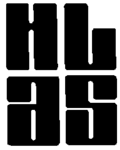

House Legislative Analysis Section

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REGULATE TELEMARKETING

House Bill 4042 as passed by the House
Sponsor: Rep. Jennifer Faunce

House Bill 4154 as passed by the House
Sponsor: Rep. Jim Howell

House Bill 4250 as passed by the House
Sponsor: Rep. Mike Kowall

House Bill 4631 as passed by the House
Sponsor: Rep. Joseph Rivet

House Bill 4632 as passed by the House
Sponsor: Rep. Irma Clark

Second Analysis (8-13-01)
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. 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), they also allow telemarketing 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 workweek, 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.

In response to the increase in unwanted, intrusive commercial telephone calls, 24 states have implemented state "do-not-call" lists in recent years. (See BACKGROUND INFORMATION.) 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. Legislation proposing a Michigan "do not call" list, and other measures, has once again been introduced.

THE CONTENT OF THE BILLS:

The bills would create a state telemarketing "do-not-call" list and add other provisions regarding telephone sales. 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, and would subject telephone solicitation sales to the same fraud provisions that currently apply to home solicitation sales. 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 add "telephone solicitation sales" to provisions of the act that currently apply to home solicitation sales, to regulate certain telephone solicitations, and to require the Public Service Commission (PSC) to establish a do-not-call list or designate an existing national "do-not-call" list for residential telephone subscribers who wished not to be subjected to certain telephone solicitations. 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.

Definitions. The bill would amend the act's current definition of "home solicitation sales" to eliminate reference to "telephonic" solicitations (and would replace the current reference to "personal" solicitations with "face-to-face" solicitations) and instead would add a new, separate definition of "telephone solicitation sale," as well as several other new definitions.

• "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 voice communication to any residential telephone subscriber who (a) had given "prior express invitation or permission" or (b) 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 bill would allow the customer to ask to be put on the business's "do-not-call" list.

• "Telephone solicitor" would mean any person doing business in this state who made or caused 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 sale" would mean a sale of goods or services of more than $25 in which the seller (or a person acting for the seller) engaged in a "telephonic solicitation" (not defined in the bill or act) of the sale, the solicitation were received by the buyer at his or her residence, and the buyer's agreement or offer to purchase was "there given to the seller or a person acting for the seller."

The bill also would limit the current list of exemptions from the definition of "goods and services" in the act to the definition of "home solicitation sales." That is, the current exemptions of loan-related financial products from regulation as "goods and services" under the home solicitation sales act would continue to apply to home solicitation sales, but not to telephone solicitation sales. (See BACKGROUND INFORMATION.)

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.

Other provisions. Currently, the home sales solicitation act has provisions allowing buyers to cancel a home solicitation sale, requiring sellers generally to obtain the buyer's signature to a written agreement or offer to purchase, and governing the return of payments to buyers – and of goods to sellers – when a buyer cancels a home solicitation sale. The bill would add telephone solicitation sales to these provisions, so that the provisions would apply to either home solicitation sales or to telephone solicitation sales.

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). (See BACKGROUND INFORMATION.)

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 a telephone solicitation an unfair practice. "Unfair practices" are punishable by 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 economic 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 a.m. or after 9 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. Generally, this legislation has focused on amendments to the home solicitation sales act, which was enacted in 1971, but a separate law to prohibit unsolicited facsimile transmissions also was enacted in 1990 (see below).

The home solicitation sales act. As originally enacted, the home solicitation sales act regulated only the "personal solicitation" of sales at a buyer's residence of at least $35 of goods or services. The act specifically exempted from regulation under its provisions three kinds of sales: those made under a preexisting revolving charge account, those made under prior negotiations between the parties at a

business establishment ("at a fixed location where goods or services [were] offered or exhibited for sale, and those of insurance by licensed insurance agents.

The act was amended by Public Act 152 in 1978, which, among other things, included telephone sales ("a telephonic solicitation"), as well as "personal" sales. The 1978 amendment also added two additional kinds of sales from regulation: (a) sales of services by real estate brokers or licensed salespersons and (b) sales of agricultural or horticultural equipment and machinery which was demonstrated to the consumer by the vendor at the request of either or both of the parties.

In response to amendments to the act made by Public Act 125 of 1998, which added "written solicitations" (except for printed advertisements in newspapers and magazines) received by a buyer at home to the existing regulation of personal or telephonic solicitations, Public Act 18 of 1999 again amended the home solicitation sales act to exempt from regulation under the act certain loan-related "financial products." Public Act 18, among other things, rewrote the definition of "home solicitation sale" and specifically excluded certain loan-related financial products that were not to be regulated under the act. These include: (a) "a loan, deposit account, or trust account lawfully offered or provided by a federally insured depository institution" (or its subsidiary or affiliate) or (b) an extension of credit that is subject to any of six acts: the Mortgage Brokers, Lenders, and Servicers Licensing Act; the Secondary Mortgage Loan Act; the Regulatory Loan Act; the Consumer Financial Services Act; Public Act 379 of 1984 (which deals with credit card and charge card arrangements); and the Motor Vehicle Sales Finance Act. The existing list of sales exempted from regulation under the act continues to be listed under the definition of "home solicitation sale." (For more information on this 1999 amendment to the home solicitation sales act, see the House Legislative Analysis Section analysis of enrolled House Bill 4318, dated 3-4-99.)

The "junk fax" act. 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.

"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 – reportedly, Connecticut, Oregon, and Wyoming – 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.

Federal regulations that implement the Telephone Consumer Protection Act of 1991 (see above) require 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 in reducing the number of unwanted telephone solicitations.

According to the National Conference of State Legislatures, as of August 2001, at least 24 states have telemarketing acts known as "do-not-call" laws, while just less than one-half of the states require some form of licensing or registration by telemarketing firms.

The following states currently have "do-not-call" laws: Alabama, Alaska, Arizona, Arkansas, Florida, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Kentucky, Maine, Missouri, Nebraska, New Jersey, New York, Oregon, Rhode Island, South Carolina, Tennessee, Texas, and Wyoming.

Regulation of non-commercial telephone solicitation. 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.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bills would have no state or local fiscal impact. More specifically, House Bill 4042 would increase administrative costs to the Public Service Commission (PSC) by an indeterminate amount, with increased costs if the PSC decided to establish and administer its own do-not-call list. However, since the PSC's operations are funded through assessments on public utilities, the bill would increase revenue from these assessments by an amount equivalent to any cost increase. House Bill 4154 would have no fiscal impact. House Bill 4250 could increase local fine revenue by a minimal amount, to the extent that violations occurred. House Bill 4631 would not impose new requirements on any public entity and thus would have no fiscal impact. And House Bill 4532 could increase costs to the attorney general slightly, but this increase likely would be met out of existing resources. (6-8-01)

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). Finally, the bill would regulate the telephone solicitation of loan-related financial products, while continuing to exempt mail solicitations from regulation under the act.

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

Against:

The telemarketing industry argues that attempts to restrict telemarketing encroach on their fundamental constitutional right of freedom of speech. They also point out that the telemarketing industry employs millions of people (according to one estimate, 5.4 million people in 1999) and contributes substantially to the national economy with over $540 billion in sales from telemarketing. Given the constitutional and economic issues involved, legislative attempts to restrict or discourage telemarketing should themselves be discouraged.

Response:

According to the National Conference of State Legislatures, a 1993 challenge to the federal Telephone Consumer Protection Act (*Moser v FCC*) was upheld in the federal district court but overturned in the federal appeals court. The district court held that the TCPA was unconstitutional, as a violation of the First Amendment, and that the commercial delivery of artificial or prerecorded commercial messages to residential homes over the telephone was a constitutionally protected right. It also held that the selective ban on the use of "non-live" methods of soliciting, without the consent of the owner, was an impermissible restriction. However, the appellate court overturned the district court's decision, which means that states can place certain restrictions on the delivery of prerecorded commercial messages to homes.

Against:

From the average citizen's point of view, the bills do not go far enough. Most importantly, the package fails to reduce or eliminate current exemptions to telemarketing regulation, and instead actually adds a significant new loophole in the form of a "small business" exemption. If the package is truly to be a consumer protection package, it should at the very least eliminate the proposed new small business exemption, while tightening or completely eliminating other existing exemptions. Moreover, unlike legislation in almost half of the states, the bills would not require any form of registration or licensing (let alone bonding or an annual fee) by telemarketers. Michigan should follow the other states' lead on this issue and require some for of licensing or registration, along with bonding and annual fees.

The package of bills would not close a number of significant loopholes in the existing law, including the sale or solicitation of insurance by licensed insurance agents and sales of services by real estate brokers or licensed salespersons. At the same time,

the package would actually create a significant new 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. If, for some reason, this new exemption is to be retained, why not at least restrict it to "direct full-time employees" of small businesses, which, among other things, would prevent small businesses from hiring automated telephone dialing companies – and spare consumers from these annoying calls.

Moreover, some, if not many, consumer groups would advocate much more radical restrictions on commercial telephone solicitation than currently exist in state or federal law, even though federal law does allow for some effective restrictions. Federal law does prohibit 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. The TCPA allows the restriction or prohibition of (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 (4) the making of telephone solicitations. So, the legislature could implement an outright ban on telephone solicitation, or it could ban the use of automatic telephone dialing systems and instead require that real, live people dial the telephone when making telephone solicitations. Since the huge growth in the telemarketing business apparently is almost entirely dependent on these systems, banning the use of these systems in telemarketing in Michigan could virtually eliminate consumer complaints about intrusive telemarketing calls.

Response:

House Bill 4042 would, in fact, allow the closing of a couple of loopholes. 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. In addition, the bill would limit the list of loan-related financial products currently exempted from regulation under the act to home solicitation sales only. That is, it would not exempt them from telephone solicitation sales. While most solicitations for loan-related financial products currently may well be done through the mail, it still would be a good move to regulate the telephone solicitation of such products, as the bill proposes.

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 non-commercial home telephone solicitations – such as telephone 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. (See BACKGROUND INFORMATION.)

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 to statutorily require governmental agencies to report to private industry? Taxpayer dollars should not be used in this way. Why not, instead, require 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.

Response:

The government already requires the private sector to include certain information on or regarding its products, with the health warnings on tobacco products being perhaps the most well-known. So requiring telephone directories to include information for residential customers on how to get on the state do-not-call list would hardly set a new precedent.

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 calls, disgruntled consumers are extremely unlikely to have much of an impact on this business that in 1999 was estimated to be making more than $540 billion a year. (A Congressional finding ten years ago estimated 18 million calls a day, while according to one recent estimate the ten largest telemarketing agencies in the country have the ability to make 560 random telephone calls per second.) With hundreds of billions of dollars at stake, any effective restriction on volume of calling will 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.

Against:

At least one business interest argues that instead of allowing the Public Service Commission the option of establishing its own do-not-call list *or* adopting the Direct Marketing Association's (DMA) list, the PSC should be required to use the DMA list. Reportedly, at least three states (Connecticut, Oregon, and Wyoming) have done so, and Michigan should do the same.

Response:

Many more states have chosen to establish their own do-not-call lists rather than adopting the industry list. For one thing, the DMA's list reportedly is not a "clean" list; that is, it has duplications. Moreover, the DMA list reportedly contains relatively few names despite being in existence for a number of years. According to one source, the DMA list contains only some 4 million names. While that might appear to be a significant number, New York State's do-not-call list, which only came into existence a year ago, reportedly already has more than a million names on its list. New York's list size, after only one year of operation, suggests that state-run lists are likely to be

more effective than the industry's list. Another concern raised by consumer groups over the use of a private industry list is what would happen to the information should the private industry go bankrupt, as there are no provisions in the bills restricting the sale of such information on the private market under such circumstances. Finally, the bills also are silent on how much a private list manager could charge for inclusion on the list. Although the fees for inclusion on the DMA list currently are nominal, nothing in the bill would prevent the industry from increasing list subscription fees substantially – or even prohibitively – for individuals wishing to be included on the list. In fact, the lead bill in the package notably lacks any specific details on the process of getting on the proposed list and on the management of the list. The bill should require Michigan to compile and run its own list, instead of giving the PSC the option of using the telemarketing industry's list. The lead bill also should be more specific about how residential telephone customers would get on the list, how much it would cost, how long an individual would be kept on the list, and what would happen to information on a list owned and operated by private industry should the list be discontinued for whatever reason.

POSITIONS:

The American Association of Retired Persons generally supports the package but still has concerns about the absence of process in House Bill 4042. (7-30-01)

The Michigan Consumer Federation supports a state-owned "do-not-call" list, but not a list owned and operated by a private lobbying and trade association. (8-8-01)

The Michigan Pest Control Association is neutral on the bills. (7-30-01)

The Small Business Association of Michigan does not oppose the bills. (8-13-01)

The Michigan Insurance Federation opposes the bills. (8-13-01)

The Michigan Bankers Association opposes the bills. (8-10-01)

National Federation of Independent Business – Michigan opposes the bills. (8-8-01)

The Direct Marketing Association opposes the bills. (7-30-01)

The Metropolitan Detroit Landscape Association opposes the bills. (7-30-01)

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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.