House
Legislative
Analysis
Section

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TELEMARKETING REGULATION

House Bill 4042 (Substitute H-3)
Sponsor: Rep. Jennifer Faunce

House Bill 4154 (Substitute H-2)
Sponsor: Rep. Jim Howell

House Bill 4250 (Substitute H-2)
Sponsor: Rep. Mike Kowall

House Bill 4631 (Substitute H-2)
Sponsor: Rep. Joseph Rivet

House Bill 4632 (Substitute H-1)
Sponsor: Rep. Irma Clark

First Analysis (5-15-01)
Committee: Energy and Technology

THE APPARENT PROBLEM:

Despite existing federal and state laws regulating telemarketing, many people still feel that their rights to privacy and freedom from unsolicited telephone intrusions into their homes are not adequately protected by these laws. Existing laws not only allow numerous exemptions to telemarketers (despite the fact that it does not matter to most people who actually makes the unwanted telemarketing call or for whom) but also allow such calls to be made between 8:00 a.m. and 9:00 p.m. This means, in practice, that many people are interrupted by unsolicited telemarketing calls during dinnertime and during the evening hours. These, of course, are precisely the times that many families look forward to sharing together during the work week, which means that many people particularly object to telemarketing during the hours roughly between 5:00 p.m. and 9:00 p.m.

Moreover, in addition to the numerous and extensive loopholes in state and federal laws regulating telemarketing, telemarketing has become even more intrusive with the advent of automatic dialing devices, which are able automatically to determine all possible telephone number combinations (including unlisted numbers) and to dial them much more rapidly than a real person could. The use of automatic dialing devices, coupled with the last two decades of deregulation fever – which has seen the deregulation of the telephone system, and the onset gas and electric utility deregulation – has resulted in a virtual flood of aggressive telemarketing calls to residences that many residential telephone customers deeply resent.

Partly in response to the aggressive use of automated telemarketing, which allows telemarketers and the businesses that hire them to make millions of phone calls every day, some states have begun to implement state "do-not-call" lists in addition to the federally-required industry lists. Residential customers, either for free or for a nominal fee ($5 to $15), can register with their state lists. And telemarketers calling people on these lists are subject to civil and sometimes criminal penalties. Reportedly, in recent years at least fourteen states have enacted legislation implementing some form of a "do not call" list. Legislation proposing a Michigan "do not call" list, and other measures, has once again been introduced.

THE CONTENT OF THE BILLS:

The bills would to create a state telemarketing "do-not-call" list and to add other provisions regarding telephone solicitors. Four of the bills would amend the home solicitation sales act (Public Act 227 of 1971): House Bill 4042 would require the Public Service Commission to create or designate a "do not call" list that state residents could be put on; House Bill 4154 would require telephone solicitors to give

certain information about themselves and the company they worked for and would prohibit the intentional blocking of caller ID; House Bill 4250 would create a list of "unfair practices" for telephone solicitors that would constitute violations of the act punishable as misdemeanors; and House Bill 4631 would require that telephone directories contain information about how residential customers could get on do-not-call lists and would exempt charitable and public safety organizations from the bill package's provisions. Finally, House Bill 4232 would amend the Consumer Protection Act to subject home solicitation sale or telephone solicitation violations of the home solicitation sales act to civil penalties under the Consumer Protection Act's prohibition against "unfair practices." The bill also would require the attorney general to provide certain better business bureaus with quarterly lists of consumer complaints about telephone solicitors.

The bills are described in greater detail below.

House Bill 4042 would amend the home solicitation sales act (MCL 445.111a) to require the Public Service Commission (PSC) to establish its own do-not-call list or designate an existing national "do-not-call" list. The bill also would prohibit telephone solicitors from making calls to names on the list beginning 90 days after the PSC established or designated the list unless the company making the telephone solicitations had no more than 25 employees and was not primarily a telemarketing business.

"Telephone solicitor" would mean any person doing business in this state who [made] or cause[d] to be made a telephone solicitation from within or outside of this state, including, but not limited to, calls made by use of automated dialing and announcing devices or by a live person."

"Telephone solicitation" would mean "any voice communication over a telephone for the purpose of encouraging the purchase or rental or, or investment in, goods or services." "Telephone solicitation" would not include any of the following:

- Any voice communication to any residential telephone subscriber who had given "prior express invitation or permission";

- Any voice communication to any residential telephone subscriber who was an existing customer of the telephone solicitor. (However, if an existing customer of a business didn't want to receive any more telephone calls from that business, the customer could ask to be put on the business's "do-not-call" list.);

- "Occasional and isolated voice communications" to a residential telephone customer if four conditions were met: (1) a "direct employee" of the business made the "voice communication"; (2) the "voice communication" were not made as part of a "telecommunications marketing plan"; (3) the business had a reasonable belief that the specific person who received the "voice communication" was considering buying a good or service sold or leased by the business and the call were specifically directed to that person; and (4) the business did not make more than three of the "voice communications" in any one calendar week.

The "do-not-call" list. Within 90 days after the bill took effect, the Public Service Commission would have to either establish a state do-not-call list or designate an existing national do-not-call list as the authorized [state] do-not-call list. Before deciding whether to establish or designate a do-not-call list, the commission would be required to consider comments from consumers, telephone solicitors, or any other person.

If the PSC established a state do-not-call list, it would have to publish that list quarterly for use by telephone solicitors and would be prohibited from selling or transferring the list to any person for any purpose unrelated to the bill.

If the PSC decided to designate an existing national do-not-call list, the commission would have to investigate "any" national list then in existence and before adopting the list consider each list's accessibility to telephone solicitors and the cost to consumers to register with the list. The commission could, at any time, review and designate a different national do-not-call list if it determined either (a) that an alternative list provided superior accessibility to telephone solicitors and ease and cost of registration to consumers or (b) that the organization maintaining the designated list engaged in activities that the commission considered to be contrary to the public interest.

The Public Service Commission also could ("at any time") stop maintaining its own list and designate a list under the bill's provisions, or discontinue a designated list and establish and maintain its own list.

Telephone solicitors. Beginning 90 days after the Public Service Commission established or designated a do-not-call list, telephone solicitors would be

prohibited from making telephone solicitations to residential subscribers on the list. Telephone solicitors also would be prohibited from using a do-not-call list for any purpose other than meeting the bill's requirements (such as selling the list to other businesses for solicitation purposes).

Small business exemption. Telephone solicitors with no more than 25 employees who were not primarily telemarketing businesses ("were not engaged in telephone solicitation as their primary business") would be exempted from the prohibition against calling residential customers on the state do-not-call list.

House Bill 4154 would add a new section to the home solicitation sales act (MCL 445.111b) to require telephone solicitors to give certain information about themselves and the company they worked for. The bill also would prohibit telephone solicitors from intentionally blocking residential customers' caller ID service, if the customer subscribed to that service.

More specifically, the bill would require a telephone solicitor to state, at the beginning of a telephone solicitation, his or her name and the full name of the organization or other person on whose behalf they were calling, as well as provide, upon request, a telephone number for the organization or other person. A real ("natural") person would have to be available to answer the organization's telephone number at any time when telephone solicitations were being made, and the person answering the organization's telephone would have to provide a residential customer who called with information describing the organization and the telephone solicitation.

The bill also would prohibit telephone solicitors from intentionally blocking or otherwise interfering with a residential customer's caller ID so that the caller's telephone number was not displayed on the residential customer's telephone.

House Bill 4250 would add a new section to the home solicitation sales act (MCL 445.111c) to make certain actions or omissions by telephone solicitors "unfair or deceptive acts or practices" and add criminal (misdemeanor) penalties for violations of the proposed new section.

More specifically, the bill would make it an unfair or deceptive act or practice – and a violation of the home solicitation sales act – for a telephone solicitor to do any of the following:

* Misrepresent or fail to disclose, in a clear, conspicuous, and intelligible manner and before payment were received from the consumer all of the following information: (1) the total purchase price to the consumer of the goods or services to be received; (2) any restrictions, limitations, or conditions to purchase or to use the goods or services that were offered for sale; (3) any material term or condition of the seller's refund, cancellation, or exchange policy (or, if the seller didn't have such a policy, that information), including a consumer's right to cancel a home sale solicitation under the act; (4) all material costs of conditions related to receiving a prize (including the odds of winning the prize, or, if the odds weren't calculable in advance, the factors used in calculating the odds), the nature and value of the prize, that no purchase were necessary to win the prize, and the "no purchase required" method of entering the contest; (5) any material aspect of an investment opportunity the seller were offering (including, but not limited to, risk, liquidity, earnings potential, market value, and profitability); (6) the quantity and any material aspect of the quality or basic characteristics of any goods or services offered; and the right to cancel a sale under the act, if any.

* Make a false or misleading statement in order to get a consumer to pay for goods or services.

* Request or accept payment from a consumer or make or submit any charge to the consumer's credit or bank account before the telephone solicitor or seller received "express verifiable authorization" from the consumer. (The bill would define "verifiable authorization" to mean a written authorization or confirmation, an oral authorization recorded by the telephone solicitor, or confirmation through an independent third party.)

* Offer (to a consumer in Michigan) a prize promotion in which a purchase or payment were necessary to obtain the prize.

* Fail to comply with the requirements of the act that (1) prohibit making telephone solicitations that are (or that contain) recorded messages; (2) require telemarketers to use the "do-not-call" list proposed in House Bill 4042 (or use it for other than allowable telephone solicitation); (3) provide the consumer at the beginning of the call the solicitor's name and the name and a telephone number for the company the solicitor was working for as proposed by House Bill 4154; or

* Make a telephone solicitation to someone who had requested that he or she not be called by the organization the caller was working for.

Criminal penalties. Beginning 90 days after the bill took effect, a person who knowingly or intentionally violated the bill's provisions would be guilty of a misdemeanor punishable by imprisonment for up to six months or a fine of up to $500 or both. The bill also would not prohibit a person from being charged with, convicted of, or punished for any other crime including any other violation of law arising out of the same transaction as the violation of the bill's provisions.

House Bill 4631 would add a new section to the home solicitation sales act (MCL 445.111d) to require (beginning 120 days after the bill took effect, if enacted) that if a telephone directory included residential telephone numbers, the publisher of the directory include a notice describing how a residential telephone subscriber could subscribe to be included on the do-not-call list (proposed under House Bill 4042).

The bill also would exempt from the new requirements proposed by the package of bills persons subject to either the Charitable Organizations and Solicitations Act (Public Act 169 of 1975), which applies to nonreligious "benevolent, educational, philanthropic, humane, patriotic, or eleemosynary" organizations, or to the Public Safety Solicitation Act (Public Act 298 of 1992), which applies to public safety organizations (law enforcement officers, fire fighters, corrections officers, their employees or any other entity affiliated or associated with such groups at least 75 percent of whose membership consists of former law enforcement officers, fire fighters, or corrections officers).

[Note: The Charitable Organizations and Solicitations Act is a licensure act that, in addition to exempting religious groups, also exempts from its requirements: (a) persons who request contributions for the relief or benefit of an individual specified by name at the time of the solicitation, if the contributions are turned over to the named beneficiary after deducting "reasonable expenses for costs of solicitation, if any," and if all fund-raising functions are carried on by persons who are unpaid, directly or indirectly, for their services; (b) a "person" who does not intend to solicit and receive, and who in fact does not receive, contributions of more than $8,000 during any 12-month period if all of its fund-raising functions are carried on by persons who are unpaid for their services and if the organization makes available to its members and the public a financial statement of its activities for the most recent fiscal year; (c) organizations that don't invite the general public to become members and that confine their solicitation drives solely to their members and immediate families and don't hold solicitation drives more frequently than quarterly; (d) educational organizations certified by the State Board of Education; (e) federally incorporated veterans' organizations; (f) an organization that receives funds from a charitable organization licensed under the act that does not solicit or receive, or intend to solicit or receive, contributions from persons other than a charitable organization, if it makes available to its members and the public a financial statement of its activities for the most recent fiscal year; (g) licensed hospitals, hospital-based foundations, and hospital auxiliaries that solicit funds solely for one or more licensed hospitals; (h) nonprofit tax exempt service organizations whose principal purpose is not charitable but that solicits "from time to time" funds for a charitable purpose by its members and without paying them; (i) nonprofit corporations whose stock is wholly owned by a religious or fraternal society that owns and operates facilities for the aged and chronically ill in which no part of the net income from the corporation's operation benefits anyone other than the residents; (j) charitable organizations licensed by the "Department of Social Services" that serve children and families; and (k) a person registered under and complying with the requirements of the Public Safety Solicitation Act. The act has no requirements that solicitors licensed under the act disclose information directly to the person being solicited for contributions.

The Public Safety Solicitation Act is a registration act that, among other things, requires each registered organization or professional fund-raiser to prepare a disclosure statement to be given with all printed material and read when contact is made by telephone to each person from whom a contribution is solicited, and prohibits certain misleading actions or behavior when soliciting contributions. The act has two specific exemptions to its registration requirements, one to do with soliciting contributions to help the families of public safety officers who die or are injured in the line of duty, and the other having to do with solicitations on behalf of charitable organizations where the person making the solicitation is not compensated by the organization and is not a member of that organization.]

House Bill 4632. Among other things, the Michigan Consumer Protection Act makes "unfair, unconscionable, or deceptive methods, acts, or practices" in the conduct of trade or commerce unlawful, and defines such unfair acts by listing them.

The bill would amend the act (MCL 445.903) to make violations of the home solicitation sales act in connection with a home solicitation sale or telephone solicitation an unfair practice, and, therefore, illegal and punishable by remedies provided by the consumer protection act (which include civil penalties and actual damages or $250 per violation, whichever is greater, plus reasonable attorney fees).

The bill also would require the attorney general, after each calendar quarter, to e-mail a list of consumer complaints (made to the attorney general about violations of the bill's new unfair practices) to four better business bureaus: the Better Business Bureau of Western Michigan, Inc., the Better Business Bureau of Michiana, Inc., the Better Business Bureau of Detroit and Eastern Michigan, Inc., and the Better Business Bureau Serving NW Ohio and SE Michigan, Inc. The quarterly list sent by the attorney general to the better business bureaus would have to contain the name of each telephone solicitor named in the complaints and the number of complaints against each solicitor.

BACKGROUND INFORMATION:

Federal legislation and regulations. In 1991, Congress passed the Telephone Consumer Protection Act (47 U.S.C. 227), which was implemented by the federal Restrictions on Telephone Solicitation Rule (47 C.F.R. 64), and which is enforced by the Federal Communications Commission. Three years later, in 1994, Congress also passed the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. 5101-6108), which was implemented at the end of 1995 by the federal Telemarketing Sales Rule (16 C.F.R. 310), and which is enforced by the Federal Trade Commission. Where the Telephone Consumer Protection Act is more concerned with telephone lines and the protection of residential telephone subscribers' privacy rights, the Telemarketing and Consumer Fraud and Abuse Prevention Act is more concerned with consumer fraud issues. Reportedly in response to the growing problem of telemarketing fraud, Congress passed the Telemarketing Fraud Prevention Act early in 1998 to address some of the jurisdictional problems involved in combating telemarketing fraud originating from locations outside U.S. borders.

The Telephone Consumer Protection Act (TCPA) places certain restrictions on the use of automated telephone equipment and required the Federal Communications Commission to initiate a rulemaking proceeding "concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." It is in the rule that "persons or entities" making telephone solicitations are required to establish their own "do-not-call" lists.

The TCPA makes it illegal to make certain calls using automatic telephone dialing systems or artificial or prerecorded voice messages, as well as to use any device to send unsolicited advertisements to telephone facsimile machines. However, the act exempted from its definition of "telephone solicitation" a call or message (a) to anyone with that person's prior express invitation or permission, (b) to anyone with whom the caller had an established business relationship, and (c) by a tax exempt nonprofit organization. In addition, in implementing the TCPA, the Federal Communications Commission (FCC) could, by rule or order, exempt from the act's prohibitions calls not made for commercial purposes and certain commercial calls that the FCC determined would not adversely affect the privacy rights that the act was intended to protect.

The act requires the FCC to "prescribe regulations to implement methods and procedures for protecting the privacy rights [of residential telephone subscribers] in an efficient, effective, and economical manner and without the imposition of any additional charge to telephone subscribers." The act says that these federal regulations required by the act might "require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations," but such a list has not been required to date.

The TCPA allows both private and public rights of action under which a "person or entity" – or state attorneys general on their behalf – can bring civil actions to enjoin telephone solicitations in violation of the act or federal regulations under the act, to recover for actual monetary loss or receive $500 in damages for each violation, or both. If the court finds the defendant willfully or knowingly violated the act or federal regulations, it can triple these maximum amounts.

The TCPA also specifically says it does not preempt state law except for the act's technical and procedural standards and unless the FCC requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations (in which case, a state couldn't require the use of a database, list, or listing system that didn't include the part of the national database relating to that state). With these

two exceptions, the act says that nothing in the act or in the regulations prescribed under the act "shall preempt any State law that imposes more restrictive intrastate requirements or regulations 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."

The federal regulation implementing the Telephone Consumer Protection Act, in part, prohibits a "person or entity" from initiating any telephone solicitation to a residential telephone subscriber (1) before 8:00 a.m. or after 9:00 p.m. (local time at the called party's location) and (2) unless the "person or entity has instituted a procedure, meeting certain specified minimum standards, for maintaining a list of persons who do not wish to receive telephone solicitations made by or on behalf of that person or entity." The minimum standards listed in the rule require a written policy, training of personnel engaged in telephone solicitation, recording and disclosure of do-not-call requests, identification of the telephone solicitor, affiliated persons or entities, and the maintenance of a do-not-call list.

Michigan legislation. Over the years the Michigan legislature has passed or proposed legislation to curb telemarketing abuse and misuse. Michigan enacted a home solicitation sales act in 1971, and amended it in 1978 specifically to include telephone sales, which had not been regulated under the original act. But federal law requires state regulation of telemarketing to include the same exemptions – explicit permission or invitation by the residential telephone subscriber, tax exempt nonprofit organizations (which include charitable and political organizations), and "previously established business relationships – as federal law. Amendments to the state act have gone even further to also exempt real estate agents, insurance agents, and, as recently as 1999 (Public Act 18), the home solicitation of certain financial "products."

In 1990, Michigan also enacted a separate law prohibiting unsolicited faxes (Public Act 48 of 1990), with violations of injunctions punishable by civil fines of up to $250 (plus actual damages or $250 to the recipient of the unwanted fax, whichever were greater, plus reasonable attorney fees) for each violation. Public Act 93 of 1998 increased the maximum fine to $500, while keeping the recovery to a person who filed a civil suit after receiving an advertisement in violation of the act to $250 or actual damages, whichever were greater, plus reasonable attorney fees.

A number of bills have been introduced in recent sessions to implement a state "do-not-call" list (as well as attempt to place other restrictions on telemarketing), but none have been enacted.

"Do-not-call" lists. The telemarketing industry has its own version of a "do-not-call" list (the "Telephone Preference Service" or "TPS"), but (except for states that adopt the list as their statewide list) the list is available only to members of the Direct Marketing Association, and not all telemarketers are DMA members. Moreover, until recently use of the DMS "do-not-call" list was entirely voluntary on the part of those members. Reportedly under this voluntary policy only a very small percentage of the DMA members actually used the list. The DMA, faced with a proliferation of state-mandated "do-not-call" lists, recently has made use of its list by its members mandatory, but figures on compliance and enforcement are not available.

The federal regulation implementing the Telephone Consumer Protection Act of 1991 (see above) also requires companies engaged in telephone solicitation to maintain their own "do-not-call" lists and to put people on the company list upon customer request. However, there reportedly is little enforcement of this requirement, and many consumer groups find such federally-required company lists to be ineffective.

Fourteen states reportedly currently have statutorily implemented statewide "do-not-call" lists for telemarketers: Alabama, Alaska, Arkansas, Connecticut, Florida, Georgia, Idaho, Kentucky, Maine, Missouri, New York, Oregon, Tennessee, and Wyoming. Residents of these states can register for free (in Connecticut, Missouri, New York, and Tennessee) or for a nominal fee ($10 per number listed in Arkansas, $10 per number plus a $5 annual renewal fee in Florida, $5 per number for two years in Georgia, $10 per number for three years plus a $5 three-year renewal fee in Idaho, and $6.50 per number plus an annual $3 renewal fee in Oregon). Most of the states with such laws maintain their own lists, though Maine and Connecticut use the Direct Marketing Association's "do-not-call" list. At least one state, Kentucky, maintains its own list and allows its citizens to sign up for free, but charges the telemarketing companies a $300 initial filing fee (and an annual $50 renewal fee) to obtain the list, to pay for the cost of the program.

The laws vary from state to state, and include variations not only in fees charged to get on the statewide list and whether or not the state maintains its own list, but also vary in terms of which state agency keeps the list and which enforces the list (it is not always the case that the agency keeping the list also enforces it). For example, in Georgia, residential customers register with the Georgia Public Service Commission, but enforcement is through the Governor's Office of Consumer Affairs. In Kentucky the list is kept and enforced by the Consumer Protection Division of the state Attorney General, and in Florida the list is kept and enforced by the Florida Department of Agriculture and Consumer Services. The state laws also vary in their maximum fines for violations. For example, Georgia and New York both allow for civil fines up to $2,000 per violation, and the Georgia statute further allows civil actions to enjoin violations, to recover actual monetary loss, and to recover up to $2,000 in damages. Some states also restrict the hours or days that a telephone marketer can call. For example, Alabama reportedly prohibits telemarketing calls on Sundays and holidays, and to between the hours of 8:00 a.m. and 8:00 p.m. on other days. Texas, like some other states (reportedly including Connecticut, Minnesota, and New Mexico), allows telemarketing calls between 9:00 a.m. and 9:00 p.m. except for Sundays, when such calls are restricted to between noon and 9:00 p.m.

FISCAL IMPLICATIONS:

Fiscal information on the bills is not available.

ARGUMENTS:

For:

According to a recent article in the *Detroit Free Press*, an EPIC-MRA poll of 600 registered voters in Michigan showed that 81 percent of those surveyed view telemarketing as an intrusion or a potential rip-off, while only nine percent considered unsolicited calls from telemarketers as opportunities for bargains or to be a valuable source of information. Over the years, both state legislatures and Congress have enacted legislation regulating telemarketing to residential telephone customers, but many consumer groups have argued that these laws are ineffective for a number of reasons, including the extensive loopholes written into the laws and the lack of effective enforcement. As the telemarketing industry has continued to expand and use ever more powerful automated telephone calling systems, consumer complaints about this form of business have continued to rise. As early as 1988, citizen groups opposed to unsolicited, unwanted telemarketing calls began forming and giving advice to their members on how to discourage such calls (which include such things as making the calls uneconomic for the telemarketer by using up as much of the telephone solicitor's time as possible, and requesting written copies of their "do-not-call" policies). With the explosive growth of the Internet, the number of anti-telemarketing web sites also has grown. Clearly many people are angered by telemarketers intruding into their homes and family time.

A relatively new legislative response to constituent complaints about telemarketing has been to implement state "do-not-call" lists that require telemarketers to refrain from calling people who register on such lists. The package of bills would implement a Michigan "do-not-call" list, as well as make a number of other changes in law that should make it easier for residential telephone subscribers to cut down on the number of intrusive, unwanted, and unsolicited telemarketing calls during dinner time and evening hours. Moreover, by allowing the Public Service Commission (PSC) to designate an existing national "do-not-call" list already in existence, such as the Direct Marketing Association's Telephone Preference Service list, the proposed list should not cost citizens anything to join (by mail, at least; apparently the DMA charges a $5 fee to join the list by e-mail) and would minimize the costs to the state of such a program. In addition, however, the bill would allow the PSC to establish and maintain its own list, as well as to change a list it had designated based on the list's accessibility to telephone solicitors and ease and cost of registration for consumers. Moreover, the bill would require the PSC, when making its decision whether to establish or to designate a "do-not-call" list to consider comments from consumers, telephone solicitors, and anyone else, thereby providing a means of public input. The bills would protect small businesses with no more than 25 employees by exempting them from the "do-not-call" list, thereby giving these small businesses parity with the large corporations that also are exempted because of an established business relationship with existing customers. The bills also would protect residential telephone subscribers who had caller ID by prohibiting telemarketers from intentionally blocking their numbers and thereby preventing the telephone solicitor from intentionally screening out his or her number (though reportedly much of the technology currently in place automatically does not display the solicitor's number).

Overall, the package of bills would balance citizens' rights to privacy and freedom from unsolicited telephone solicitation with businesses' free speech rights.

Against:

While the bills would make a good start, from a citizen's point of view they do not go far enough. Most importantly, the bills miss an opportunity to add a number of provisions that would promote consumer protection by greatly reducing or eliminating, rather than increasing, exemptions to telemarketing regulation.

In the first place, the bills would do nothing to close any of the large loopholes in the existing law, and in fact they would actually create an additional loophole for small businesses with no more than 25 employees. That small business telephone solicitations can be as annoying as those from large businesses can be attested to by anyone who has received a dozen calls from lawn care companies on almost any spring weekend, or a similar number of calls from furnace companies in the fall. Moreover, the bill exempts small businesses based on a definition of no more than 25 employees, without specifying whether these employees are directly employed by the small business or temporarily contracted part-time just to do telephone solicitation. Under the exemptions to the definition of "telephone solicitation," House Bill 4042 includes "occasional and isolated voice communications to a residential telephone subscriber" under certain circumstances, including requiring that a "direct employee" of the business make the call, and not as part of a "telecommunications marketing plan." Why not use this same "direct employee" language with regard to the proposed new exemption for small businesses? The effect would be to prohibit them from hiring automated telephone dialing companies, and sparing consumers from these annoying calls.

Moreover, many consumer groups have expressed dissatisfaction with the other commercial loopholes in existing telemarketing legislation. A company still can call a residential number if the residential party has done business with the company in the past, and exemptions in Michigan law include real estate agents, insurance agents, and most recently (as of Public Act 18 of 1999), sellers of certain "financial products." From many consumer groups' point of view, these exemptions should be deleted in order to protect citizens' privacy rights.

Finally, some, if not many, consumer groups would advocate much more radical restrictions on commercial telephone solicitation than currently exist in state or federal law, and federal law would appear to allow some effective restrictions. Federal law prohibits states from enacting legislation that does *not* exempt three specific categories from telemarketing regulation calls – those to anyone who has given their prior express invitation or permission, to anyone who has an established business relationship with the caller, or calls by tax exempt nonprofit organizations. However, the federal Telephone Consumer Protection Act of 1991 explicitly allows states to impose *more* restrictive intrastate requirements or regulations on – or to outright prohibit – a number of specified telemarketing practices, namely, (1) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements (which Michigan already has done, under Public Act 93 of 1998), (2) the use of automatic telephone dialing systems, (3) the use of artificial or prerecorded voice messages, and (3) the making of telephone solicitations. If the legislature really wanted to protect citizens from intrusive commercial telemarketing, it wouldn't even have to ban the making of telephone solicitations (which federal law allows). All the legislature would have to do is ban the use of automatic dialing systems, since the huge growth in the telemarketing business apparently is almost entirely dependent on these systems. If legislation were enacted that required the use of real people to dial residential telephone numbers, consumer complaints about intrusive telemarketing calls likely would virtually disappear.

Response:

House Bill 4042 would, in fact, allow the closing of one loophole: the established business customer. If someone who had an established relationship with a business didn't want to be called by that business, all he or she would have to do would be to ask to be put on the business' "do-not-call" list.

Against:

The bill package would amend or add new sections to the home solicitation sales act. But since that act only applies to home *sales* solicitations, it would leave all of the other kinds of home telephone solicitations – including fundraisers for charities and political parties and candidates – unchanged. Yet many people find these kinds of telephone solicitations just as annoying as commercial calls, and believe that more should be done to curb these kinds of unwanted intrusions as well. Just as banning the use of automatic dialing systems in commercial telemarketing would take care of virtually all consumer complaints about commercial telemarketing, requiring charitable and political

fundraising to use their own unpaid volunteers to make fundraising calls would greatly reduce both the number of unwanted charitable and political "telemarketing." It also, incidentally, would ensure that the all of funds raised by such fundraising would go to the charities and political parties or candidates instead some high percentage of it, as currently, to the professional telephone solicitors hired by charities and political parties and candidates.

Response:

As was pointed out in the House committee discussion, charitable and political solicitations are not covered by the home solicitation sales act. So while some people may be interested in looking further into the issue of charitable and political fundraising by telephone, the acts governing these activities – the Charitable Organizations and Solicitations Act (Public Act 169 of 1975) and the Michigan Campaign Finance Act (Public Act 388 of 1976) – would be the acts to amend, not the home solicitation sales act.

Against:

House Bill 4632 would impose new record-keeping and reporting duties on the attorney general's office, but instead of reporting to another governmental entity, such as the Public Service Commission, the bill would require the attorney general to report to private business entities (namely, four listed better business bureaus). Even if it is proper and legal to require a state department to report to private business entities, is it desirable? Why not have the attorney general report the number of complaints against telephone solicitors to the Public Service Commission, who then could make this information available upon request to private business entities?

Against:

House Bill 4631 would set a dangerous precedent of allowing the government to require private publications – in this case, privately published telephone directories – to include certain information – namely, how residential telephone customers could get on the proposed "do-not-call" list. Most telephone directories reportedly already include information on how to get on the telemarketing industry's "do-not-call" list, and once a state "do-not-call" list were established in law telephone directory publishers likely would include this information voluntarily as a service to their customers.

Against:

Some business interests argue that the current package goes too far and unfairly impinges upon legitimate business interests. Mechanisms already are in place that allow residential telephone subscribers to ask to be placed on "do-not-call" lists, and while the recent EPIC-MRA poll indicated that a large percentage of respondents objected to telemarketing, a certain percentage still found unsolicited telephone calls from telemarketers to be either a valuable source of information or an opportunity for bargains. If telemarketers truly anger so many people, then surely this will be reflected in the market: if people resent being called by a business, they are unlikely to avail themselves of that business' goods or services. As the recent change in the Direct Marketing Association's policy regarding its national "do-not-call" list (the Telephone Preference Service) indicates, business is responsive to consumer feedback. The DMA changed its policy to make use of its list by members mandatory rather than voluntary, which shows that business can police itself without intrusive government regulation.

Response:

Because telemarketing profits depend on an extraordinary high volume of calling (a Congressional finding ten years ago estimated 18 million calls a day, and that volume surely has increased over the past ten years), disgruntled consumers are likely not to have much of an impact on this business that ten years ago was estimated to be making more than $400 billion a year. With that much money at stake, any effective restriction on volume of calling is likely to be vigorously opposed by the businesses involved. There also are those who say that the recent change in the DMA policy making its members' use of its "do-not-call" list mandatory rather than voluntary was precisely in response to legislation such as proposed in the current bill package. So while the telemarketing industry certainly can continue to try to improve its customer relations, this effort can only be helped by legislation reasonably regulating the industry.

POSITIONS:

The American Association of Retired Persons generally supports the package but believes that House Bill 4042 has too many exemptions. (5-15-01)

The Direct Marketing Association supports the concept of a do-not-call list but has concerns about the way House Bill 4042 would implement such a list. (5-15-01)

The Metropolitan Detroit Landscape Association supports the concept of a do-not-call list but has concerns about the scope of the proposed small business exemption in House Bill 4042. (5-15-01)

The Michigan Pest Control Association supports the concept of a do-not-call list but has concerns about the scope of the proposed small business exemption in House Bill 4042. (5-15-01)

The Michigan Consumer Federation supports the package in general but feels that House Bill 4042 has too many exemptions. (5-15-01)

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■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.