House
Legislative
Analysis
Section

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TELEMARKETING: DO-NOT-CALL LIST AND OTHER REGULATIONS

Public Act 612 of 2002
House Bill 4042 as enrolled
Sponsor: Rep. Jennifer Faunce

Public Act 613 of 2002
House Bill 4632 as enrolled
Sponsor: Rep. Irma Clark

Committee: Energy and Technology
Senate Committee: Technology and Energy
Third Analysis (1-9-03)

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), but 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:

House Bill 4042 would amend Public Act 227 of 1971 (MCL 444.111 et al.), also known as the home solicitation sales act, to regulate certain telephone solicitations and to provide for either the creation of a state "do-not-call list" or the maintenance of such a list by an independent vendor, unless the federal government established such a list. House Bill 4632 would make violations of the home solicitation sales act in connection with a home solicitation sale or a telephone solicitation an unfair practice under the Michigan Consumer Protection Act, and would require the attorney general to notify various state better business bureaus of unfair practice violations under that act. The bills are summarized in detail below.

House Bill 4042. Among other things, the home solicitation sales act prohibits making a "home solicitation sale" by "telephonic solicitation" using in whole or in part a recorded message. The act defines "home solicitation *sales*" as actual sales of "goods or

services" of more than $25 that meet the following three criteria:

• the seller or a person acting for the seller engages in a "personal, telephonic, or written solicitation" of the sale;

• the solicitation is received by the buyer at a residence of the buyer; and

• the buyer's agreement or offer to purchase is given to the seller or a person acting for the seller at the buyer's residence.

Also, the act sets forth a list of specific items that are not considered "goods or services" for the purposes of home solicitation sales.

The bill would retain the prohibition against making a home solicitation sale by telephonic solicitation using a recorded message but would indirectly change the definition of "home solicitation sales", by revising the list of goods and services that the act explicitly excludes from the definition. Specifically, a sale of a security or interest in a security subject to the Uniform Securities Act (Public Act 265 of 1964) would not count as a home solicitation sale.

Telephone solicitations. The bill would add a prohibition against making any "telephone solicitation" that consisted in whole or in part of a recorded message. Under the bill, "telephone solicitation" would be a defined term (and thus would be distinct from "telephonic solicitation", which is used in the definition of "home solicitation sales" but is not defined in the act). "Telephone solicitation" would mean any voice communication over a telephone for the purpose of encouraging the recipient of the call to purchase, rent, or invest in goods or services during that telephone call. The term would not include any of the following:

• a voice communication to a residential telephone subscriber with that subscriber's express invitation or permission prior to the communication;

• a voice communication to an "existing customer" of the person on whose behalf the voice communication was made, unless the existing customer was a consumer who had requested that he or she not receive calls from or on behalf of that person, according to provisions set forth in the bill; or

• a voice communication to a residential telephone subscriber in which the caller requested a face-to-face meeting with the residential telephone subscriber to discuss a purchase, sale, or rental of, or investment in, goods or services but did not urge the subscriber to make a decision to purchase, sell, rent, invest, or make a deposit on that good or service during the voice communication.

"Existing customer" would mean an individual who had purchased goods or services from a person, who was the recipient of a voice communication from that person, and who either paid for the goods or services within the 12 months preceding the voice communication or had not paid for the goods and services at the time of the voice communication because of a prior agreement.

At the beginning of a telephone solicitation a person making a telephone solicitation to a residential telephone subscriber would be required to state his or her name and the full name of the organization or other person on whose behalf the call was initiated. On request, the person making the telephone solicitation would have to provide a telephone number of that organization or other person. A natural person would have to be available to answer the telephone at the number provided at any time when telephone solicitations were being made. The person answering the telephone at that number would have to provide a residential telephone subscriber calling the number with information describing the organization or other person on whose behalf the telephone solicitation was made and information describing the telephone solicitation.

A telephone solicitor could not intentionally block or otherwise interfere with the caller ID function on the telephone of a residential telephone subscriber to whom a telephone solicitation was made so that the solicitor's phone number was not displayed on the subscriber's phone number.

Do-not-call list. Within 120 days after the bill's effective date, the PSC would have to either establish a state do-not-call list or designate an independent vendor to maintain a do-not-call list. "Do-not-call list" would mean a do-not-call list of consumers and their *residential* telephone numbers. In determining whether to establish a state do-not-call list or to designate a vendor to maintain such a list (and in making the designation) the PSC would have to consider comments submitted from consumers, telephone solicitors, or any other person. If an agency of the federal government established a federal do-not-call list (referred to as a "DNC list" or "list" below), the PSC would have to designate the federal DNC list as the state list within 120 days after the establishment of the federal list. The federal list would remain the state list as long as the federal list

was maintained. Telephone solicitors would be prohibited from making telephone solicitations to a residential telephone subscriber whose name and residential number was on the then-current version of the federal list.

Beginning 90 days after the PSC established a DNC list or designated a vendor to maintain such a list, a "telephone solicitor" would be prohibited from making telephone solicitations to a residential telephone subscriber whose name and residential telephone number was on the then-current version of that list. "Telephone solicitor" would refer to any person doing business in the state who made or caused to be made a telephone solicitation from within or outside of the state, including calls made by use of automated dialing and announcing devices or by a live person. A telephone solicitor would be prohibited from using a DNC list for any purpose other than meeting these requirements. The PSC or a vendor could not sell or transfer the list to any person for any unrelated purpose. Provisions specific to a "PSC-established" list or a "vendor-maintained" list are described below.

PSC-established do-not-call list. If the PSC established a DNC list, the PSC would have to publish the list quarterly for use by telephone solicitors. To cover costs of administering the list, the PSC would have to establish and collect fees charged to telephone solicitors for access to the list or fees charged to residential telephone subscribers for inclusion on the list (or both). The PSC could not charge a residential telephone subscriber a fee of more than $5 for a three-year period.

A do-not-call fund would be created in the state treasury, and money received from telephone solicitors' access fees and residential telephone subscribers' inclusion fees would be credited to the fund. The treasurer would be charged with directing the fund's investment and with crediting to the fund interest and earnings from fund investments. Money remaining in the fund at the end of a fiscal year would have to be carried over in the fund to the next and succeeding fiscal years. Fund money could be appropriated to the PSC to cover the PSC's costs of administering the DNC list but could not be appropriated to compensate or reimburse a vendor designated to maintain a list.

If the PSC established a DNC list, it would have to maintain the list for at least one year, after which the PSC could at any time elect to designate a vendor to maintain a list.

Vendor-maintained do-not-call list. If the PSC designated a vendor (including a governmental entity) to maintain a DNC list--either within 120 days after the bill's effective date or at least one year after the PSC established a list as provided above--the following provisions would apply. The PSC would have to establish a procedure or follow existing procedure for both the submission of bids to maintain the list and for the selection of a vendor. In selecting the vendor, the PSC would have to consider the cost of obtaining and the accessibility and frequency of publication of the list to telephone solicitors, as well as the cost and ease of registration on the list to consumers who sought inclusion on the list. The PSC could review its designation and make a different designation if the designated vendor engaged in activities the PSC considered contrary to the public interest or if the PSC determined that another person would be better than the designated vendor in meeting these selection factors.

If the PSC did not establish a state DNC list within 120 days after the bill's effective date, the PSC would have to comply with these designation requirements for at least one year. After one year, the PSC could at any time elect to establish and maintain a list according to the provisions above.

Unless the vendor was a governmental entity, a vendor designated to maintain a DNC list could not be a governmental agency and would not be an agent of the PSC. The PSC and a vendor designated to maintain a DNC list would have to execute a written contract, which would have to include the vendor's agreement to the bill's requirements for vendors and any additional requirements established by the PSC.

The PSC could not use state funds to compensate or reimburse a vendor designated to maintain a DNC list. The vendor could receive compensation or reimbursement only from telephone solicitors' fees for access to the list or residential telephone subscribers' fees for inclusion on the list (or both). A designated vendor could not charge a residential telephone subscriber a fee of more than $5 for a three-year period.

A "designee do-not-call list fund" would be created in the state treasury. If the vendor was a state department or agency, money received by the vendor for the fees (described above) would be credited to the fund. Fund money could be appropriated to the vendor to cover the costs of administering the list. The state treasurer would have the same responsibilities with respect to the fund as the

treasurer would have with respect to the "do-not-call list fund" described above.

Information requirements. Beginning 210 days after the bill's effective date, if a telephone directory included residential telephone numbers, a person that published a new telephone directory would have to include in the directory a notice describing the do-not-call list and how to enroll on the list.

Beginning 210 days after the bill's effective date, each "telecommunication provider" (as defined in the Michigan Telecommunications Act) that provided residential phone service would have to include a notice describing the do-not-call list and how to enroll on the list with one of that telecommunication provider's bills for telecommunication services to a residential phone subscriber each year. If the Federal Communications Commission or any other federal agency established a federal DNC list, the notice would also have to describe that list and how to enroll on that list.

Unfair or deceptive acts/practices. Under the bill it would be an unfair or deceptive act or practice--and a violation of the act--for a telephone solicitor to do any of the following:

- misrepresent any material aspect of the quality or basic characteristics of any goods or services offered;

- make a false or misleading statement with the purpose of inducing 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 from the consumer an express "verifiable authorization"--i.e., a written authorization or conformation, an oral authorization recorded by the telephone solicitor, or confirmation through an independent third party;

- offer to a consumer in this state a prize promotion in which a purchase or payment was necessary to obtain the prize;

- fail to comply with the requirements of the bill set forth above;

- make a telephone solicitation to a consumer in Michigan who had requested that he or she not receive calls from the organization or other person on whose behalf the telephone solicitation was made.

It would also be an unfair or deceptive act or practice, and a violation of the act, for a telephone solicitor to misrepresent or fail to disclose in a clear, conspicuous, and intelligible manner and before payment was received from the consumer, any of the following information:

- total purchase price to the consumer of the goods or services to be received;

- any restrictions, limitations, or conditions to purchase or to use the goods or services that were the subject of an offer to sell goods or services;

- any material term or condition of the seller's refund, cancellation, or exchange policy, including a consumer's right to cancel a home solicitation sale (as described below) and, if applicable, that the seller did not have a refund, cancellation, or exchange policy;

- any material costs or conditions related to receiving a prize;

- any material aspect of an investment opportunity the seller was offering;

- 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.

Penalties for unfair or deceptive acts/practices. Beginning 210 days after the bill's effective date, a person who knowingly or intentionally committed any of the prohibited unfair or deceptive acts or practices would be guilty of a misdemeanor punishable by imprisonment for not more than six months or a fine of not more than $500 (or both). However, guilt and punishment for one of these violations would not preclude 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. Also, the bill would specify that these penalties would not apply if the unfair or deceptive act or practice constituted a failure to comply with the requirements for home solicitation sales, telephone solicitations, and do-not-call lists described above—i.e., under "Home solicitation sales", "Telephone solicitations", "Do-not-call list", "PSC-established do-not-call list" and "Vendor-maintained do-not-call list".

A person who suffered loss as a result of a violation of the bill's unfair or deceptive acts or practices

provision could bring an action to recover actual damages or $250, whichever was greater, and reasonable attorney fees. This would not prevent the consumer from asserting his or her rights under the act if the telephone solicitation resulted in a home solicitation sale, or from asserting any other rights or claims the consumer may have under applicable state and federal law.

Exemption. None of the requirements listed above would apply to a person subject to the Charitable Organizations and Solicitations Act (Public Act 169 of 1975), the Public Safety Solicitation Act (Public Act 298 of 1992), or Section 527 of the (federal) Internal Revenue Code of 1986 (political organizations).

Non-emergency home solicitation sales. Except for emergency situations, the act requires the seller, in a home solicitation sale, to obtain the buyer's signature to either a written agreement or an offer to purchase that designates as the date of the transaction the date on which the buyer actually signs. The agreement or offer to purchase must contain a statement that conforms substantially to specific language set forth in the act. Until the seller has complied with these requirements, the buyer may cancel the home solicitation sale by notifying the seller of his or her intention to cancel. The bill would specify that these provisions do not apply to a home solicitation sale where the seller engaged in a telephone solicitation of the sale if sections 505 to 507 of the Michigan Telecommunications Act applied to the solicitation or sale. (Sections 505 to 507 prohibit "slamming" and "cramming", i.e., switching a customer from one telecommunications provider to another or adding services to a customer's telecommunications service package, without the customer's prior authorization.)

House Bill 4632. Among other things, the Michigan Consumer Protection Act makes specific "unfair, unconscionable, or deceptive methods, acts, or practices" in the conduct of trade or commerce unlawful. These "unfair practices" are punishable by civil penalties and actual damages or $250 per violation, whichever is greater, plus reasonable attorney fees. 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.

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.

Finally, the bill would update a reference to the (federal) "Guides for the Use of Environmental Marketing Claims".

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.

House Bills 4861-4863 propose to create or provide for the independent maintenance of a do-not-call list for persons who do not wish to be called by professional political fundraisers, professional public safety fundraisers, and professional charitable fund-raisers.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the "do-not-call" list provisions of House Bill 4042 would increase state costs by an indeterminate amount. Costs would be met out of the bill's fee provisions. The bill's provisions establishing a code of conduct and prohibiting specific unfair and deceptive practices--and punishing violations of those provisions--could increase both local incarceration costs and local fine revenue. Those provisions could also increase state enforcement costs, which could not be met from the "do-not-call" list fees and thus would have to be met either from existing resources or alternative revenues.

The House Fiscal Agency reports that House Bill 4632 could increase local fine revenue to the extent that violations of the bill occurred. By requiring the attorney general to e-mail a list of consumer complaints regarding unfair practices under the bill's provisions to various Better Business Bureaus, the bill could slightly increase costs to the attorney general. However, the increase would likely be met out of existing resources. (1-9-03)

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 valuable sources 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—e.g., 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 companies' "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 the lists. House Bill 4042 would implement a "do-not-call" list in Michigan, 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 dinnertime and evening hours. The bill would allow the Public Service Commission (PSC) to designate an existing "do-not-call" list already in existence, such as the Direct Marketing Association's Telephone Preference Service list, which would minimize costs to the state of such a program and may not cost citizens anything to join. (Apparently the DMA charges a $5 fee to join the list by e-mail and charges nothing to join the list by regular mail.) In addition, the bill would allow the PSC to establish and maintain its own list and to replace a vendor that it had previously designated with another vendor, if it had concerns about 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 bill would also 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). Further, the bill would protect consumers by prohibiting telephone solicitors from engaging in a number of unfair and deceptive acts and establishing penalties for such acts.

House Bill 4632 would protect consumers from unfair practices committed in conjunction with home solicitation sales by subjecting sellers to penalties under the Michigan Consumer Protection Act, and by making lists of related complaints available to various better business bureaus in the state.

Overall, the 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 the industry's fundamental constitutional right of freedom of speech. Industry representatives 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 bills fail to eliminate or even reduce current exemptions to telemarketing regulation of home solicitation sales and would actually create a new exemption for sales of securities. 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.

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:

House Bill 4042 would specifically exempt charities, public safety associations, and political candidates and parties from the telephone solicitation regulations, 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, public safety-related and political organizations to use their own unpaid volunteers to make fundraising calls would greatly reduce both the number of unwanted noncommercial "telemarketing." It also, incidentally, would ensure that all of funds raised by such fundraising would go to the organizations themselves instead of allowing a high percentage of it to go to the professional telephone solicitors hired by these organizations as it currently does.

Response:

Charitable, public safety-related, and political solicitations are not covered by the home solicitation sales act. So while some people may be interested in looking further into this issue, it would be more appropriate to amend the acts governing these activities—i.e., the Charitable Organizations and Solicitations Act (Public Act 169 of 1975), the Public Safety and Solicitations Act (Public Act 298 of 1992) and the Michigan Campaign Finance Act (Public Act 388 of 1976). (See BACKGROUND INFORMATION.)

Against:

House Bill 4042 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:

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:

Some business interests argue that the bills go too far and unfairly impinge upon legitimate business interests. Mechanisms already in place 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 purchase 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.

Analyst: J. Caver

■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.