

MINUTES OF THE HOUSE COMMITTEE ON BUSINESS, COMMERCE & LABOR.

The meeting was called to order by Chairman Al Lane at 9:06 a.m. on March 12, 1998 in Room 526-S of the Capitol.

All members were present except: Rep. David Adkins - excused  
Rep. Vaughn Flora - excused  
Rep. Broderick Henderson - excused

Committee staff present: Bob Nugent, Revisor of Statutes  
Bev Adams, Committee Secretary

Conferees appearing before the committee: John Holmgren, AARP  
Michael R. Murray, Sprint  
Bob Storey, DMA  
Steve Rarrick, Deputy Attorney General

Others attending: See attached list

The minutes of March 5 and 6 were passed out to the committee. Rep. Grant made a motion to approve the minutes. It was seconded by Rep. Crow. The motion passed and the minutes were approved as written.

Hearing on: **Sub for SB 573 - Consumer protection; telephone solicitation.**

John Holmgren, Coordinator of the Kansas Capital City Task Force for the American Association of Retired Persons (AARP), appeared before the committee as a proponent of the bill. AARP is taking an active role in trying to prevent people from becoming telemarketing fraud victims. In their consumer research they find that 78% of the targeted victims are over the age of 55. Because two-thirds of these victims cannot tell the difference between legitimate and illegitimate telemarketers, AARP believe that state laws should be enacted to protect consumers against such abuses. They ask for three amendments: 1) that the solicitor is required to "immediately" discontinue the solicitation when the consumer gives a negative response, 2) change the "or" to "and" so that the disclosure regarding the return and refund privilege would be provided orally by telephone "and" in writing, and 3) courier pickups be banned in certain situations. (See Attachment 1) He concluded his testimony by answering questions from the committee.

Michael R. Murray, Director of Governmental Affairs, Sprint, appeared as a supporter of the bill. Sprint is placed at a competitive disadvantage because the law now exempts companies with preexisting business relationships from the jurisdiction of telemarketing laws. Sprint can claim such business relationships with only about 10% of the local and long distance market in Kansas. The bill would bring under the telemarketing laws all solicitors and providers of telecommunications services. They also would like to leave the word "promptly" in the bill as it pertains to when a telemarketer must discontinue a phone call after receiving a negative response. (See Attachment 2) He ended his testimony by answering questions.

Bob Storey representing Dehart and Darr Associates, Inc., which represents the Direct Marketing Association (DMA), appeared as a proponent of the bill. They ask for a change on page 2, line 5, by striking the word "indicating" and inserting "stating". They believe this would make it easier to train their telemarketers what a negative response means. (See Attachment 3)

Steve Rarrick, Deputy Attorney General, Consumer Protection Division, Office of the Attorney General, appeared in support of the bill. The Attorney General's Office supports the primary purpose of the bill in removing providers of telecommunications services from the exemptions for existing and preexisting business relationships. This would level the playing field for telecommunications companies who telemarket in Kansas. Attached to his testimony is a balloon which includes a technical amendment on page 1, lines 29-32. The AG office has no problem with the word "promptly" as there has never been a dispute in enforcing the law over the word "immediately". (See Attachment 4) He finished his testimony by answering questions.

No others were in the audience to testify as proponents or opponents of the bill and Chairman Lane closed the hearing on **Sub for SB 573.**

The meeting was adjourned at 9:55 a.m.

The next meeting is scheduled for March 13, 1998.

# HOUSE BUSINESS, COMMERCE & LABOR COMMITTEE GUEST LIST

DATE March 12, 1998

NAME	REPRESENTING
<i>Elvira J. Pomroy</i>	<i>KS Collectors Assn, KS Credit Attorneys Assn</i>
<i>Juan Sult</i>	<i>Attorney General</i>
<i>Gail Bight</i>	<i>Attorney General</i>
<i>Steve Parvitt</i>	<i>Attorney General</i>
<i>Mike Murray</i>	<i>Sprint</i>
<i>John Pinegar</i>	<i>State Independent Telephons Assn</i>
<i>Bob Storey</i>	<i>DMA</i>
<i>Denny Koch</i>	<i>SW BEU</i>
<i>Linda</i>	
<i>William Turner</i>	<i>AARP</i>
<i>BOB GRANT</i>	<i>ICCI</i>
<i>Bettie Sue Shumway</i>	<i>AARP</i>
<i>Paul Laverent</i>	<i>AARP</i>
<i>JOHN HOLMGREN</i>	<i>AARP</i>



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## KANSAS STATE LEGISLATIVE COMMITTEE

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### TESTIMONY BEFORE THE HOUSE BUSINESS, COMMERCE AND LABOR COMMITTEE

#### SUBSTITUTE FOR SENATE BILL 573 MARCH 12, 1998

Good Morning. My name is John Holmgren and I am the Coordinator of the Kansas Capital City Task Force for the American Association of Retired Persons (AARP). AARP is a nonprofit member organization of persons 50 and older with over 332,000 members in Kansas. AARP, the Retired Teachers Association, and the Kansas Association of Area Agencies on Aging have an ongoing interest in preventing, deterring and prosecuting telemarketing fraud.

I appreciate this opportunity to testify on Substitute for Senate Bill 573. AARP commends the Committee for its examination of telemarketing fraud. The Association has conducted consumer research over the past few years in an attempt to reveal more about victims' behavior, attitudes, and values with regard to telemarketing fraud. It is our hope that this research will move us closer to effective prevention methods and messages. Unfortunately, our research and that of others has shown that older Americans are being targeted by fraudulent telemarketers. The information obtained during a lengthy investigation revealed that more than 78 percent of the targeted

*House Business, Commerce  
& Labor Committee  
3/12/98*

American Association of Retired Persons 601 E Street, NW Washington, DC 20049 (202) 434-2277

Margaret A. Dixon, Ed.D. *President*

Horace B. Deets *Executive Director*

*Att. 1*



victims were over the age of 55. AARP is therefore taking an active role in trying to prevent people from becoming telemarketing fraud victims. This job will be difficult, as our research found that two-thirds of telemarketing victims cannot tell the difference between legitimate and illegitimate telemarketers. It was estimated by Congress that over \$40 billion is lost to telemarketing fraud each year. This number may actually be much higher, as victims sometimes do not recognize they have been defrauded, or are too ashamed to report this crime to friends, family, or law enforcement.

**It is essential that state laws are enacted to protect consumers against such abuses.** Some of the proposed amendments contained in Substitute for Senate Bill 573 makes these abuses more likely. I would like to take a few moments to address some of the amendments.

The bill makes it more difficult for consumers to terminate an unsolicited consumer telephone call. An AARP survey in 1995 indicated that victims of telemarketing fraud have a problem hanging up on fraudulent telemarketers. Generally the reasons for this behavior include good manners and a basic respect toward others. Last year, this legislature eliminated the requirement that the telephone solicitor specifically ask the consumer whether he or she wanted to listen to the sales pitch. Instead, the solicitor was required to **immediately** discontinue the solicitation when the consumer gives a negative response. Now, Substitute for Senate Bill 573 weakens the provision even further by requiring the solicitor to **promptly** discontinue the solicitation when the consumer gives a negative response. The proposed amendment will give fraudulent telephone solicitors the opportunity to engage the consumer in additional conversation after the negative response. If that is not the case, there is absolutely no reason to include this amendment.

The amendment regarding the seven day review period raises some questions

about the length of time that consumers have to return the goods. Consumers should not be compelled to pay for and receive goods based on a single telephone conversation, without the opportunity to cancel the sale before payment is made and merchandise shipped. In order to support this amendment, AARP recommends that disclosures regarding the return and refund privilege be provided orally by telephone **“and”** in writing with advertising, promotional material or with the delivery of the product or service. The consumer should receive this disclosure at the earliest possible time so that questions can be asked and the policy explained, if necessary. Please refer to our attachment of page 3 of the bill, line 23.

One other point that AARP believes will strengthen the bill is the inclusion of an amendment that bans courier pickups in certain situations. When the Federal Trade Commission (FTC) developed the Telemarketing Sales Rules, it found that there were certain practices that were used almost exclusively by fraudulent telemarketers. The use of courier pickups was so widespread that it was considered a hallmark of fraudulent prize promoters and other fraudulent telemarketers. Banning the activity will *not* impair legitimate companies from doing business, but *will* eliminate a practice that has been significantly abused. Please refer to our attachment with proposed language to be inserted on page two of the bill.

AARP believes Substitute for Senate Bill 573 can be greatly improved by the adopting of the suggested changes, since they will protect the citizens of Kansas from the potentially devastating consequences of telemarketing fraud. AARP greatly appreciates the opportunity to present its comments today and will be pleased to answer any questions you may have for us.

1-4

1 ~~cessor~~ [predecessor] in interest, making the solicitation has made a prior  
2 sale to the consumer, is establishing a business to business relationship  
3 or has a clear, preexisting business relationship with the consumer, pro-  
4 vided that relationship resulted in the consumer becoming aware of the  
5 full name, business address and phone number of the establishment and  
6 is not a provider of telecommunications services;

7 (c) in which the consumer purchases goods or services pursuant to  
8 an examination of a television, radio, or print advertisement or a sample,  
9 brochure, catalogue, or other mailing material of the telemarketer that  
10 contains:

11 (1) The name, address, and telephone number of the telemarketer;

12 (2) a full description of the goods or services being sold along with a  
13 list of all prices or fees being requested, including any handling, shipping,  
14 or delivery charges; and

15 (3) any limitations or restrictions that apply to the offer; or

16 (d) in which the consumer may obtain a full refund for the return of  
17 undamaged and unused goods or a cancellation of services notice to the  
18 seller ~~within seven days after receipt by the consumer~~ after the consumer  
19 has had at least seven days to review the goods or services, and the seller  
20 will process the refund within 30 days after receipt of the returned mer-  
21 chandise by the consumer or the refund for any services not performed  
22 or a pro rata refund for any services not yet performed for the consumer.

23 The return and refund privilege shall be disclosed to the consumer orally  
24 by telephone or in writing with advertising, promotional material or with and  
25 delivery of the product or service. The words "satisfaction guaranteed,"  
26 "free inspection," "no risk guarantee" or similar words and phrases meet  
27 the requirements of this act.

28 (e) Any telemarketer who, pursuant to this section, is exempted from  
29 K.S.A. 50-671 through 50-674 and amendments thereto, impliedly war-  
30 rants the goods or property to be satisfactory to the consumer to the  
31 extent that the consumer shall have the right to choose at any time within  
32 the seven-day refund period, to cancel the sale by notifying the telemar-  
33 keter in writing, provided the consumer returns to the telemarketer the  
34 goods sold in substantially the same condition as when they were received  
35 by the consumer. A telemarketer that has received such notice to cancel  
36 from a consumer shall then, within 30 business days of the receipt of such  
37 notice:

38 (1) Refund all payments made, including any down payment made  
39 under the agreement;

40 (2) return any goods or property traded in to the seller on account of  
41 or in contemplation of the agreement, in substantially the same condition  
42 as when received by the telemarketer; and

43 (3) take any action necessary or appropriate to terminate promptly

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1 sequential number generator; or  
2 (B) when connected to a telephone line can disseminate a recorded  
3 message to the telephone number called, either with or without manual  
4 assistance;

5 (5) "negative response" means a statement from a consumer indicat-  
6 ing the consumer does not wish to listen to the sales presentation or  
7 participate in the solicitation presented in the consumer telephone call.

8 (b) Any telephone solicitor who makes an unsolicited consumer tel-  
9 ephone call to a residential telephone number shall:

10 (1) Identify themselves;

11 (2) identify the business on whose behalf such person is soliciting;

12 (3) identify the purpose of the call immediately upon making contact  
13 by telephone with the person who is the object of the telephone solici-  
14 tation;

15 (4) immediately promptly discontinue the solicitation if the person  
16 being solicited gives a negative response at any time during the consumer  
17 telephone call; and

18 (5) hang up the phone, or in the case of an automatic dialing-an-  
19 nouncing device operator, disconnect the automatic dialing-announcing  
20 device from the telephone line within 25 seconds of the termination of  
21 the call by the person being called.

22 (c) A telephone solicitor shall not withhold the display of the tele-  
23 phone solicitor's telephone number from a caller identification service  
24 when that number is being used for telemarketing purposes and when  
25 the telephone solicitor's service or equipment is capable of allowing the  
26 display of such number.

27 (d) A telephone solicitor shall not transmit any written information  
28 by facsimile machine or computer to a consumer after the consumer  
29 requests orally or in writing that such transmissions cease.

30 ~~(e) Local exchange carriers and telecommunications carriers shall not  
31 be responsible for the enforcement of the provisions of this section.~~

32 ~~(f) Any violation of this section is an unconscionable act or practice  
33 under the Kansas consumer protection act.~~

34 ~~(g) This section shall be part of and supplemental to the Kansas con-  
35 sumer protection act.~~

36 Sec. 2. K.S.A. 50-673 is hereby amended to read as follows: 50-673.  
37 The provisions of K.S.A. 50-671 through 50-674 and amendments thereto  
38 do not apply to a transaction:

39 (a) That has been made in accordance with prior negotiations in the  
40 course of a visit by the consumer to a merchant operating a business  
41 establishment that has a fixed permanent location and where consumer  
42 goods or services are displayed or offered for sale on a continuing basis;

43 (b) in which the business establishment, or the establishment's est-

*(e) A telephone solicitor shall not obtain by use of any professional  
delivery, courier or other pickup service receipt or possession of a  
consumer's payment unless the goods are delivered with the opportunity  
to inspect before any payment is collected.*

*(f)  
(g)  
(h)*



Testimony Before the House Business, Commerce and Labor Committee  
Thursday, March 12, 1998  
Michael R. Murray, Director of Governmental Affairs, Sprint  
Substitute for Senate Bill 573

Mr. Chairman and Members of the Committee:

My name is Mike Murray, Director of Governmental Affairs for Sprint, and I am here to express Sprint's support for the Substitute for Senate Bill 573 which amends current telemarketing laws in Kansas.

Under current Kansas law, some of Sprint's principal competitors are exempt from certain provisions of the consumer protection statutes because of preexisting business relationships.

Prior to divestiture, AT&T was everyone's phone company, and therefore has a preexisting business relationship with virtually every telephone customer in the state. Southwestern Bell enjoys such a business relationship with about 90% of the local telephone customers in the state.

Consequently, because the law exempts companies with these preexisting business relationships from the jurisdiction of telemarketing laws, Sprint is placed at a competitive disadvantage because of greater exposure to the application of the law. Sprint can claim such business relationships with only about 10% of the local and long distance market in Kansas.

Therefore on lines 31 and 32 of page one of the Bill, and lines 5 and 6 on page three, the Senate has added language which brings under the telemarketing laws all solicitors and providers of telecommunications services.

The amendments are such that small businessmen and women who have preexisting business relationships with customers and clients, and who are currently exempted from telemarketing laws, will not be affected.

An additional amendment which is important to Sprint is contained on line 15, page 2, changing the word "immediately" to the word "promptly" as it pertains to when a telemarketer must discontinue a phone call after receiving a negative response.

*House Business, Commerce  
& Labor Comm  
3/12/98  
Att. 2*



This is a very difficult, if not impossible, standard for a telemarketer to meet. If a telemarketer calls you and asks if this is a good time to talk, you say no, under current law, the conversation is over. If a telemarketer is going to comply with the law, he or she cannot ask when would be a good time to call or pursue the interview in any other manner. "Immediately" means just that-- immediately. By substituting the word "promptly" for the word "immediately" there is at least some room for reasonable follow up.

Sprint does not seek to run afoul of Kansas law. As a consequence of this provision, and of the unequal application of the law to Sprint compared to some of its competitors, for nearly the last year and a half Sprint has discontinued telemarketing its services in its own home state of Kansas.

We therefore respectfully ask that the Committee recommend to the full House that Substitute for Senate Bill 573 be passed.

Thank you for your attention and consideration, and I'd be pleased to respond to any questions.

TESTIMONY OF BOB W. STOREY ON SENATE BILL 573  
BEFORE THE HOUSE BUSINESS, COMMERCE AND LABOR COMMITTEE  
MARCH 12, 1998

MISTER CHAIRMAN AND MEMBERS OF THE COMMITTEE:

ON BEHALF OF MY CLIENT, I APPRECIATE THE OPPORTUNITY TO APPEAR  
BEFORE YOU TODAY IN SUPPORT OF SENATE BILL 573.

I REPRESENT DEHART AND DARR ASSOCIATES, INC., A PUBLIC RELATIONS  
FIRM WHICH IN TURN REPRESENTS THE DIRECT MARKETING ASSOCIATION  
(DMA). THE DMA HAS 3,600 MEMBER COMPANIES NATIONWIDE, WITH SIXTEEN  
OF THOSE MEMBER COMPANIES HEADQUARTERED AT EIGHT KANSAS CITIES.  
THIRTY-NINE OF THE MEMBER COMPANIES HAVE OPERATIONS IN THE STATE OF  
KANSAS.

THESE COMPANIES PROVIDE APPROXIMATELY 117,730 DIRECT  
MARKETING-RELATED JOBS IN KANSAS, AND GENERATE APPROXIMATELY \$11.45  
MILLION IN ANNUAL SALES REVENUE IN THE STATE OF KANSAS.

THESE ARE 1996 STATISTICS PROVIDED BY THE WEFA GROUP, A LEADING ECONOMIC AND BUSINESS FORECASTING AND CONSULTING FIRM WITH OFFICES IN NINE STATES AND NINE FOREIGN COUNTRIES. IN ADDITION TO THE ABOVE, THE DMA REPRESENTS A CONSORTIUM OF BOOK AND RECORDING PUBLISHERS AND MANUFACTURERS SUCH AS READERS DIGEST, BOOK OF THE MONTH CLUB, RECORD OF THE MONTH CLUB, AND MAGAZINE PUBLISHERS OF AMERICA (MPA).

THERE ARE FORTY TELEPHONE MARKETING SERVICE COMPANIES IN KANSAS, WITH APPROXIMATELY 4,515 EMPLOYEES. THE PURPOSE OF OUR TESTIMONY TODAY IS TO SUPPORT SENATE BILL 573.

WE WOULD ASK YOU HOWEVER TO CONSIDER A PROPOSED AMENDMENT PAGE 2, LINE 5 BY STRIKING THE WORD "INDICATING" AND INSERTING "STATEMENT".

THE REASON FOR THE REQUESTED CHANGE IN THE NEGATIVE RESPONSE IS THAT THE MARKETERS HAVE FOUND IT IMPOSSIBLE TO TRAIN THEIR EMPLOYEES AS TO WHAT A NEGATIVE RESPONSE IS. FOR INSTANCE, IT IS EASY TO UNDERSTAND WHAT THE FOLLOWING RESPONSES ARE:

- 1) "I DON'T WANT TO TALK NOW"
- 2) "I DON'T WANT TO HEAR FROM YOU AGAIN"
- 3) "I DON'T NEED OR WANT SERVICES OR GOODS"

WE ARE ALL AWARE THAT THESE WOULD BE NEGATIVE RESPONSES, BUT HOW ABOUT THE FOLLOWING:

- 1) "I MAY ALREADY HAVE THAT"

- 2) "I DON'T HAVE MONEY TO PAY FOR THAT THIS MONTH" (YOU CAN PAY LATER, BUT THEY NEED TO BE TOLD)
- 3) "I DON'T WANT A CIVIL WAR SERIES"
- 4) "I DON'T WANT IT BECAUSE THE LAST TIME IT DIDN'T WORK"

ARE THOSE NEGATIVE RESPONSES? BY CHANGING THE LAW AS IT IS PROPOSED IN 573, THE CONSUMER STILL HAS ALL OF THE PROTECTIONS UNDER THE CURRENT LAW, BUT IT IS LESS CONFUSING TO ALL PARTIES.

THE TELEMARKETERS DO NOT WANT TO ANNOY THEIR CUSTOMERS, BUT THE LAW CANNOT BE FUZZY SO THEY CAN PROPERLY OBEY THE LAW.

THE STATE OF UTAH COPIED THE KANSAS LAW AS IT APPLIES TO TELEMARKETING. HOWEVER, AFTER REVIEWING THE SAME, IT WAS DETERMINED THAT THE INTERPRETATION OF THE NEGATIVE RESPONSE WAS RATHER BLURRED WHEN THE WORD "INDICATING" WAS USED. THEREFORE, UTAH CHANGED ITS LAW TO SUBSTITUTE THE WORD "STATEMENT" FOR "INDICATING" AS DEPICTED ON PAGE 2, LINE 9 OF EXHIBIT A, ATTACHED HERETO, WHICH IS THE LAW OF THE STATE OF UTAH.

WE WOULD ASK YOU TO CONSIDER THIS AMENDMENT SINCE IT WOULD HELP TO CLARIFY THE LAW, AND TO MAKE IT EASIER FOR THE TELEMARKETER AND THE CONSUMER TO UNDERSTAND THAT A NEGATIVE STATEMENT MEANS THAT THE TELEMARKETER IS TO HANG UP THE PHONE PROMPTLY, AND NOT TO BOTHER THE CONSUMER ANY MORE WITH THE TELEPHONE CALL.

IN ADDITION, YOU WILL FIND ATTACHED AS EXHIBIT B A LEGAL MEMORANDUM DISCUSSING THE VAGUENESS OF THE WAY A NEGATIVE RESPONSE IS DEFINED IN OUR LAW TODAY AS IT APPLIES TO THE CONSTITUTIONAL RIGHT OF FREE SPEECH.

ON BEHALF OF MY CLIENT, I RESPECTFULLY THANK YOU FOR YOUR CONSIDERATION IN HEARING THIS MATTER, AND I WILL STAND FOR QUESTIONS FROM THE COMMITTEE.

BOB W. STOREY

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EXHIBITS

- A) STATE OF UTAH H.B. 44 — TELEMARKETING REQUIREMENTS.
- B) LEGAL OPINION LETTER DATED FEBRUARY 12, 1998, TO MEMBERS OF SENATE COMMERCE COMMITTEE.

LEGISLATIVE GENERAL COUNSEL

Ⓢ Approved for Filing: TPD Ⓢ  
Ⓢ 01-06-98 5:22 PM Ⓢ

TELEMARKETING REQUIREMENTS

1998 GENERAL SESSION

STATE OF UTAH

Sponsor: Lowell A. Nelson

AN ACT RELATING TO COMMERCE AND TRADE; AMENDING REQUIREMENTS FOR  
TELEPHONE SOLICITATIONS; PROVIDING DEFINITIONS; h MAKING IT UNLAWFUL FOR ANY  
TELEPHONE SOLICITING BUSINESS TO EMPLOY OR USE PRISONERS IN SOLICITATIONS IN  
CERTAIN CIRCUMSTANCES; h AND MAKING  
TECHNICAL CORRECTIONS.

This act affects sections of Utah Code Annotated 1953 as follows:  
AMENDS:

13-25a-102, as enacted by Chapter 26, Laws of Utah 1996

13-25a-103, as enacted by Chapter 26, Laws of Utah 1996

h 13-26-11, as enacted by Chapter 189, Laws of Utah 1994 h

*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section 13-25a-102 is amended to read:

**13-25a-102. Definitions.**

As used in this chapter:

(1) "Advertisement" means material offering for sale, or advertising the availability or  
quality of, any property, goods, or services.

(2) (a) "Automated telephone dialing system" means equipment used to:

(i) store or produce telephone numbers;

(ii) call a stored or produced number; and

(iii) connect the number called with a recorded message or artificial voice.

(b) "Automated telephone dialing system" does not include equipment used with a burglar  
alarm system, voice messaging system, fire alarm system, or other system used in an emergency  
involving the immediate health or safety of a person.

(3) "Established business relationship" means a relationship that:

(a) is based on inquiry, application, purchase, or transaction regarding products or services  
offered;

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1 (b) is formed by a voluntary two-way communication between a person making a  
2 telephone solicitation and a person to whom a telephone solicitation is made; and

3 (c) has not been terminated by either party.

4 (4) "Facsimile machine" means equipment used for:

5 (a) scanning or encoding text or images for conversion into electronic signals for  
6 transmission; or

7 (b) receiving electronic signals and reproducing them as a duplicate of the original text or  
8 image.

9 (5) "Negative response" means a statement from a party ~~§ [indicating]~~ **STATING** § the party  
9a does not wish

10 to listen to the sales presentation or participate in the solicitation presented in the telephone call.

11 ~~[(5)]~~ (6) "Telephone solicitation" means~~[-(a)]~~ the initiation of a telephone call or message  
12 for the purpose of:

13 (a) encouraging the purchase ~~§ [h, PROMOTION OF h]~~ § or rental of, or investment in,  
13a property, goods, or services;

14 ~~[or (b) the initiation of a telephone call or message for the purpose of]~~

15 (b) soliciting a sale of or extension of credit for property or services to the person called;

16 (c) soliciting information that will § [or may] § be used for:

17 (i) the direct solicitation of a sale of property or services to the person called; or

18 (ii) an extension of credit to the person called for a sale of property or services; or

19 (d) soliciting a charitable donation involving the exchange of any premium, prize, gift,  
20 ticket, subscription, or other benefit in connection with any appeal made for a charitable purpose.

21 (7) "Telephone solicitor" means any natural person, firm, organization, partnership,  
22 association, or corporation who makes or causes to be made an unsolicited telephone call,  
23 including calls made by use of automated telephone dialing system.

24 (8) "Unsolicited telephone call" means a telephone call § FOR A COMMERCIAL PURPOSE OR  
24a TO SEEK A FINANCIAL DONATION § other than a call made:

25 (a) in response to an express request of the person called;

26 (b) primarily in connection with an existing debt or contract, payment or performance of  
27 which has not been completed at the time of the call; or

28 (c) to any person with whom the telephone solicitor has an existing business relationship.

29 Section 2. Section 13-25a-103 is amended to read:

30 **13-25a-103. Prohibited conduct for telephone solicitations – Exceptions.**

31 (1) Except as provided in Subsection (2), a person may not operate or authorize the

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1 operation of an automated telephone dialing system to make a telephone solicitation.

2 (2) A person may operate an automated telephone dialing system if a call is made:

3 (a) with the prior express consent of the person who is called agreeing to receive a  
4 telephone solicitation from a specific solicitor; or

5 (b) to a person with whom the solicitor has an established business relationship.

6 (3) A person may not make a telephone solicitation to a residential telephone before 8:00  
7 a.m. or after 9:00 p.m. local time unless prior express consent is given to call at a different time.

8 (4) A person may not make or authorize a telephone solicitation in violation of Title 47  
9 U.S.C. 227.

10 ~~[(5) Where a caller identification service is available, a telephone solicitor may not block  
11 the reception of its telephone number to a called party's telephone line.]~~

12 (5) Any telephone solicitor who makes an unsolicited telephone call to a telephone number  
13 shall:

14 (a) identify themselves;

15 (b) identify the business on whose behalf the person is soliciting;

16 (c) identify the purpose of the call; ~~h [immediately]~~ PROMPTLY ~~h~~ upon making contact by  
16a telephone with

17 the person who is the object of the telephone solicitation;

18 (d) ~~h [immediately]~~ h discontinue the solicitation if the person being solicited gives a negative  
19 response at any time during the telephone call; and

20 (e) hang up the phone, or in the case of an automated telephone dialing system operator,  
21 disconnect the automated telephone dialing system from the telephone line within 25 seconds of  
22 the termination of the call by the person being called.

23 (6) A telephone solicitor may not withhold the display of the telephone solicitor's  
24 telephone number from a caller identification service when that number is being used for  
25 telemarketing purposes and when the telephone solicitor's service or equipment is capable of  
26 allowing the display of the number.

26a h Section 3. Section 13-26-11 is amended to read:

26b 13-26-11. Prohibited practices.

26c (1) It is unlawful for any solicitor:

26d (a) to solicit prospective purchasers on behalf of a telephone soliciting business that is not  
26e registered with the division or exempt from registration under this chapter;

26f (b) to use a fictitious personal name in connection with a telephone solicitation; h 3-8

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26g           h (c) to make or cause to be made any untrue material statement, or fail to disclose a material  
26h fact necessary to make any statement made not misleading, whether in connection with a telephone  
26i solicitation or a filing with the division;

26j           (d) to make or authorize the making of any misrepresentation about its compliance with this  
26k chapter to any prospective or actual purchaser; or

26l           (e) to fail to refund within 30 days any amount due a purchaser who exercises the right to  
26m cancel under Section 13-26-5.

26n           (2) It is unlawful for any telephone soliciting business;

26o           (a) to cause or permit any solicitor to violate any provision of this chapter; OR

26p           (b) TO USE INMATES IN TELEPHONE SOLICITING OPERATIONS WHERE INMATES HAVE

26q ACCESS TO PERSONAL DATA ABOUT AN INDIVIDUAL SUFFICIENT TO PHYSICALLY LOCATE OR

26r CONTACT THAT INDIVIDUAL, SUCH AS NAMES, ADDRESSES, TELEPHONE NUMBERS, SOCIAL

26s SECURITY NUMBERS, CREDIT CARD INFORMATION, OR PHYSICAL DESCRIPTIONS. h

February 12, 1998

Members of Senate Commerce Committee

Re: Kansas K.S.A. 50-670 (b)(4) and (a)(5)  
hereinafter referred to as b4/a5

On behalf of national direct marketers and publishers, including *The New York Times*, *The Wall Street Journal*, and *Time-Life Books*, we write to address the serious constitutional issues raised by b4/a5 which purports to regulate telephone solicitations and subjects its violators to serious penalties. The law provides that:

Any telephone solicitor who makes an unsolicited consumer telephone call to a residence shall . . . immediately discontinue the solicitation if the person being solicited gives a negative response at any time during the telephone call.

"Negative response" is defined as

a statement from a consumer indicating the consumer does not wish to listen to the sales presentation or participate in the solicitation presented in the consumer telephone call.

The legislation suffers from fundamental constitutional infirmities and it would not survive challenge. Indeed, we believe the legislation would fail on several, independent grounds: (1) it is unconstitutionally vague; (2) it violates the rights of "speakers" such as our clients by impermissibly burdening the dissemination of constitutionally protected speech; (3) it impermissibly burdens constitutionally protected commercial speech; (4) it unduly burdens interstate commerce; and (5) to the extent it purports to regulate interstate telemarketing activities, it is preempted by the federal Telephone Consumer Protection Act.

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### Vagueness

The vagueness of b4/a5, coupled with the sanction it imposes for a violation, raises special First Amendment concerns because of the obvious chilling effect on free speech.

It is well established that legislation which is unduly vague will not survive constitutional scrutiny. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Grayned v. City of Rockford*, 408 U.S. 104 (1972). The clarity the Constitution demands in legislation is most stringent if, as here, it threatens to interfere with constitutionally protected rights, such as First Amendment rights of expression. *Papachristou*, 405 U.S. at 162; *Grayned*, 408 U.S. at 109. b4/a5 requires telephone solicitors to "immediately discontinue the solicitation if the person being solicited gives a negative response at any time during the telephone call." This requirement is unconstitutionally vague on its face.

In reviewing a business regulation for facial vagueness, the principal inquiry is whether the law provides fair warning about what is proscribed. *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503 (1982). Here, far from affording fair warning, the standard is virtually unintelligible. "Negative response" is vaguely defined as "a statement from a consumer *indicating* the consumer does not wish to listen to the sales presentation or participate in the solicitation presented in the consumer telephone call." (Emphasis added).

This provision of the bill, as drafted, "does not give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly", and is thus constitutionally infirm. *Hoffman Estates*, 455 U.S. at 498 (citing *Grayned*, 408 U.S. at 108-109). For example, if a recipient of a telephone call states, "I may have ordered that before," it is questionable whether that statement constitutes a "negative response" indicating that the consumer does not wish to listen or participate. Telephone solicitors will have to decide whether such statements constitute "negative responses" and risk liability if they guess incorrectly.

Equally fatal from a constitutional standpoint, b4/a5 fails to provide explicit standards for the officials who will enforce it. "[I]f arbitrary and discriminatory enforcement is to be prevented, laws must apply explicit standards for those who apply them." *Hoffman Estates, Grayned, General Media Communications v. Perry*, 1997 U.S. Dist. LEXIS 1932

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(S.D.N.Y.), at 33. The bill provides no explicit standard to determine when a recipient of a call has made a "negative response" "indicating" the consumer does not wish to listen to a presentation or participate in a solicitation. Depending on how the myriad of state officials charged with enforcing the law interpret the language, the scope of the restriction changes accordingly. While one telemarketer could potentially be charged with violating the statute for continuing a telephone call after the customer has stated "I don't think I need that," another solicitor could be exonerated. Such a varying standard invites arbitrary enforcement, placing unfettered discretion in the hands of officials and, therefore, will not survive constitutional scrutiny. *Papachristou*, 405 U.S. at 162; *Grayned*, 408 U.S. at 109; *General Media Communications*, 1997 U.S. Dist. LEXIS at 36-37.

### First Amendment Rights to Disseminate Information

First Amendment protection extends not only to the speech itself but also to the freedom to associate and circulate and distribute such speech. *Lovell v. City of Griffin, GA*, 303 U.S. 444, 452 (1938); *Solid Rock Foundation v. Ohio State University*, 478 F.Supp. 96, 100 (S.D. Ohio 1979). As the Supreme Court has held, "[l]iberty of circulation is as essential to [free expression] as liberty of publishing; indeed without the circulation, the publication would be of little value." *Lovell*, 303 U.S. at 669; see also *Dulaney v. Municipal Court*, 11 Cal. 3d 77, 83 (1974) ("the First Amendment protects not only the content but also the dissemination of written material.")

In regulating telephone solicitation, b4/a5 impedes the free flow of information, broadly defining "consumer telephone call" and including the communication of important consumer information such as the price, quality, and availability of goods and services. The United States Supreme Court has recognized that even persons engaged in solicitation are entitled to First Amendment protection, particularly where such efforts involve an underlying constitutionally-protected activity.

The right to speak ... contemplates effective communication." *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943). By subjecting telephone solicitors to serious penalties for violation of its vague provisions, b4/a5 substantially impairs the rights of telephone solicitors to disseminate information.

The First Amendment requires that content-neutral restrictions on speech be "narrowly tailored" to serve a significant government interest. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989). Legislation is only "narrowly tailored" if the state has chosen the "least restrictive" means to further the articulated interest. *Sable Communications*, 492 U.S. at 126; *Frisby*, 487 U.S. at 481 (the law must "target and eliminate no more than the exact source of the 'evil' it seeks to remedy").

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b4/a5 is not narrowly tailored to, nor is it the least restrictive means of achieving, the goal of protecting Kansas citizens from unwanted telephone solicitations. The legislation affect businesses, and many will avoid using the telephone to spread important social and educational messages out of fear that they might be held liable under the regulation. Likewise, many businesses will avoid contacting potential customers by telephone for the same reason. b4/a5 is likely to diminish communication between telephone solicitors and consumers who appreciate receiving useful information by telephone.

Given the effect of obstructing communication, b4/a5 violates the First Amendment not only from the speaker's perspective, but from that of the listener as well. It is "well established that the Constitution protects the right to receive information and ideas," *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), and that "[t]he State may not ... contract the spectrum of available knowledge." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). Indeed, the U.S. Supreme Court recognized long ago that the right to know and to receive information is an essential part of the First Amendment — and that this protection extends to situations where the information to be received is purely commercial in nature. See *Virginia State Board of Pharmacy v. Virginia Consumer Council, Inc.*, 425 U.S. 748, 764-65 (1975); and see *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (the First Amendment "necessarily protects the right to receive ... information and ideas.")

Kansas consumers may reduce telephone sales calls if they desire. A twenty year-old nationwide organization called Telephone Preference Service ("TPS") already exists to help people remove their names from telemarketing lists. The TPS is a *free* service provided to consumers by the Direct Marketing Association. Kansas residents who do not want to receive telemarketing calls can simply contact the TPS to have their names removed from telephone solicitation lists. Furthermore, as discussed more fully below, federal law already provides a uniform, national scheme by which consumers may avoid unwanted telephone solicitations. Under federal law, once a consumer has asked a telemarketer not to call again, the telemarketer must honor that request for ten years.

Far from being the "least restrictive" means to limit telephone solicitations to those that wish to receive them, b4/a5 threatens to significantly suppress the dissemination of the speech it attempts to regulate. There are less restrictive alternatives to secure the state's goal. The bill as drafted is thus classically overbroad, and will not survive constitutional scrutiny. *Sable Communications*, 492 U.S. at 126; *Frisby*, 487 U.S. at 481.

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### Constitutionally Protected Commercial Speech

It is well established that the First Amendment protects commercial speech from undue regulation, including telephone solicitations. See *Edenfield v. Fane*, 507 U.S. 761, 775 (1993) (striking down prohibitions on in-person and telephone solicitations, the Court held that "[i]f they [the prospective clients] are unreceptive to [the solicitor's] initial telephone solicitation, they need only terminate the call. Invasion of privacy is not a significant concern"). b4/a5, as currently drafted, violates applicable First Amendment commercial speech standards.

Under the standard set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), if the commercial speech in question is not unlawful or misleading, then it may only be regulated if the state satisfies a three-part test: (1) the state must assert a "substantial" interest in support of its regulation; (2) the state must demonstrate that the restriction directly and material advances the state interest; and, as with content-neutral restrictions, (3) the regulation must be "narrowly drawn." *Florida Bar v. Went For It, Inc.*, 115 S.Ct. 2371, 2380 (1995); *Central Hudson*, 447 U.S. at 567.

In this case, there is no evidence that b4/a5 will actually protect Kansas consumers in a direct and material fashion. Rather, the bill may interfere with the right of thousands consumers to make private decisions based on the unfettered receipt of useful information, because solicitors may be unwilling to call customers in Kansas based upon the potential criminal and civil sanctions associated with failing to determine what constitutes a "negative response". If Kansas is unable to provide evidence that b4/a5 directly and materially advances its interests in protecting consumers from unwanted telephone solicitations, the regulation will fail.

Finally, First Amendment commercial standards require, as with content-neutral restrictions on speech generally, that the legislation be "narrowly tailored" to achieve the state's interest. *Central Hudson*, 447 U.S. 557. Furthermore, "the existence of 'numerous and obvious less-burdensome alternatives to the restriction on commercial speech is certainly a relevant consideration in determining whether the 'fit' between ends as means is reasonable.'" *Id.* As explained above, there are a number of less-burdensome alternatives which would achieve the objective of protecting individuals from the unwanted telephone solicitations.

In short, b4/a5 imposes a heavy burden on commercial speech by placing a vague restriction on the communication of important commercial information. By making it difficult for companies to communicate, and for consumers to receive, valuable and relevant information, b4/a5 hampers the ability of companies to reach thousands of consumers and for those thousands of consumers to make informed decisions. As the Supreme Court recently

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noted: "the free flow of commercial information is 'indispensable to the proper allocation of resources in a free enterprise system' because it informs the numerous private decisions that drive the system." *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995), quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

### Unduly Burdens Interstate Commerce

Kansas has no power to create barriers against interstate commerce. It is well established that a state cannot, through its own legislation, prevent the sale of products to or from other states. Even if a state does not directly prohibit the sale of a product within its boundaries, it can offend the Commerce Clause by imposing unreasonable burdens. As the United States Supreme Court explained in *South-Central Timber Dev. Co. v. Wunnicke*, 467 U.S. 82 (1984):

Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.

An increasing number of companies are selling goods by direct marketing throughout the nation. Such businesses conduct much of their business over the telephone. b4/a5 would unduly burden certain interstate commercial activities by placing vague restrictions on businesses communicating to Kansas residents by telephone. The bill fails to distinguish Kansas citizens from citizens of other states, requiring all "telephone solicitors," regardless of their state of residence to comply with the bill. Such a requirement is a patent interference with the communication of information, goods, and services in interstate commerce. When state regulations vary from state to state, even if they are non-discriminatory, they may place an unacceptable burden on interstate commerce. *Kassel v. Consolidated Freightways Corporation of Delaware*, 450 U.S. 662, 670 (1981) ("Regulations designed for [a] salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially as to be invalid under the Commerce Clause.")

b4/a5 is unconstitutional under the Commerce Clause because there must be some evidence that requiring telemarketers to follow the vague restrictions will promote the state's interest in protecting consumers without unduly burdening interstate commerce. The law burdens interstate commerce substantially. That the regulation will advance the government interest of protecting consumers and encouraging the development of reasonable and fair telephone solicitation sales practices, however, is uncertain.



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The Federal Telephone Consumer Protection Act  
Preempts State Laws Affecting Interstate Telemarketing

The direct marketing industry and federal law already provide consumers with simple and effective solutions to the problem of unwanted telephone solicitations.

The Telephone Consumer Protection Act of 1991 (the "TCPA") establishes certain federal restrictions concerning telephone solicitation and applies to "*any person within the United States.*" 47 U.S.C.A. § 227 (emphasis added). Thus, the TCPA applies to all telemarketers operating in the United States, including those operating in Kansas.

Congress enacted the TCPA after lengthy and detailed consideration. Indeed, the TCPA is the culmination of nearly a year of hearings and congressional deliberations aimed at creating a legislative scheme which would protect consumers from unwanted telephone solicitation without unduly interfering with commerce and speech.<sup>1</sup>

If a consumer receives an unwanted telephone solicitation, the consumer has the right, under federal law, to ask the telemarketer not to call again. The TCPA charges the Federal Communications Commission (the "FCC") with the task of creating regulations "concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." To that end, the FCC established rules requiring persons or entities making telephone solicitations to maintain "do-not-call" lists.

The federal regulations basically provide that if a person or entity receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity "must record the request and place the subscriber's name and telephone number on the do-not-call list at the time the request is made." A do-not-call request must be honored for ten years from the time the request is made. 47 C.F.R. § 64.1200(e)(2)(vi).

Although the TCPA provides that it does not preempt any state law imposing more restrictive *intrastate* requirements or regulations on telemarketing activities, the TCPA does

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<sup>1</sup>The TCPA is the result of one House of Representatives bill and two Senate bills. The House bill was introduced on March 6, 1991. President Bush signed the final version into law on December 20, 1991. See Howard E. Berkenblit, Note, *Can Those Telemarketing Machines Keep Calling Me? -- The Telephone Consumer Protection Act of 1991 After Moser v. FCC*, 36 B.C. L. Rev. 85, 96-99 (1994).

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preempt state laws purporting to regulate *interstate* marketing.<sup>2</sup> Thus, to the extent the bill imposes restrictions on out-of-state telemarketers calling residents within Kansas or on Kansas telemarketers engaging in interstate commerce, it is preempted by the TCPA.

In sum, b4/a5 is not the easiest or best solution to the problem of an unwanted call. The simplest answer to an unwelcome telephone call is to simply hang up. The consumer may request the telemarketer to place the consumer's name on a "do-not-call" list or request the Telephone Preference Service to remove his name from national telephone solicitation lists. There is simply no need for b4/a5. Indeed, the law unduly burdens not only the constitutionally protected rights of the businesses to communicate but also the rights of consumers to receive useful information.

Submitted by

Bob Storey

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<sup>2</sup>That Congress intended to preempt the field with regard to interstate telemarketing is confirmed by Congress' decision to allow states to enact more restrictive requirements only with regard to *intrastate* telemarketing activity, whereas Congress created the federal Act to regulate *interstate* telemarketing activity. The fact that Congress has not granted the same authority to the states with respect to interstate telephone solicitations indicates that Congress did not intend to confer such power on the states. As such, Congress is the only body which can legislate with respect to interstate telephone solicitations.



CARLA J. STOVALL  
ATTORNEY GENERAL

State of Kansas

## Office of the Attorney General

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Testimony of  
C. Steven Rarrick, Deputy Attorney General  
Consumer Protection Division  
Office of Attorney General Carla J. Stovall  
Before the House Business, Commerce & Labor Committee  
RE: Sub SB 573  
March 12, 1998

Chairperson Lane and Members of the Committee:

Thank you for the opportunity to appear before you today on behalf of Attorney General Carla J. Stovall to testify in support of Substitute Senate Bill 573. My name is Steve Rarrick and I am the Deputy Attorney General for Consumer Protection.

K.S.A. 50-670, which is amended in Section 1 of this bill, was enacted in 1991 and provides privacy protections to Kansas citizens from unwanted telephone solicitations. The privacy concerns which led to its passage are even greater today.

Kansas citizens are entitled to privacy in their own homes. When a telemarketer calls during dinner, all Kansas citizens should be able to politely say "no" just once and have the call terminate. While an argument may be made that all one has to do is hang up the telephone, unfortunately, the target for many of these types of calls is the elderly, who are not inclined to hang up on callers because they do not want to be rude. Kansans shouldn't have to become rude to stop telemarketers from invading the privacy of their own homes.

The number of telephone solicitation complaints to our office continues to increase from year to year. In 1995, approximately 460 complaints were filed related to telephone solicitation of property and/or services. In 1996, the number was 753. The climb continued in 1997 when complaints numbered 985. This represents a 61% increase in telemarketing complaints over a three year period. Solicitation by telephone is, to use a popular term, a "growth industry." One company alone made over 2.5 million telemarketing calls to Kansans in 1996. However, we have seen a dramatic increase in compliance with the "just say no" requirement of our telemarketing solicitations law in the last year.

The primary result achieved by SB 573 is to remove providers of telecommunications services from the exemptions for existing and preexisting business relationships contained in K.S.A. 50-673 and K.S.A. 50-670. This will level the playing field for telecommunications companies who telemarket in Kansas. While the Attorney General would prefer eliminating the existing and

*House Business, Commerce  
& Labor Committee*

*3/12/98*

*Att. 4*

preexisting business relationship exemptions completely (and thereby level the playing field for all businesses), she supports SB 573 as a step in the right direction. I have attached to my testimony a balloon amendment which contains a technical amendment at page 1, lines 29-32, which is intended to clarify that independent contractors telemarketing for telecommunications companies are likewise required to comply with the telemarketing rules.

SB 573 also amends K.S.A. 50-670(b)(4) by requiring a telemarketer to "promptly" discontinue the call if the consumer gives a negative response. The former language required a telemarketer to "immediately" discontinue the call. This amendment does not pose any problems for our office since our enforcement of the law has never involved a dispute over the word "immediately".

On behalf of Attorney General Stovall, I urge your favorable consideration of Senate Bill 573. Thank you.

Substitute for SENATE BILL No. 573

By Committee on Commerce

2-24

4-3

10 AN ACT concerning telephone solicitation; relating to telecommunica-  
11 tions public utilities; amending K.S.A. 50-673 and K.S.A. 1997 Supp.  
12 50-670 and repealing the existing sections.

13  
14 *Be it enacted by the Legislature of the State of Kansas:*

15 Section 1. K.S.A. 1997 Supp. 50-670 is hereby amended to read as  
16 follows: 50-670. (a) As used in this section:

17 (1) "Consumer telephone call" means a call made by a telephone  
18 solicitor to the residence of a consumer for the purpose of soliciting a  
19 sale of any property or services to the person called, or for the purpose  
20 of soliciting an extension of credit for property or services to the person  
21 called, or for the purpose of obtaining information that will or may be  
22 used for the direct solicitation of a sale of property or services to the  
23 person called or an extension of credit for such purposes;

24 (2) "unsolicited consumer telephone call" means a consumer tele-  
25 phone call other than a call made:

26 (A) In response to an express request of the person called;

27 (B) primarily in connection with an existing debt or contract, payment  
28 or performance of which has not been completed at the time of such call;

29 (C) to any person with whom the telephone solicitor *or the solicitor's*  
30 *successor [predecessor] in interest has [had]* an existing business rela-  
31 tionship *if the solicitor is not an employee or a contract employee of a*  
32 *provider of telecommunications services; or*

telephone

telephone solicitor is not an employee, contract employee or independent contractor of a provider of telecommunications services

33 (D) by a newspaper publisher or such publisher's agent or employee  
34 in connection with such publisher's business;

35 (3) "telephone solicitor" means any natural person, firm, organiza-  
36 tion, partnership, association or corporation who makes or causes to be  
37 made a consumer telephone call, including, but not limited to, calls made  
38 by use of automatic dialing-announcing device;

39 (4) "automatic dialing-announcing device" means any user terminal  
40 equipment which:

41 (A) When connected to a telephone line can dial, with or without  
42 manual assistance, telephone numbers which have been stored or pro-  
43 grammed in the device or are produced or selected by a random or se-

4-4

1   quential number generator; or

2   (B) when connected to a telephone line can disseminate a recorded  
3 message to the telephone number called, either with or without manual  
4 assistance;

5   (5) "negative response" means a statement from a consumer indicat-  
6 ing the consumer does not wish to listen to the sales presentation or  
7 participate in the solicitation presented in the consumer telephone call.

8   (b) Any telephone solicitor who makes an unsolicited consumer tel-  
9 ephone call to a residential telephone number shall:

10   (1) Identify themselves;

11   (2) identify the business on whose behalf such person is soliciting;

12   (3) identify the purpose of the call immediately upon making contact  
13 by telephone with the person who is the object of the telephone solici-  
14 tation;

15   (4) *immediately promptly* discontinue the solicitation if the person  
16 being solicited gives a negative response at any time during the consumer  
17 telephone call; and

18   (5) hang up the phone, or in the case of an automatic dialing-an-  
19 nouncing device operator, disconnect the automatic dialing-announcing  
20 device from the telephone line within 25 seconds of the termination of  
21 the call by the person being called.

22   (c) A telephone solicitor shall not withhold the display of the tele-  
23 phone solicitor's telephone number from a caller identification service  
24 when that number is being used for telemarketing purposes and when  
25 the telephone solicitor's service or equipment is capable of allowing the  
26 display of such number.

27   (d) A telephone solicitor shall not transmit any written information  
28 by facsimile machine or computer to a consumer after the consumer  
29 requests orally or in writing that such transmissions cease.

30   (e) Local exchange carriers and telecommunications carriers shall not  
31 be responsible for the enforcement of the provisions of this section.

32   (f) Any violation of this section is an unconscionable act or practice  
33 under the Kansas consumer protection act.

34   (g) This section shall be part of and supplemental to the Kansas con-  
35 sumer protection act.

36   Sec. 2. K.S.A. 50-673 is hereby amended to read as follows: 50-673.  
37 The provisions of K.S.A. 50-671 through 50-674 and amendments thereto  
38 do not apply to a transaction:

39   (a) That has been made in accordance with prior negotiations in the  
40 course of a visit by the consumer to a merchant operating a business  
41 establishment that has a fixed permanent location and where consumer  
42 goods or services are displayed or offered for sale on a continuing basis;

43   (b) in which the business establishment, *or the establishment's use-*

H.S

1 ~~cessor~~ *[predecessor]* in interest, making the solicitation has made a prior  
2 sale to the consumer, is establishing a business to business relationship  
3 or has a clear, preexisting business relationship with the consumer, pro-  
4 vided that relationship resulted in the consumer becoming aware of the  
5 full name, business address and phone number of the establishment *and*  
6 *is not a provider of telecommunications services;*

7 (c) in which the consumer purchases goods or services pursuant to  
8 an examination of a television, radio, or print advertisement or a sample,  
9 brochure, catalogue, or other mailing material of the telemarketer that  
10 contains:

11 (1) The name, address, and telephone number of the telemarketer;  
12 (2) a full description of the goods or services being sold along with a  
13 list of all prices or fees being requested, including any handling, shipping,  
14 or delivery charges; and

15 (3) any limitations or restrictions that apply to the offer; or

16 (d) in which the consumer may obtain a full refund for the return of  
17 undamaged and unused goods or a cancellation of services notice to the  
18 seller ~~within seven days after receipt by the consumer~~ *after the consumer*  
19 *has had at least seven days to review the goods or services*, and the seller  
20 will process the refund within 30 days after receipt of the returned mer-  
21 chandise by the consumer or the refund for any services not performed  
22 or a pro rata refund for any services not yet performed for the consumer.  
23 The return and refund privilege shall be disclosed to the consumer orally  
24 by telephone or in writing with advertising, promotional material or with  
25 delivery of the product or service. The words "satisfaction guaranteed,"  
26 "free inspection," "no risk guarantee" or similar words and phrases meet  
27 the requirements of this act.

28 (e) Any telemarketer who, pursuant to this section, is exempted from  
29 K.S.A. 50-671 through 50-674 and amendments thereto, impliedly war-  
30 rants the goods or property to be satisfactory to the consumer to the  
31 extent that the consumer shall have the right to choose at any time within  
32 the seven-day refund period, to cancel the sale by notifying the telemar-  
33 keter in writing, provided the consumer returns to the telemarketer the  
34 goods sold in substantially the same condition as when they were received  
35 by the consumer. A telemarketer that has received such notice to cancel  
36 from a consumer shall then, within 30 business days of the receipt of such  
37 notice:

38 (1) Refund all payments made, including any down payment made  
39 under the agreement;

40 (2) return any goods or property traded in to the seller on account of  
41 or in contemplation of the agreement, in substantially the same condition  
42 as when received by the telemarketer; and

43 (3) take any action necessary or appropriate to terminate promptly

- 1 any security interest created in connection with the agreement.
- 2 Sec. 3. K.S.A. 50-673 and K.S.A. 1997 Supp. 56-670 are hereby re-
- 3 pealed.
- 4 Sec. 4. This act shall take effect and be in force from and after its
- 5 publication in the statute book.

4-6