messages, which does not include an "existing business relationship" exception. As the Federal Communications Commission ("FCC" or "Commission") has made clear, however, state statutes may not restrict *interstate* calls in ways that impose "multiple, conflicting regulations" and "frustrate the federal objective of uniform national rules" Accordingly, because the calls in question were interstate, the Florida statute is preempted as applied to those calls, to the extent the Florida statute is inconsistent with federal law.

Attachment 2

NCMC hopes that this response satisfactorily addresses Ms. Beatty's complaint. However, if it is your intention to enforce section 501.059 of the Florida Statutes in this case, or in the case of other interstate calls to Florida residents that are permitted under federal law, please advise me of that decision as soon as possible. In such a case, NCMC does intend to file a petition for declaratory ruling asking the FCC to preempt the Florida statute to the extent it is contrary to the Commission's regulations. In the event such a petition is filed, NCMC will provide you with a copy and will request that any proceedings before your Department be held in abeyance pending the FCC's decision.

If you have questions or if we can provide further information, please do not hesitate to contact me.

Very truly yours,



Jennifer Malkin

TELEPHONE SOLICITATION

2004 Florida Statutes TITLE XXXIII, CHAPTER 501 – PART I (s. 501.059)

501.059 Telephone solicitation.--

(1) As used in this section:

(a) "Telephonic sales call" means 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.

(b) "Consumer goods or services" means any real property or any tangible or intangible personal property which is normally used for personal, family, or household purposes, including, without limitation, any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed, as well as cemetery lots and timeshare estates, and any services related to such property.

(c) "Unsolicited telephonic sales call" means a telephonic sales call other than a call made:

1. In response to an express request of the person called;
2. Primarily in connection with an existing debt or contract, payment or performance of which has not been completed at the time of such call;
3. To any person with whom the telephone solicitor has a prior or existing business relationship; or
4. By a newspaper publisher or his or her agent or employee in connection with his or her business.

(d) "Commission" means the Florida Public Service Commission.

(e) "Telephone solicitor" means any 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, including, but not limited to, calls made by use of automated dialing or recorded message devices.

(f) "Consumer" means an actual or prospective purchaser, lessee, or recipient of consumer goods or services.

(g) "Merchant" means a person who, directly or indirectly, offers or makes available to consumers any consumer goods or services.

(h) "Doing business in this state" refers to businesses who conduct telephonic sales calls from a location in Florida or from other states or nations to consumers located in Florida.

(i) "Department" means the Department of Agriculture and Consumer Services.

(2) Any telephone solicitor who makes an unsolicited telephonic sales call to a residential, mobile, or telephonic paging device telephone number shall identify himself or herself by his or her true first and last names and the business on whose behalf he or she is soliciting immediately upon making contact by telephone with the person who is the object of the telephone solicitation.

(3)(a) Any residential, mobile, or telephonic paging device telephone subscriber desiring to be placed on a "no sales solicitation calls" listing indicating that the subscriber does not wish to receive unsolicited telephonic sales calls may notify the department and be placed on that listing upon receipt by the department of a \$10 initial listing charge. This listing shall be renewed by the department annually for each consumer upon receipt of a renewal notice and a \$5 assessment.

(b) The department shall update its "no sales solicitation calls" listing upon receipt of initial consumer subscriptions or renewals and provide this listing for a fee to telephone solicitors upon request.

(c) All fees imposed pursuant to this section shall be deposited in the General Inspection Trust Fund for the administration of this section.

(4) No telephone solicitor shall make or cause to be made any unsolicited telephonic sales call to any residential, mobile, or telephonic paging device telephone number if the number for that telephone appears in the then-current quarterly listing published by the department. Any telephone solicitor or person who offers for sale any consumer information which includes residential, mobile, or telephonic paging device telephone numbers, except directory assistance and telephone directories sold by telephone companies and organizations exempt under s. 501(c)(3) or (6) of the Internal Revenue Code, shall screen and exclude those numbers which appear on the division's then-current "no sales solicitation calls" list. This subsection does not apply to any person licensed pursuant to chapter 475 who calls an actual or prospective seller or lessor of real property when such call is made in response to a yard sign or other form of advertisement placed by the seller or lessor.

(5)(a) A contract made pursuant to a telephonic sales call is not valid and enforceable against a consumer unless made in compliance with this subsection.

(b) A contract made pursuant to a telephonic sales call:

1. Shall be reduced to writing and signed by the consumer.
2. Shall comply with all other applicable laws and rules.
3. Shall match the description of goods or services as principally used in the telephone solicitations.
4. Shall contain the name, address, and telephone number of the seller, the total price of the contract, and a detailed description of the goods or services being sold.
5. Shall contain, in bold, conspicuous type, immediately preceding the signature, the following statement:

"You are not obligated to pay any money unless you sign this contract and return it to the seller."

6. May not exclude from its terms any oral or written representations made by the telephone solicitor to the consumer in connection with the transaction.

(c) The provisions of this subsection do not apply to contractual sales regulated under other sections of the Florida Statutes, or to the sale of financial services, security sales, or sales transacted by companies or their wholly owned subsidiaries or agents, which companies are regulated by chapter 364, or to the sale of cable television services to the duly franchised cable television operator's existing subscribers within that cable television operator's franchise area, or to any sales where no prior payment is made to the merchant and an invoice accompanies the goods or services allowing the consumer 7 days to cancel or return without obligation for any payment.

(6)(a) A merchant who engages a telephone solicitor to make or cause to be made a telephonic sales call shall not make or submit any charge to the consumer's credit card account or make or cause to be made any electronic transfer of funds until after the merchant receives from the consumer a copy of the contract, signed by the purchaser, which complies with this section.

(b) A merchant who conducts a credit card account transaction pursuant to this section shall be subject to the provisions of s. 817.62.

(c) The provisions of this subsection do not apply to a transaction:

1. Made in accordance with prior negotiations in the course of a visit by the consumer to a merchant operating a retail business establishment which has a fixed permanent location and where consumer goods are displayed or offered for sale on a continuing basis;
2. In which the consumer may obtain a full refund for the return of undamaged and unused goods or a cancellation of services notice to the seller within 7 days after receipt by the consumer, and the seller will process the refund within 30 days after receipt of the returned merchandise by the consumer;

3. In which the consumer purchases goods or services pursuant to an examination of a television, radio, or print advertisement or a sample, brochure, or catalog of the merchant that contains:

- a. The name, address, and telephone number of the merchant;
- b. A description of the goods or services being sold; and
- c. Any limitations or restrictions that apply to the offer; or

4. In which the merchant is a bona fide charitable organization or a newspaper as defined in chapter 50.

(7)(a) No person shall make or knowingly allow a telephonic sales call to be made if such call involves 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.

(b) Nothing herein prohibits the use of an automated telephone dialing system with live messages 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 or 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 if the calls made concern goods or services that have been previously ordered or purchased.

(8) The department shall investigate any complaints received concerning violations of this section. If, after investigating any complaint, the department finds that there has been a violation of this section, the department or the Department of Legal Affairs may bring an action to impose a civil penalty and to seek other relief, including injunctive relief, as the court deems appropriate against the telephone solicitor. The civil penalty shall not exceed \$10,000 per violation and shall be deposited in the General Inspection Trust Fund if the action or proceeding was brought by the department, or the Legal Affairs Revolving Trust Fund if the action or proceeding was brought by the Department of Legal Affairs. This civil penalty may be recovered in any action brought under this part by the department, or the department may terminate any investigation or action upon agreement by the person to pay a stipulated civil penalty. The department or the court may waive any civil penalty if the person has previously made full restitution or reimbursement or has paid actual damages to the consumers who have been injured by the violation.

(9)(a) In any civil litigation resulting from a transaction involving a violation of this section, the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, shall receive his or her reasonable attorney's fees and costs from the nonprevailing party.

(b) The attorney for the prevailing party shall submit a sworn affidavit of his or her time spent on the case and his or her costs incurred for all the motions, hearings, and appeals to the trial judge who presided over the civil case.

(c) The trial judge shall award the prevailing party the sum of reasonable costs incurred in the action plus a reasonable legal fee for the hours actually spent on the case as sworn to in an affidavit.

(d) Any award of attorney's fees or costs shall become a part of the judgment and subject to execution as the law allows.

(e) In any civil litigation initiated by the department or the Department of Legal Affairs, the court may award to the prevailing party reasonable attorney's fees and costs if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party or if the court finds bad faith on the part of the losing party.

(10) The commission shall by rule ensure that telecommunications companies inform their customers of the provisions of this section. The notification may be made by:

- (a) Annual inserts in the billing statements mailed to customers; and
- (b) Conspicuous publication of the notice in the consumer information pages of the local telephone directories.

History.—s. 1, ch. 87-253; s. 1, ch. 90-143; ss. 3, 5, ch. 91-237; s. 1, ch. 92-186; s. 59, ch. 92-291; s. 3, ch. 94-298; s. 616, ch. 97-103; s. 4, ch. 2003-179.