

TELEMARKETING: PROVIDE FOR "NO CALL" LIST

House Bill 5267 (Substitute H-2) First Analysis (10-28-97)

Sponsor: Rep. Eileen DeHart
Committee: Consumer Protection

THE APPARENT PROBLEM:

As most residential telephone users are aware, there has been a tremendous increase in telemarketing over the past few years. Receiving unsolicited telemarketing phone calls during dinner time or evening hours is annoying and can interrupt both dinner and much-needed family time. While federal law and federal rules afford residential telephone users some protections from telemarketers (see BACKGROUND INFORMATION), more can be done at the state level, as was done for businesses with the banning of "junk" faxes without prior consent by Public Act 48 of 1990. Legislation has been introduced to address this issue.

THE CONTENT OF THE BILL:

House Bill 5267 would create a new act to provide for the creation of a list (in the Department of Consumer and Industry Services) of individuals who did not wish to receive telephone sales solicitations, to prohibit such calls to individuals on this "no call" list, to impose civil fines of up to \$250 per violation, and to allow aggrieved recipients of such calls to sue to recover actual damages plus reasonable attorney fees.

"No call" lists. The bill would require the Department of Consumer and Industry Services (DCIS) to maintain a list of the names, addresses, and telephone numbers of individuals who did not wish to receive telephone sales solicitations (as defined in the bill), and to update the list at least every 30 days.

In order to be placed on the list, an individual would have to file a written statement (in the form and manner set by the DCIS) expressly providing that he or she wanted to be placed on the no call list. An individual could remove his or her name from such a list by a written request to the DCIS.

Access to "no call" lists. The bill would require the DCIS to make such "no call" lists available to any person or other legal entity that requested a copy, but the department could require persons or other entities seeking

to review or obtain a copy of the list to pay a reasonable fee.

Penalties and remedies. The bill would prohibit a person or other entity (other than a federally recognized nonprofit organization) from making telephone sales solicitations to someone whose name had been on the "no call" list for more than 30 days. Except for persons determined liable for federal penalties or remedies, violations could be punished under the proposed state act by a civil fine of not more than \$250 per violation, while someone aggrieved by a violation of the proposed act could sue and recover their actual damages or \$1,000 (whichever were greater), plus reasonable attorney fees and costs.

Rules promulgation. The bill would allow the DCIS to promulgate rules to implement and administer the act under the Administrative Procedures Act of 1969.

Definition. A "telephone sales solicitation" would include any attempt over the telephone ("telephonic attempt") to induce an individual to purchase or invest in real property or in a consumer good, service, or commodity. It would not include telephone solicitations made at the individual's request or by a federally recognized nonprofit organization.

BACKGROUND INFORMATION

Federal law and rules. The federal Telephone Consumer Protection Act (or "TCPA," Public Law 102-243, as added December 20, 1991) amended the Federal Communications Act of 1934 (47 U.S.C. 227), primarily to place restrictions on the use of automated telephone equipment, including prohibiting initiating any telephone calls to residential telephone lines using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party (unless the call is for emergency purposes or exempted by certain FCC rules or orders). The 1991 TCPA also provided the following congressional statement of findings:

The Congress find that:

(1) The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques.

(2) Over 30,000 businesses actively telemarket goods and services to business and residential customers.

(3) More than 300,000 solicitors call more than 18,000,000 Americans every day.

(4) Total United States sales generated through telemarketing amounted to \$435,000,000,000 in 1990, a more than four-fold increase since 1984.

(5) Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.

(6) Many customers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.

(7) Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operation; therefore, Federal law is needed to control residential telemarketing practices.

(8) The Constitution does not prohibit restrictions on commercial telemarketing solicitations.

(9) Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.

(10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.

(11) Technologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer.

(12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of

protecting telephone consumers from this nuisance and privacy invasion.

(13) While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

(14) Businesses also have complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls are a nuisance, are an invasion of privacy, and interfere with interstate commerce.

(15) The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls to businesses as well as to the home, consistent with the constitutional protections of free speech.

Except for technical and procedural standards established by the Telephone Consumer Protection Act, the act explicitly states that nothing in the act or in the regulations prescribed under the act would preempt state law that imposes more restrictive intrastate requirements or regulation on, or which prohibits: "(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements; (B) the use of automatic telephone dialing systems; (C) the use of artificial or prerecorded voice messages; or (D) the making of telephone solicitations."

In addition to the Telephone Consumer Protection Act of 1991, which involves Federal Communication Commission (FCC) regulations, there also is a relatively new Telemarketing and Consumer Fraud and Abuse Prevention Act, which was signed by President Clinton on August 16, 1994, and which amends the Federal Trade Commission (FTC) act (15 U.S.C. 6101-6108) with regard to sales made by telephone.

State law, current legislation. Currently, Public Act 48 of 1990 prohibits the faxing of advertisements without the prior consent of the recipient (by means other than faxing). The attorney general can bring actions against persons who continue to violate the act after being notified that they are in violation (or who violate an assurance of discontinuance of a violation), and those who knowingly violate the terms of an injunction, order, decree, or judgment (or the terms of an assurance of discontinuance) must pay the state a civil fine of up to

\$500 for each violation. In addition, and under certain circumstances, the recipient of the unwanted advertisement can file a civil suit to recover actual damages or \$250, whichever is greater. House Bill 4972 of 1997 (which was referred to second reading on the House calendar on October 15 of this year) would increase the penalty for violations of the act to allow a person who filed a successful civil suit to recover the greater of actual damages or \$1,000 (instead of the current \$250), plus reasonable attorney fees.

Other legislation has been introduced into, or acted upon by, the House of Representatives this session that deals with various problems that have arisen either specifically with regard to telephone advertising (House Bill 4694, which passed the House on May 29 of this year, would require recorded commercial phone calls to be terminated when the recipient of such a call hung up) or with regard to home solicitation sales (which covers telemarketing as well as door-to-door sales solicitations). Both House Bills 4984 and 5216 would amend the home solicitation sales act, the former to require that certain additional information be given by the seller to the buyer, and the latter to add written solicitations that asked the potential buyer to contact the seller by telephone (for example, when the seller mailed a notice telling a prospective buyer that he or she had won a sweepstake and asking him or her to telephone for further information) to the definition of "home solicitation sale." (House Bills 4984 and 5215 were referred to second reading on the House calendar on October 1 and October 15, respectively, of this year.) Finally, House Bill 4869, which still is in the House Committee on Consumer Protection, would amend the Consumer Protection Act, also to protect consumers with regard to solicitations identifying the consumer as a sweepstakes or contest winner.

Past legislative sessions also have seen bi-partisan and bi-cameral attempts to strengthen protections for consumers against telemarketing.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency the bill would have no immediate state or local fiscal impact, since the Department of Consumer and Industry Services would not request additional fiscal resources to implement the bill but instead would initially use existing staff. However, based on the amount of requests generated under the bill, additional resources might be required in the future. In addition, an appropriation would have to be made to allow for the expenditure of any fees to be collected in connection with the provision of the proposed list. (10-22-97)

ARGUMENTS:

For:

Given the level of legislative activity at both the state and federal levels, telemarketing (as well as other forms of residential sales solicitations) has been seen by many as posing significant, ongoing problems for consumers. One problem with telemarketing is that unsolicited telemarketing calls to private residential telephones constitute not only a nuisance but an invasion of privacy that should not have to be unconditionally tolerated in a civilized society. As telemarketing has expanded in recent years, private citizens have been subjected to a deluge of unwanted telephone calls at their residences, often during the dinner hour or during scarce family time. Some telemarketers still even use illegal "computer generated dialing," so that when a private citizen answers his or her residential phone, he or she may be greeted with a recorded message to the effect that "your call is important to us, but since all of our operators are busy now, please stay on the line." That is, individuals in the privacy of their own homes are subjected to the ridiculous situation of being put on hold by a computer for a commercial call that they had not initiated in the first place! Given the increasing aggressiveness of telemarketers and the escalating time pressures on private citizens, this unwarranted intrusion into people's homes must be controlled, if not stopped outright. The legislature already has enacted legislation that prohibits "junk" faxes, and private, residential phone users should be afforded the same courtesy.

The bill would parallel some of the current provisions in federal law, which, for example, defines "telephone solicitation" in a way that exempts calls or messages from anyone with "prior express invitation or permission" from the recipient, anyone with whom the caller has an established business relationship, or by tax exempt nonprofit organizations. Federal law also allows private lawsuits ("private right of action"), based on a violation of the federal law (or regulations enjoining such violations), to recover "for actual monetary loss from such a violation, or to receive \$500 in damages for each violation, whichever is greater." If the court, moreover, finds that the defendant willfully or knowingly violated this part of the federal law (or the regulations under this part of the law), it may increase the amount of the award to up to \$1,500. (However, unlike the bill, the federal law also restricts the use of automated telephone equipment such as so-called "computer generated" dialing).

Against:

While a good idea, the bill would allow too many exceptions. In particular, many people find telephone solicitations by telemarketers on behalf of charitable

nonprofit organizations just as annoying as "junk sales calls" for private businesses. Further, some groups claim that as little as 10 to 25 percent of what people who donate to charities as the result of a telemarketing call will actually get to the charity on whose behalf the solicitation is made (with the telemarketing firms that "junk call" on behalf of charities keeping the rest). It should be an option for people to opt out of all telemarketing solicitations, whether from private sector for-profit businesses or from charitable, nonprofit organizations. At the very least, the law should require "charitable" telemarketing solicitations to reveal what percentage of a proposed donation to the charity actually will go to the charity and how much will go to the telemarketing firm.

Response:

The federal Telephone Consumer Protection Act exempts tax exempt nonprofit organizations from its restrictions regarding the use of automated telephone equipment, and the bill would follow federal law by exempting such organizations from its proposed restrictions on telemarketing.

Against:

Since it often is difficult for private citizens to successfully bring lawsuits on consumer protection issues, some people believe that the attorney general's office should be allowed or required to take action against telemarketers who violated the bill's provisions, as it can under the state "junk fax" law.

Against:

Although the bill does address a problem that many people currently have with telemarketers, the effectiveness of this approach to the problem could be questioned. In the first place, its effectiveness would depend on whether or not people found out about this option, and, if they did, whether or not they would act on this information. Secondly, it is questionable how much attention out-of-state telemarketers would pay to a Michigan law such as the bill proposes, particularly with the modest penalties involved. Finally, there already is a voluntary, private sector program (the direct marketing industry's "telephone preference service") that does what the bill proposes, and that has the added advantage that the telemarketing industry itself can exercise moral suasion over its members who do not comply. Rather than take the approach proposed in the bill, consumer education on existing options would be more appropriate and would not involve the expenditure of state resources.

Response:

While the direct marketing industry's private, voluntary listing program (the "telephone preference service," or "TPS") could be useful if required by the industry of all telemarketers -- as, for example, use of such private programs by telemarketers reportedly is required in

Canada and in England -- the effectiveness of the American TPS has been questioned, both because of its reported low rate of use by industry members and because the listing reportedly is made available only to national, not local or regional, industry members. While statistics on how many American telemarketing firms use the TPS apparently are difficult to come by, reportedly a 1991 Congressional report found that only three percent of the direct marketing industry's members used the list. Also troubling to some people is the fact that the American TPS reportedly requires consumers to list their names and complete addresses, as well as telephone numbers, when all that would be required for a true "purge" list would be a telephone number (as, for example, the British TPS reportedly requires), thereby leaving open the possibility that even this list could be sold to telemarketers and then used for direct sales solicitations instead of as a "do not call" list. Clearly, a statutorily-mandated list, such as proposed in the bill, would be more effective than what the industry currently has in place. What really is needed to protect consumer privacy in their homes is a mandatory program with some "teeth" in it -- as well as a central, public place to keep such lists, effective sanctions for violations, and an active state consumer education campaign on the availability of such a list -- which is what the bill, in part, would provide.

Reply:

Apparently, the Direct Marketing Association (DMA) -- the nation's largest marketing trade group, with 3,600 members -- had feared that requiring, rather than advising, its members to stop soliciting consumers who requested to be dropped from phone and mail lists would open it to antitrust lawsuits by members. However, according to the October 17, 1997, FTC News Notes, the Federal Trade Commission has ruled that mandatory "do not call" lists for DMA members would not violate antitrust laws, and the DMA reportedly will be implementing (as of July 1, 1999) new policies that will require its members to honor consumers' request to be taken off mail and phone solicitation lists, will require as a condition of membership that direct marketers disclose to consumers whether and how they disseminate information about their customers, and, upon request, to refrain from transferring customer information to others. Presumably, these new policies, once implemented, will make the telephone and mail "preference" lists more effective than they have been to date.

Against:

The bill is anti-business and would violate federal First Amendment free speech rights. Why shouldn't businesses be allowed to solicit potential customers by telephone in addition to through the mail? If someone doesn't want to take such telephone calls, all they have

to do is hang up on the solicitor. Certainly from a business point of view

the bill is not needed and, indeed, could be counterproductive.

Response:

As the Congressional findings for the federal Telephone Consumer Protection Act point out (see BACKGROUND INFORMATION, above), the U.S. Constitution "does not prohibit restrictions on commercial telemarketing solicitations," and "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protect the privacy of individuals and permits legitimate telemarketing practices." According to one source, a recent Louis Harris survey found that 82 percent of residents considered "junk sales calls" to be a nuisance or invasion of privacy. And, as the Congressional findings point out, "many customers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers." Just as Public Act 48 of 1990 protects businesses from "junk faxes," the bill would provide some protection to private citizens from "junk sales calls." People should not have to put up with this kind of invasion of their privacy if they don't want to do so. Again, as the Congressional findings point out, "[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety." The findings also observe that "[m]any customers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers." Most people use their residential telephones for private use, and it is not unreasonable for people in their homes to be able to block the intrusion of ever-increasing numbers of unsolicited and unwanted "junk" phone calls. If businesses want to contact people in their homes, they can send something through the mail. That way, the consumer's home time at least would not be wasted on unwanted commercial telephone messages.

POSITIONS:

The Michigan Consumer Federation supports the bill. (10-22-97)

The Detroit Consumer Affairs Department supports the bill. (10-23-97)

The Michigan AFL-CIO supports the bill. (10-27-97)

The Department of Consumer and Industry Services does not support the bill. (10-23-97)

The Direct Marketing Association of Michigan opposes the bill. (10-27-97)

Analyst: S. Ekstrom

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.