

Approved: February 16, 1998
date

MINUTES OF THE SENATE COMMITTEE ON COMMERCE.

The meeting was called to order by Chairperson Alicia Salisbury at 8:00 a.m. on February 13, 1998 in Room 123-S of the Capitol.

Members present: Senators Salisbury, Brownlee, Donovan, Feleciano, Gooch, Jordan, Ranson, Steffes, Steineger and Umbarger.

Committee staff present: Lynne Holt, Legislative Research Department
Bob Nugent, Revisor of Statutes
Betty Bomar, Committee Secretary

Conferees appearing before the committee:

C. Steven Rarrick, Deputy Attorney General, Consumer Protection Division
Senator Anthony Hensley
Don Norwood, AARP
Ted Walters, AARP
Betty Malburg
Gail Bright, Assistant Attorney General Consumer Protection Division
Bob Storey, Dehart and Darr, representing Direct Marketing Association
Michael R. Murray, Sprint
Mike Reece, AT&T
Tyler Prochnow, American Telemarketing Association

Others attending: See attached list

Upon motion made by Senator Steineger, seconded by Senator Donovan, the Minutes of the February 11 and February 12 meetings were unanimously approved

SB 573 - Consumer protection telephone solicitations

The Chair stated additional information from Tom Young, AARP, clarifying its opposition to **SB 573** was distributed (Attachment 1), and a written response from Bob Storey answering Committee questions regarding **SB 573**. (Attachment 2)

C. Steven Rarrick, Deputy Attorney General, Consumer Protection Division, testified in opposition to **SB 573**. Mr. Rarrick stated the Attorney General opposes **SB 573**, as it repeals KSA 50-670, the telephone solicitations statute. **SB 573** does not provide for privacy rights concerning facsimile transmissions, it broadens the definition of negative responses and fails to provide any remedies for violations of the Consumer Protection Act. Mr. Rarrick stated **SB 573** contains only a fraction of what is contained in the federal Telemarketing Sales Rule (TSR) and is not in line with federal law. State attorneys general already have the authority to enforce the federal law. **SB 573** duplicates portions of what currently exists in federal law or rules and regulations. **SB 573** includes an incomplete list of the disclosures required by the TSR and does not support proponents claim that this bill brings state law more in line with federal law. The new definitions contained in **SB 573** could conflict with definitions already existing in other sections of the Kansas Consumer Protection Act. (Attachment 3)

The number of telephone solicitation complaints to the Consumer Protection Division continues to increase. In 1995, approximately 460 complaints were filed relating to telephone solicitation of property and/or services. In 1997, complaints number 985, a 61% increase in telemarketing complaints over a three year period.

The hearing on **SB 573** was concluded.

SB 580 - Consumer protection; telemarketing fraud and prize notification

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON COMMERCE, Room 123-S Statehouse, at 8:00 a.m. on February 13, 1998.

Senator Anthony Hensley, testified in support of **SB 580**, stating the bill amends the Kansas Consumer Protection Act requiring registration of telemarketers and provides stronger protection for consumers against telemarketing fraud and abuse. (Attachment 4)

Senator Hensley stated **SB 580** amends current law to make certain that the signed confirmation of approval includes information from the telemarketer regarding any restriction on the purchase and/or any terms of a refund or cancellation. **SB 580** requires telemarketers to register with the Attorney General at least 60 days before conducting business in the state. A surety bond of \$100,000 must accompany the application for registration. **SB 580** further requires telemarketers to: 1) keep all financial transaction records for 24 months from the date of purchase; 2) keep a list of all current and former employees; 3) keep an up-to-date list of all employees and the fictitious name associated with each employee. Thirteen states have implemented legislation to require telemarketers to be registered and bonded; eleven states currently have laws that list specific restrictions for certain unconscionable acts.

Don Norwood, State Legislative Committee, AARP, testified in support of **SB 580**, stating older Americans are being targeted by fraudulent telemarketers, and it is estimated by Congress that over \$40 billion is lost to telemarketing fraud each year. Mr. Norwood stated present federal laws do not address many abusive telemarketing practices that rob consumer of billions of dollars each year. For example, disclosures are not mandated on a full range of issues consumers face in telemarketing transaction, the burden is placed on the consumers to ask the right questions and rely on the answers to determine the legitimacy of the transaction; there is no prohibition to send couriers to pick up payments or allowing telemarketers access to a consumer's checking account via a bank draft. **SB 580** provides an opportunity to ban courier pickups, ban access to consumer checking, saving or bankcard accounts without the consumer's express written authorization, and requires the registration and bonding of telemarketers. (Attachment 5)

J. Ted Walters, President, Kansas Retired Teachers Association (KRTA), testified in support of **SB 580** and stated its members support of legislation to control telemarketing and to eliminate scams and frauds. Mr. Walters stated telemarketers have demonstrated that they cannot be trusted to operate ethically on their own; therefore, it is necessary to put safeguards in place to protect consumers. **SB 580** requires disclosure, registration and the bonding of telemarketers, and provides penalties. (Attachment 6)

Betty Malburg, a private citizen, testified she was a victim of telemarketing fraud. Ms. Malburg stated she is alone, her children grown and her husband, deceased. She was bored and almost became a victim as the result of a telemarketer. On another occasion she was duped out of a large sum of money which was recovered through the assistance of the Attorney General. Ms. Malburg testified in support of legislation which protects consumers.

Gail Bright, Assistant Attorney General, Consumer Protection Division, testified in support of **SB 580**, stating the attorney General would like the Committee to consider some modifications. Section 1 amends KSA 50-672, relating to telemarketing fraud, to include additional disclosure requirements for written confirmations which allows consumers to be more informed. Section 2 is a new section and sets forth registration requirements for telemarketers conducting business in Kansas. This section, should it become law, would have a tremendous impact and would require the Consumer Protection Division to receive and maintain registrations, as well as prosecute registration violations. Based on current staffing and the history of complaints, the Attorney General proposes a registration fee of \$400 and an annual renewal fee of \$250. These amounts would assist the office financially in administering this program. (Attachment 7)

Section 3 details the record keeping requirements for telemarketers. Section 4 adds a list of prohibited and/or abuse acts. On Page 5, lines 6-8, there is a provision prohibiting the submission for payment of a check or other negotiable paper drawn on a financial account without the consumer's express written authorization. Similar provisions currently exist which would be inconsistent, as **SB 580** contains no exemptions; and to have both in effect would create conflict. Ms. Bright stated an issue not addressed in **SB 580** is that proprietary information submitted by telemarketers is available to competitors. More specific language requiring that scripts, outlines or presentation material be submitted with the registration could alleviate this concern.

Bob W. Storey, Dehart and Darr, representing Direct Marketing Association (DMA), testified in opposition to **SB 580**, stating the legislation goes far beyond federal law: 1) requires a signed copy of a written contract in any telephone sale; 2) requires registration and the posting of a \$100,000 surety bond; 3) requires written verification of payment by bank account debit; and 4) makes it a violation if a person who has not to be called is called and does not allow for possibility of human error. Kansas marketers and national marketers support consistent interstate laws and regulations to protect the consumers and must comply with the Telephone Consumer Protection Act, the Mail and Telephone Order Rule, Telemarketing Sales Rule, and

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON COMMERCE, Room 123-S Statehouse, at 8:00 a.m. on February 13, 1998.

the Telephone Preference Service which allows a consumer to be removed from national marketing lists. The telemarketing industry supports laws, rules and regulations, but excessive regulation and restrictions harm legitimate sellers. Fraudulent sellers would not comply with registration or any other laws or rules enacted. (Attachment 8)

Michael R. Murray, Director of Governmental Affairs, Sprint, testified in opposition to **SB 580**, stating the bill does not eliminate the existing and preexisting business relationship provisions of KSA 50-670 and 50-673; the bill goes beyond what may be reasonably necessary to regulate telemarketing and imposes a number of regulatory and record keeping requirements that will discourage legitimate businesses from offering goods and services to Kansas consumers. (Attachment 9)

Mike Reece, AT&T, testified in opposition to **SB 580**, and stated telemarketing is an important tool for AT&T in attracting new customers. **SB 580** would create a significant impediment to AT&T's winback programs in Kansas. The bill would require AT&T to obtain a registration even though it is subject to extensive policing by a variety of entities, such as the FCC, the SEC, and the KCC. **SB 580** is designed to correct problems associated with telemarketers who have the intent to defraud. Rules and regulations necessary to do business in Kansas under this law would drive up costs for legitimate firms and do very little to curb abuses by firms for whom the law is designed to target. Mr. Reece submitted proposed amendments should the Committee consider the bill for passage. (Attachment 10)

Tyler Prochnow, American Telemarketing Association, Inc. (ATA), testified in opposition to **SB 580**, stating the bill will make it impossible for a legitimate telemarketer to comply with its provisions and still be able to maintain a profitable business, is overly burdensome, is redundant and unnecessary. A majority of ATA members are small businesses which are legitimate businesses, and the posting of a \$100,000 bond presumes they have done something wrong and are not trustworthy. Adding this additional cost will effectively eliminate many new companies and the jobs they create. Mr. Prochnow stated there are existing federal regulations with which legitimate telemarketers must comply. (Attachment 11)

The hearing on **SB 580** was concluded.

The Chair did advise conferees that written testimony could be submitted on **SB 580**.

The Chair advised the Committee there would be a meeting on Monday, February 16, 1998 to consider bills previously heard.

The meeting adjourned at 9:00 a.m.

The next meeting is scheduled for February 16, 1998.

SENATE COMMERCE COMMITTEE COMMITTEE GUEST LIST

DATE: _____

NAME	REPRESENTING
Robert Meyer	SoS
Janora Baird	SOE
Ed Walters	MRTA
Charles E. Nicholson	AARP
Tom Young	AARP
Susan Anderson	Hein + Weir
Tyler Prochnow	American Telemarketing Assn.
RUD GRANT	KCL
George Barbee	Barbee & Assoc's
Steve Montgomery	CAS
Harold S. Nelson	AARP Chap #4334
Non Bachtel	AARP Chap #4334
Edith Bachtel	AARP Ch 4334, Leav. KS
Virginia Kelso	K.P.A.
Eileen Baldwin	AARP Chap #4334 Leaning KS
Helen Barnhart	AARP Legislative Committee
Charles H. Freeman	AARP Legislative Committee
Melanie Casley	AARP Leg Committee
William Casley	AARP

Leav. KS
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SENATE COMMERCE COMMITTEE COMMITTEE GUEST LIST

DATE: _____

NAME	REPRESENTING
Mike Reucht	AT&T
Mike Moray	Sprint
Bob Storey	DNA
Cal Dickinson	AARP
Lon Norwood	AARP
JOHN HOLMGREN	AARP
DARRELL DONAHUE	AARP
DENNY KOCH	SW Bell
Don Banning	KCOA
Mara Betm	AARP
Gracie Auck	AARP
Pat J. Pellom	"
Steve Kelly	KDOC+H
MARK BARDELLINA	KDOC+H
Steve Rarrick	A.G.
Gail Bright	A.G.
Hubb Dickinson	AARP
Carol Niles Henderson	AARP
Donna Freeman	AARP



FEBRUARY 13, 1998

STATE LEGISLATIVE COMMITTEE

THE AARP POSITION ON
SENATE BILL 573

AARP provided brief testimony before the Senate Commerce Committee in opposition to Senate Bill 573 on February 12, 1998.

In our brief statement, we outlined that Senate Bill 573 does not provide sufficient penalties for telemarketers that do not comply with the law.

WE ARE ALSO OPPOSED TO ANY PROVISIONS THAT WOULD REPEAL K.S.A. 50-670, THE TELEPHONE SOLICITATIONS STATUTE.

We hope this clarifies our position, and WE URGE YOU TO VOTE AGAINST SENATE BILL 573.

Please feel free to contact us if you have additional questions.

Tom Young
785/273-6919

Senate Commerce Committee

601 E Street, NW Washington, DC 20049 (202) Date 2-13-98

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

Horac Attachment # 1

SUPPLEMENTAL TESTIMONY OF BOB W. STOREY
BEFORE THE SENATE COMMERCE COMMITTEE
ON SENATE BILL 573
FEBRUARY 13, 1998

IN READING THE ATTORNEY GENERAL'S COMMENTS ON THE OBJECTIONS TO SENATE BILL 573, I WOULD HAVE THE FOLLOWING RESPONSES:

THE ATTORNEY GENERAL BELIEVES THAT THERE IS NO PROVISION IN THE BILL TO DECLARE A VIOLATION OF K.S.A. 670 AN UNCONSCIONABLE ACT UNDER THE KANSAS CONSUMER PROTECTION LAW AND WE CERTAINLY HAVE NO OBJECTION TO REINSTATING THAT LANGUAGE AS IT IS CONTAINED IN THE PRESENT LAW UNDER K.S.A. 5670 SUBPARAGRAPH (3) (D) WHERE IT STATES, "ANY VIOLATION OF THIS SECTION IS AN UNCONSCIONABLE ACT OR PRACTICE UNDER THE KANSAS CONSUMER PROTECTION ACT."

THE NEXT POINT THE ATTORNEY GENERAL MAKES IS THE FACT THAT WE HAVE NOT ADOPTED ALL OF THE BILL TRADE COMMISSION ACT AND THERE IS A GOOD REASON FOR THAT. WE WOULD NOT OBJECT TO ADOPTING THE FTC RULES IN TOTO FOR THE STATE OF KANSAS, HOWEVER, WE BELIEVE IT WOULD BE RATHER BURDENSOME AND SINCE IT IS ALREADY THE LAW OF THE LAND, IT IS ALREADY APPLICABLE TO THE STATE OF KANSAS. WHAT WE HAVE TRIED TO DO IS PICK OUT THE AREAS WHICH CAUSE THE MOST CONCERN IN TELEMARKETING AND ADDRESS THOSE IN KANSAS TO GIVE THE ATTORNEY GENERAL THE POWER TO ENFORCE THOSE PARTICULAR SECTIONS WHICH ARE THE MOST ABUSED.

THE NEXT AREA THAT THE ATTORNEY GENERAL HAS SOME CONCERN WITH IS WHERE WE STRIKE THE NEGATIVE RESPONSE OUT OF K.S.A. 670. AS

STATED IN MY TESTIMONY, IT IS VERY DIFFICULT TO DETERMINE WHAT A NEGATIVE RESPONSE IS AND TO MAKE THAT MATTER MORE CLEAR, I AM ENCLOSING A LEGAL MEMORANDUM WHICH TALKS ABOUT A NEGATIVE RESPONSE AND ITS RELATION TO THE FIRST AMENDMENT FOR YOUR REVIEW.

AND LASTLY, IN RESPONSE TO SENATOR GOOCH'S QUESTION ABOUT HOW DO YOU TELL AN AUTOMATIC MACHINE THAT YOU DON'T WANT TO BE CALLED AGAIN, I AM ENCLOSING A COPY OF THE LAW WHICH STATES THAT A LIVE PERSON HAS TO INITIATE THE CALL. AS I STATED TO THE COMMITTEE, IF YOU GET A CALL OF THIS SORT, YOU SHOULD IMMEDIATELY TURN IT INTO THE ATTORNEY GENERAL'S OFFICE SINCE IT IS A VIOLATION OF THE ACT AND GIVES THE ATTORNEY GENERAL THE RIGHT TO PROSECUTE.

THANK YOU FOR YOUR CONSIDERATION.

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.¹

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

¹The 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.² 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

²That 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

CONSUMER PROTECTION DIVISION

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CONSUMER HOTLINE
1-800-432-2310

Testimony of

C. Steven Rarrick, Deputy Attorney General
Consumer Protection Division

Office of Attorney General Carla J. Stovall
Before the Senate Commerce Committee

RE: SB 573

February 13, 1998

Chairperson Salisbury 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 opposition to Senate Bill 573. My name is Steve Rarrick and I am the Deputy Attorney General for Consumer Protection.

The Attorney General opposes SB 573 because its primary purpose is to repeal K.S.A. 50-670, the telephone solicitations statute. This statute was enacted in 1991 and provides privacy protections to Kansas citizens from unwanted telephone solicitations. The privacy concerns which led to the passage of K.S.A. 50-670 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.

As this Committee will recall, amendments were made to K.S.A. 50-670 during the 1997 session. Although many changes were made, the requirement that a telemarketer terminate the call when the consumer gives a negative response was retained. This privacy right, as well as Senator Jordan's amendment concerning facsimile transmissions, are eliminated by this bill.

We believe the definition of a negative response in K.S.A. 50-670 is clear and does not, as the proponents of this bill claim, make it impossible for telemarketers to train their employees as to what a negative response is. The definition provides that a negative response "means 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." This language is clear, and the increased compliance we are seeing indicates that telemarketers are able to train their employees to recognize a negative response.

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Section 1 of SB 573 makes a minor modification to K.S.A. 50-673 as it relates to telemarketing fraud. While Attorney General Stovall would not oppose this provision if freestanding, she cannot support it while contained within a bill repealing K.S.A. 50-670, the telephone solicitations statute.

The proponents of this bill claim Section 2 makes Kansas law more compatible with federal law, so that it will be easier to understand and to enforce. The Attorney General disagrees. First, SB 573 contains only a fraction of what is currently contained in the federal Telemarketing Sales Rule (TSR), so the proposal itself is not in line with federal law. Second, state attorneys general already have the authority to enforce the federal law, so those protections, all of those protections, already exist. This bill merely duplicates portions of what currently exists in the federal arena. Finally, Kansas often provides greater protections to its citizens than what is provided by federal law.

In reality, Section 2 of SB 573 is a jumble of bits and pieces from the TSR and K.S.A. 50-670. Transferred from K.S.A. 50-670 are provisions related to automatic dialing-announcing devices (ADAD) and withholding of the display of a telemarketer's number from a caller identification service. The remaining provisions, minus one paragraph, are from the TSR, but not in their entirety. One paragraph, page 4, lines 8-11, is not from either statute and, yet, is the one consumer friendly aspect of this bill. It prohibits the use of a professional delivery or courier service for payment pick-up before the consumer is provided an opportunity to inspect the goods. This provision could easily be added to K.S.A. 50-670, which the Attorney General would support.

The bill also includes an incomplete list of the disclosures required by the TSR at page 4, lines 12-23. These required disclosures look good until you compare them with what is really contained in the TSR. In the TSR, there are five disclosures required. The two not contained in this bill are (1) all material restrictions, limitations, conditions to purchase, receive, or use the goods or services that are the subject of the sales offer and (2) if the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, a statement informing the consumer that this is the seller's policy; or, if the seller or telemarketer makes a representation about a refund, cancellation, exchange or repurchase policy, a statement of all material terms and conditions of such policy. Omitting these disclosures required by federal law does not support the proponents claim that this bill brings State law more in line with federal law.

In addition, some of the new definitions could conflict with definitions already existing in other sections of the Kansas Consumer Protection Act. On the other hand, there are sections of this bill containing terms which are not defined, allowing for future problems with interpretation.

As noted by the revisor, this bill also fails to provide any remedies for violations of the few requirements included in the bill, nor does it make the proposed statute a part of the Consumer Protection Act. What you are being asked to pass with this bill is a statute with no consequences for telemarketers.

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.

Kansans are tired of having to argue with telemarketers to convince them to get off their phone lines. The current law gives them the right to say no, and have telemarketers terminate the sales pitch. We have seen a dramatic increase in compliance with the "just say no" requirement of our telemarketing solicitations law in the last couple of years, and certainly do not want to lose the ground we've gained by the elimination of this common courtesy and common sense approach to protecting the privacy of Kansans in their own homes. The Attorney General strongly supports this privacy protection, and opposes this bill on behalf of consumers all across the State of Kansas.

On behalf of Attorney General Stovall, I urge you to vote against Senate Bill 573. Thank you.

Senate Bill 580 - Consumer Protection against Telemarketing Fraud and Abuse

February 13, 1998

Senator Anthony Hensley

Senator Salisbury and committee members: I testify today in support of SB 580, a bill which would amend the Kansas Consumer Protection Act to require registration of telemarketers and provide stronger protection for Kansas consumers against telemarketing fraud and abuse.

I am grateful to you, Senator Salisbury, for holding a hearing on this bill in such a quick and timely manner. I believe that this bill is necessary to help protect Kansans from the abuses and problems associated with telemarketing fraud.

The FBI estimates that over ten percent of the 140,000 telemarketing operations in the United States are fraudulent. One of every six Americans is believed to have been victimized. The FBI estimates that more than 80% of those who are victimized by telemarketing fraud are older Americans. These fraudulent crimes cost consumers \$40 billion a year and we need to pass this legislation to help protect Kansan consumers from this problem.

We applaud the work that numerous telemarketing companies and long-distance carriers have done to help protect the consumers of Kansas. However, we cannot count on all telemarketers to be so understanding of consumers' needs and rights.

Current law states that no verbal agreement made by a consumer to purchase goods or services from a telemarketer is valid until the telemarketer receives a signed confirmation of approval from the customer. SB 580 amends current law to make sure that the signed confirmation of approval includes information from the telemarketer regarding any restriction on the purchase and/or any terms of a refund or cancellation. SB 580 also requires that the signed written confirmation of approval includes information regarding the quality, efficacy and nature of the product being purchased. This information is important to ensuring that all Kansas consumers are informed and educated on the purchases they will be making.

SB 580 requires telemarketers to register with the Attorney General at least 60 days before conducting business in this state. The application for registration must also be accompanied by a surety bond of \$100,000 to help pay for the consumers' costs in the event of fraud or fines for violations. This will help to ensure that Kansans are protected financially from telemarketing fraud.

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In order to further protect Kansas consumers against fraud and abuse, SB 580 requires telemarketers to keep all financial transaction records, written notices, disclosures and acknowledgments for 24 months from the date the purchase was made. Telemarketers will also be required to keep a list of all current and former employees in the event there is a future investigation. If a telemarketing firm uses fictitious names in their sales, they must keep an up-to-date list of all employees and the fictitious name associated with each employee. Measures such as these help to guarantee access to important information for both consumers and investigators throughout Kansas.

Finally, SB 580 amends the current Kansas Consumer Protection Act list of unconscionable acts to include: providing any false or misleading information; obtaining access to a checking, savings or bankcard account without written authorization; using a courier to pickup payment; threatening, intimidating or using profane and obscene language in a telemarketing call; engaging in a telemarketing call outside of the hours of 8:00 am to 9:00 pm local time; failing to register and maintain a surety bond; and other unconscionable acts.

Thirteen states throughout the country have already implemented legislation to require telemarketers to be registered and bonded. Eleven states currently have laws that list specific restrictions for certain unconscionable acts. Currently, the legislatures of California, Georgia, Massachusetts, Montana, Texas and West Virginia are considering legislation similar to SB 580.

We have an obligation to protect Kansas citizens against fraud and abuse. SB580 enacts additional protections under our current Consumer Protection Act which will help reduce fraud and abuse and provide consumers throughout Kansas with a sense of safety and financial security.

I urge your support for SB 580.



Bringing lifetimes of experience and leadership to serve all generations.

STATE LEGISLATIVE COMMITTEE

TESTIMONY OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS KANSAS STATE LEGISLATIVE COMMITTEE

**Before the Senate Commerce Committee
In Support of Senate Bill 580**

Good morning. My name is Don Norwood, and I am a member of the Kansas State Legislative Committee 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 has an ongoing interest in preventing, deterring and prosecuting telemarketing fraud.

I appreciate this opportunity to testify in support of Senate Bill 580. AARP commends the committee for its examination of telemarketing fraud and we are particularly pleased that you are taking the bill up *today*. We sincerely hope that it can pass this year as it is an important piece of consumer protection legislation.

AARP 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 victims were over the age of 55. AARP is therefore taking an active role

American Association of Retired Persons 601 E Street, N.W., Washington

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

Senate Commerce Committee

Date *2-13-98*
Horace

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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. But, it is 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. The Federal Telemarketing Sales Rule enacted by the Federal Trade Commission is a good *start* toward reducing telemarketing fraud. Among other things, it requires telemarketers to disclose that they are making a sales call, and prohibits them from misrepresenting the nature of the goods or services offered. Telemarketers must also disclose the total cost of the goods or services ordered before payment is collected. It is now illegal for telemarketers to call you if you have asked not to be called, though few consumers know of this right. The new federal rule also creates an important new enforcement tool, as it allows state attorneys general to go into federal court and seek a *nationwide* remedy against the telemarketer, so that the telemarketer cannot simply cross state lines to escape prosecution.

However, **the FTC rule does *not* address many abusive telemarketing practices that rob consumers of billions of dollars a year.** For example, while the new rule prohibits telemarketers from making misrepresentations about a *limited* number of activities they are required to disclose, these disclosures are not mandated on the full range of issues consumers will face in telemarketing transactions. **The FTC has placed the burden on consumers** to ask the right questions and rely on the

answers provided to determine the legitimacy of the transaction. This is something older consumers admit they are unable to do.

In addition, while prohibiting some unfair and abusive practices, the FTC chose not to curtail other predatory practices, such as sending couriers to pick up payments or allowing telemarketers to access a consumer's checking account via a bank draft. These practices, permitted under the FTC's new rule, are used predominately by unscrupulous and illegal telemarketers to bilk money from consumers at an alarming rate. Had the FTC curtailed these prepayment practices, consumers would have been provided a *bright line* test to determine whether to avoid the transaction. These practices are a red flag for fraud in many instances. If both legitimate and illegitimate telemarketers use these questionable practices, it is harder for the consumer to recognize fraud. If these practices are made illegal, the consumer would know to avoid any telemarketer using them. Unfortunately, under the FTC rule, this is not the case. Therefore, it is up to the state to fill in the gaps left under the federal rule.

Senate Bill 580 provides such an opportunity. **There are three provisions in this bill that are essential to preventing telemarketing fraud. First, the ban on courier pickups in most instances.** 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. **Second, the ban on access to consumer checking, saving or bankcard account without the consumer's express written authorization.** A critical component of telemarketing fraud is getting the victim's money before the victim has the opportunity to reconsider the transaction. Use of demand drafts by telemarketers should not be permitted. Banks

clearly recognize the potential for abuse in this practice. However, they can do little for the consumer if an unauthorized draft is honored and the telemarketer disappears with the money. Even if the money does not disappear, it is difficult for the consumer to recoup their money. Misuse of this practice costs consumers hundreds of millions of dollars. For older persons on fixed incomes, the loss can be devastating. **Finally, the requirement of registration and bonding of telemarketers.** Registration of telemarketers is necessary in order for the state to be able to identify businesses that are conducting telemarketing. The bond is necessary to insure that victims have a source of recovery if the telemarketer lacks the resources to satisfy a judgment for violation of the law.

AARP supports Senate Bill 580, as it will help protect the citizens of Kansas from the potentially devastating consequences of telemarketing fraud. AARP greatly appreciates the opportunity to present our comments today and will be pleased to answer any questions you may have for us.

SENATE BILL #580
Comments by J. TED WALTERS

Distinguished members of the Committee, I appreciate the opportunity to appear before you to speak in support of Senate Bill #580. My name is TED WALTERS and I am President of the Kansas Retired Teachers Association. Our members are in general support of legislation to control telemarketing and to eliminate scams and frauds in the marketplace. Some of our members have been victimized by unscrupulous telemarketers. When redress is sought, they often find there is nothing that can be done to assist the victim or to prevent future dishonesty.

Telemarketing is a relatively new field and proper guidelines and regulations have not been developed. A "Let the Buyer Beware" attitude has permitted uncontrolled scams and frauds to be perpetrated upon the public. We believe legislation is needed to help develop the conscience and morality that seems to be missing among too many telemarketers. We recognize that we cannot protect all of the people all of the time but we believe we can, and should, implement safeguards that will give the consumer considerable protection and recourse. Telemarketers have demonstrated that they cannot be trusted to operate ethically on their own. Certainly, that is not true of all telemarketers but it is true of many.

Why we would be reluctant to enact legislation to regulate telemarketers, I do not know. Our most noble, honest, trustworthy, and moral professions and business fields are regulated. Bankers are undoubtedly honest to a fault but they are required to disclose nearly every facet of a business transaction. Why would we consider requiring less of a smooth talking voice oozing from the telephone? Just as locks help keep honest men honest, telemarketing legislation could help keep honest marketers honest. Additionally, it would give recourse for punishing and correcting dishonest behavior and misleading practices. Telemarketing needs to be regulated and the public deserves to be protected. KRTA members support this bill.

Thank you.

J. TED WALTERS
1924 SW Arrowhead Rd.
Topeka, KS 66604 (785) 272-1788

Senate Commerce Committee

Date 2-13-98

Attachment # 6



CARLA J. STOVALL
ATTORNEY GENERAL

State of Kansas

Office of the Attorney General

CONSUMER PROTECTION DIVISION

301 S.W. 10TH, LOWER LEVEL, TOPEKA 66612-1597
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1-800-432-2310

Testimony of
Gail E. Bright, Assistant Attorney General
Consumer Protection Division
Office of Attorney General Carla J. Stovall
Before the Senate Commerce Committee

RE: SB 580
February 13, 1998

Chairperson Salisbury 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 Senate Bill 580. My name is Gail Bright and I am an Assistant Attorney General for Consumer Protection.

The concept of telemarketer registration is taking hold across the country. Currently, twenty-two states have mandatory registration statutes for telemarketers conducting business in their state. With telephone solicitation on the increase, Attorney General Stovall is supportive of attempts aimed at reducing the number of telemarketing complaints submitted to her office.

While SB 580 is well-intentioned, Attorney General Stovall would like the Committee to consider some modifications. Please allow me to review the bill, section by section, to address those issues which need to be highlighted.

Section 1 amends K.S.A. 50-672 (relating to telemarketing fraud) to include additional disclosure requirements for written confirmations. Attorney General Stovall is certainly supportive of additional disclosures being made to consumers. This allows consumers to be more informed and, perhaps, more discriminating in their purchases.

Section 2 is a new section adding registration requirements for telemarketers wishing to conduct business in Kansas. Registration can be an additional tool for the Consumer Protection Division in the fight against unscrupulous telemarketers, but this bill, should it become law, would have a tremendous fiscal impact upon the Division especially since it contains no registration fees, as drafted, and requires our office to receive and maintain registrations, as well as prosecute registration violations. It would take a significant amount of research to actually assess the impact, but it is believed the number of registrants would be quite large based upon our complaint files.

In 1995, approximately 460 complaints were filed relating to telephone solicitation of property and/or services. In 1996, the number was 753. The climb continued in 1997 when
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complaints numbered 985. This high of a complaint level indicates the number of registrants would be significant. Consequently, a number of new employees, space, file capacity, computer capacity and programming and operating expenses would be required to implement and maintain a telemarketer registration system within the Office of the Attorney General. The information to be included on the application, p. 2, lines 34-43, and p. 3, lines 1-23, is comprehensive. In addition to the extensive data entry for each application, telemarketers are also to provide scripts, outlines or presentation materials. This would require the Division to physically store those documents.

The level of current staff and funding within the Consumer Protection Division is not compatible with the implementation of a telemarketer registration system. In 1997, our office received a total of 7,714 complaints up from 5,571 in 1996 and 4,216 in 1995. Based upon complaints to date, we expect to receive over 8,200 complaints in 1998. To require the office to handle a registration program of this magnitude without additional funding or staff would translate to less resources available to investigate and prosecute complaints from Kansas consumers.

In that regard, Attorney General Stovall would propose the imposition of a registration fee of \$400 and an annual renewal fee of \$250. This would assist the office financially in administering this program. There would also be significant upfront costs to set up and prepare for the registration process, both for personnel and equipment.

Section 3 details the recordkeeping requirements for telemarketers. They would be required to keep records of transactions and employees for 24 months. It also requires telemarketers to keep a record of fictitious names used by its telemarketers. This information could be helpful when investigating any telemarketing complaint, whether related to a harassing phone call or a misrepresentation concerning product or service quality.

Section 4 adds a list of prohibited and/or abusive acts. Attorney General Stovall is certainly not opposed to prohibiting certain acts or practices by telemarketers, but would offer a comment on this section. At page 5, lines 6-8, there is a provision prohibiting the submission for payment of a check or other negotiable paper drawn on a financial account without the consumer's express written authorization. Similar protective provisions currently exist at K.S.A. 50-672(c), (d) and (e), with exemptions in K.S.A. 50-673. These two provisions would be inconsistent as SB 580 contains no exemptions and to have both in effect would create a conflict. Perhaps the Revisor's office might be able to offer assistance in this regard.

The prize notification statute is modified by the revisions in Section 5. These amendments are positive for consumers and Attorney General Stovall is supportive of the changed language.

One potential problem not addressed in this bill, but by statutory provisions in other states, is the issue of proprietary information being submitted by telemarketers. Telemarketing companies have voiced concerns to our office when providing scripts and training materials that the information will become an open record and, in effect, available to their competitors. This Committee may wish

to consider the addition of a specific language in this regard since the registration provisions require the telemarketer to submit “scripts, outlines or presentation material” with their application.

This bill, if modified, could positively affect Kansas citizens as it serves to provide another piece to the puzzle of solving the ever-growing number of telemarketing complaints in Kansas.

On behalf of Attorney General Stovall, I would request this Committee recommend favorable passage of SB 580 with our proposed changes.

TESTIMONY OF BOB W. STOREY
BEFORE THE SENATE COMMERCE COMMITTEE

ON SENATE BILL 580

FEBRUARY 13, 1998

MADAM CHAIRMAN, MEMBERS OF THE COMMITTEE.

ON BEHALF OF MY CLIENT, I APPRECIATE THE OPPORTUNITY TO APPEAR
BEFORE YOU TODAY IN OPPOSITION TO SENATE BILL 580.

I REPRESENT DEHART AND DARR, A PUBLIC RELATIONS FIRM IN
WASHINGTON, D.C., WHICH IN TURN REPRESENTS THE DIRECT MARKETING
ASSOCIATION.

DIRECT MARKETING IS A \$11.8 BILLION BUSINESS IN KANSAS, EMPLOYING
2,538 KANSAS CITIZENS. NATIONWIDE, DIRECT MARKETING GENERATES \$1,177.6
TRILLION, AND EMPLOYS 20.1 MILLION AMERICANS.

DIRECT MARKETERS SUPPORT REASONABLE LAWS AND REGULATIONS
WHICH AFFORD THE CONSUMER PROTECTION AND PROVIDE ENFORCEMENT
TOOLS TO CONSUMER PROTECTION OFFICIALS.

WE OPPOSE SENATE BILL 580 FOR THE FOLLOWING REASONS:

THE LANGUAGE CONTAINED IN SENATE BILL 580 GOES FAR BEYOND THE
FEDERAL LAW, WHICH MAKES IT VERY CONFUSING WHEN TRAINING
EMPLOYEES AND REGULATING THE INDUSTRY AS TO WHICH LAW APPLIES.

THE BILL REQUIRES A SIGNED COPY OF A WRITTEN CONTRACT IN ANY
TELEPHONE SALE. KANSAS ALREADY HAS SUCH A LAW, BUT EXEMPTS SALES IN

WHICH A CONSUMER HAS A RIGHT TO REVIEW, RETURN, OR CANCEL AND GET A FULL REFUND, AS IS OFFERED BY ALL MEMBERS OF THE DIRECT MARKETING ASSOCIATION.

THE BILL REQUIRES REGISTRATION AND POSTING OF A \$100,000 BOND. TWENTY-ONE STATES HAVE REGISTRATION LAWS, BUT EXEMPT SELLERS WHO ARE IDENTIFIABLE TO THE ATTORNEY GENERAL AND CONSUMER PROTECTION OFFICIALS SHOULD A PROBLEM ARISE. THERE ARE TWENTY-FIVE EXEMPTIONS IN THE REGISTRATION LAWS.

THE BILL REQUIRES WRITTEN VERIFICATION OF PAYMENT BY BANK ACCOUNT DEBIT. THE FEDERAL TRADE COMMISSION PERMITS WRITTEN OR TAPED ORAL VERIFICATION, WHICH SHOULD BE SUFFICIENT TO PROTECT THE CONSUMER.

THE BILL MAKES A CALL TO A PERSON WHO HAS NOT ASKED TO BE CALLED A VIOLATION. THE FEDERAL TRADE COMMISSION REQUIRES A SELLER TO ESTABLISH PROCEDURES FOR AN IN-HOUSE DO-NOT-CALL LIST, BUT IN ALL CASES ALLOWS FOR POSSIBLE HUMAN ERROR. THE BILL AS IT IS BEFORE YOU DOES NOT ALLOW FOR ANY ERRORS OR MISTAKES BY THE CALLING PARTY.

KANSAS MARKETERS AND NATIONAL DIRECT MARKETERS SUPPORTED THESE FEDERAL LAWS:

- 1) TELEPHONE CONSUMER PROTECTION ACT (TCPA);
- 2) TELEMARKETING SALES RULE;
- 3) MAIL AND TELEPHONE ORDER RULE.

THE INDUSTRY HAS SPONSORED A FREE SERVICE TO CONSUMERS TO BE DELETED FROM NATIONAL TELEPHONE MARKETING LISTS --- FOR TWENTY YEARS.

KANSAS MARKETERS AND NATIONAL MARKETERS SUPPORT CONSISTENT INTERSTATE LAWS AND REGULATIONS TO PROTECT THE CONSUMERS. THE CONSUMER GETS HIS OR HER MONEY BACK FOR ANY REASON. DIRECT MARKETING IS A SIGNIFICANT NATIONAL INDUSTRY OFFERING AMERICANS MORE CHOICE AND CONVENIENCE THAN ANY OTHER COUNTRY IN THE WORLD, AS WELL AS THE MOST GENEROUS REVIEW AND RETURN AND CANCEL PRIVILEGES IN THE WORLD.

DIRECT MARKETERS ARE IDENTIFIABLE, SELLING BY MAIL, BY TELEPHONE, IN MAGAZINES AND NEWSPAPERS, BY CABLE AND TELEVISION, IN RETAIL LOCATIONS, AND ON THE INTERNET.

TELEPHONE MARKETING AS A PART OF DIRECT MARKETING IS REGULATED BY THREE FEDERAL LAWS. BECAUSE DIRECT MARKETERS OPERATE IN INTERSTATE COMMERCE, IT IS IMPORTANT THAT STATE LAWS BE CONSISTENT WITH FEDERAL LAW. TELEPHONE FRAUD HAS BEEN SIGNIFICANTLY REDUCED BY THE EFFORTS OF FEDERAL AND STATE OFFICIALS IN COOPERATION AND WITH SUPPORT FROM THE INDUSTRY. THE THREE FEDERAL LAWS IN THIS AREA ARE:

- 1) THE FEDERAL COMMUNICATIONS COMMISSION'S ACT, WHICH IS THE TELEPHONE CONSUMER PROTECTION ACT (TCPA);

- 2) THE FEDERAL TRADE COMMISSION ACTS, OF WHICH THERE ARE TWO:
- A) MAIL AND TELEPHONE ORDER RULE (MTOR); AND
 - B) TELEMARKETING SALES RULE (TSR).

IN ADDITION TO THE ABOVE, A FREE SERVICE TO CONSUMERS IS OFFERED BY THE TELEPHONE PREFERENCE SERVICE (TPS) WHICH ALLOWS A CONSUMER TO BE REMOVED FROM NATIONAL MARKETING LISTS PROVIDED BY THE DIRECT MARKETING ASSOCIATION (DMA).

AS STATED ABOVE CONSISTENTLY, THE INDUSTRY SUPPORTS LAWS, RULES AND REGULATIONS, BUT EXCESSIVE REGULATION AND RESTRICTIONS ONLY HARM LEGITIMATE SELLERS.

FRAUDULENT OPERATORS OBVIOUSLY IGNORE THE LAWS.

A TELEPHONE CALL IS CURRENTLY MORE REGULATED THAN MOST OTHER SALES TRANSACTIONS.

WE WOULD LIKE TO NOTE HERE THAT THIS COMMITTEE IN THIS SESSION REPORTED HOUSE BILL 2479 UNFAVORABLY, WHICH WAS THE PRIZE NOTIFICATION BILL VERY SIMILAR TO THIS ONE WHICH WAS PASSED BY THE HOUSE LAST SESSION.

FOR THE REASONS STATED HEREIN, THE DIRECT MARKETING ASSOCIATION OPPOSES SENATE BILL 580 AND ASKS THAT IT NOT BE RECOMMENDED FAVORABLY FOR PASSAGE BY THIS COMMITTEE.

THANK YOU AGAIN FOR YOUR CONSIDERATION IN ALLOWING ME TO

APPEAR ON BEHALF OF MY CLIENT TODAY. I WILL STAND FOR ANY QUESTIONS,
PROVIDED I AM QUALIFIED TO ANSWER THEM.

BOB W. STOREY

EXHIBITS

- 1) DMA TELEMARKETERS IN KANSAS.
- 2) DIRECT MARKETING'S IMPACT ON THE ECONOMY OF KANSAS.

Direct Marketing's Impact On the Economy of KANSAS

In 1996, more than 200 thousand jobs in Kansas are related to the practice of direct marketing by Kansas-based businesses and organizations. Combined, Kansas businesses generated 11.8 billion in sales and revenue using direct marketing methods in 1996.

ALL OF DIRECT MARKETING MEDIA COMBINED

1996 (Estimate)		State's Rank of 50 States + DC	% Compound Annual Growth 1996-2001
Impact on Revenue			
	In \$Millions*		
Direct Marketing Sales Revenue From State-Based Businesses	11,850	31	8.3
Direct Marketing Ad Expenditures Of State-Based Businesses	1,541	30	7.4
Impact on Employment			
	# Jobs		
Total State-Based Direct Marketing Employment	200,538	31	3.5
Direct Marketing Seller Employment in State	94,998	31	3.6
Direct Marketing Advertising Employment	21,567	30	2.3
Direct Marketing Supplier Employment	34,899	32	3.6
Direct Marketing Inter-Industry Employment (Suppliers to the Suppliers)	49,074	32	3.6

* These numbers have not been adjusted for inflation. They represent current (nominal) dollars.
Source: Economic Impact: U.S. Direct Marketing Today. Commissioned by the Direct Marketing Association. Authored by The WEFA Group, 1996



8-8



Testimony before the Senate Commerce Committee
Friday, February 13, 1998
Michael R. Murray, Director of Governmental Affairs, Sprint
Senate Bill 580

Madam Chairman and Members of the Committee:

My name is Mike Murray, Director of Governmental Affairs in Kansas for Sprint.

Thank you for the opportunity to express our views concerning Senate Bill 580 which would amend current telemarketing laws.

We are opposed to the bill.

First, it does not address our concerns expressed at yesterday's hearing having to do with the inequitable application of current telemarketing laws to Sprint and its principal competitors. It does nothing to eliminate the existing and preexisting business relationship provisions of KSA 50-670 and 50-673.

Secondly, it is our belief that Senate Bill 580 goes beyond what may be reasonably necessary to regulate telemarketing and protect consumers in the state of Kansas. As a matter of public policy, there should be a reasonable and prudent balance struck between consumer protection and business regulation.

The bill adds two new sections to the current law imposing a number of regulatory and record keeping requirements. Generally, we believe these could discourage legitimate businesses from offering their goods and services to Kansas consumers.

No legitimate telemarketer wants to see our citizens taken advantage of and deprived of their savings or other property by fraudulent or deceptive means. Unfortunately, statutes and regulations don't always stop such unscrupulous and criminal behavior. We believe the best solution, not necessarily the perfect one, is swift and certain enforcement of the law and the imposition of stiff civil and/or criminal penalties on those who violate it.

Thank you for your attention, and I'd be happy to respond to questions.

Senate Commerce Committee

Date 2-13-98

Attachment # 9



Mike Reecht
Kansas Director
State Government Affairs

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Topeka, KS 66612
Phone (913) 232-2128
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**TESTIMONY ON BEHALF OF AT&T
BEFORE THE SENATE COMMERCE COMMITTEE
SENATE BILL 580
FEBRUARY 13, 1998**

Madam Chairman and members of the committee:

My name is Mike Reecht and I am the State Director for State Government Affairs in Kansas.

AT&T supports the position of the Direct Marketing Association which opposes the passage of SB580.

AT&T is a part of the extremely competitive long distance marketplace. Although some long distance companies have abused the telemarketing process by using this means to slam customers, telemarketing remains an important tool for AT&T in attracting new customers as well as winning back those customers who have switched to other carriers.

SB580 would create a significant impediment to AT&T's winback programs in Kansas. As an example, the requirement of a surety bond is designed to protect Kansas citizens from unscrupulous fly-by-night operators who would literally take the money and run. However, under the provisions of the bill, firms like AT&T would be required to obtain registration even though we are subject to extensive policing by a variety of entities, such as the FCC, the SEC, and at the state level, the KCC. The additional requirement for bonding specified by the bill would do little to enhance consumer protection over what they already have from firms like AT&T.

SB580 seems to be designed to correct problems associated with telemarketers who have the intent to defraud. Unfortunately, the rules and regulations necessary to do business in Kansas under this law would drive costs up for legitimate firms, while doing very little to curb the abuses by firms that the law is designed to target.

In summary, AT&T recommends the committee not pass SB580. However, should the committee decide to consider some action on the bill, I have attached a balloon amendment to my testimony for your consideration.

I would be glad to answer any questions.

Senate Commerce Committee

Date *2-13-98*

Attachment # *10-1 thru 10-10*

SENATE BILL No. 580

By Senator Hensley

2-3

9 AN ACT amending and supplementing the Kansas consumer protection
10 act; relating to telemarketing fraud; requiring registration and certain
11 record keeping; prohibiting certain acts and providing penalties and
12 remedies for violations; concerning prize notification; amending K.S.A.
13 50-672, 50-675 and 50-692 and repealing the existing sections.
14

15 *Be it enacted by the Legislature of the State of Kansas:*

16 Section 1. K.S.A. 50-672 is hereby amended to read as follows: 50-
17 672. (a) Any verbal agreement made by a consumer to purchase any
18 goods or services from a telemarketer shall not be considered valid and
19 legally binding unless the telemarketer receives from the consumer a
20 signed confirmation that discloses in full the terms of the sale agreed
21 upon.

22 (b) The confirmation shall include, but is not limited to, the following
23 information:

- 24 (1) The name of the telemarketer;
- 25 (2) the address and telephone number at which personal or voice
26 contact with an employee or agent of the telemarketer can be made dur-
27 ing normal business hours;
- 28 (3) a list of all prices or fees being requested, including any handling,
29 shipping, delivery, or other charges;
- 30 (4) the date of the transaction;
- 31 (5) a detailed description of the goods or services being sold;
- 32 (6) *any restrictions, limitations or conditions to purchase the goods*
33 *or services being sold;*
- 34 (7) *any material aspect of the performance, quality, efficacy, nature*
35 *or basic characteristics of the goods or services being sold;*
- 36 (8) *any material aspect of the nature or terms of refund, cancellation,*
37 *exchange or repurchase policies;*
- 38 ~~(6)~~ (9) a duplicate copy with the complete information as presented
39 in the original confirmation, to be retained by the consumer as proof of
40 terms of the agreement to purchase; and
- 41 (10) in a type size of a minimum of twelve points, in a space
42 immediately preceding the space allotted for the consumer signature, the
43 following statement:

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1 "YOU ARE NOT OBLIGATED TO PAY ANY MONEY UNLESS
2 YOU SIGN THIS CONFIRMATION AND RETURN IT TO THE
3 SELLER."

4 (c) A telemarketer may not make or submit any charge to the con-
5 sumer's credit card account until the telemarketer has received from the
6 consumer an original copy of a confirmation, signed by the consumer,
7 that complies with this section. Any merchandise sent or services provided
8 without such written confirmation shall be considered as unsolicited
9 goods subject to the provisions of K.S.A. 50-617 and amendments thereto.

10 (d) No consumer shall be held liable for payment for any good or
11 service provided by a telemarketer unless such telemarketer has first re-
12 ceived the written consent of the consumer in the form of a confirmation
13 as defined in this section.

14 (e) In the event that the consumer sends payment to the telemarketer
15 in the form of a personal check, cash money, or any other form of payment
16 other than credit card without having included a signed copy of such
17 confirmation, the consumer shall have the right to choose at any time to
18 cancel the sale by notifying the telemarketer in writing, provided the
19 consumer returns to the telemarketer the goods sold in substantially the
20 same condition as when they were received by the consumer. A telemar-
21 keter that has received such notice to cancel from a consumer shall then,
22 within 10 business days of the receipt of such notice:

- 23 (1) Refund all payments made, including any down payment made
- 24 under the agreement;
- 25 (2) return any goods or property traded in to the seller on account of
- 26 or in contemplation of the agreement, in substantially the same condition
- 27 as when received by the telemarketer; and
- 28 (3) take any action necessary or appropriate to terminate promptly
- 29 any security interest created in connection with the agreement.

30 New Sec. 2. (a) No telemarketer shall conduct business in this state
31 without having registered with the attorney general at least 60 days before
32 conducting such business. An application for renewal shall be made on
33 an annual basis thereafter.

34 (b) The application for a certificate of registration or renewal shall
35 include, but not be limited to, the following information:

- 36 (1) The name, current address, telephone number and location of the
- 37 telemarketer, including each name under which the telemarketer intends
- 38 to engage in telemarketing;
- 39 (2) each occupation or business that the telemarketer's principal
- 40 owner has engaged in for two years immediately preceding the date of
- 41 the application;
- 42 (3) whether any principal or manager of the telemarketer has been
- 43 convicted or plead guilty to or is being prosecuted by indictment for

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1 racketeering, violations of state or federal securities laws or a theft of-
2 fense;

3 (4) whether there has been entered against any principal or manager
4 of the telemarketer an injunction, temporary restraining order or a final
5 judgment in any civil or administrative action, involving fraud, theft, rack-
6 eteering, embezzlement, fraudulent conversion or misappropriation of
7 property, including any pending litigation against the applicant;

8 (5) whether the telemarketer, at any time during the previous seven
9 years, has filed for bankruptcy, been adjudged bankrupt or been reor-
10 ganized because of insolvency;

11 (6) the name, current home address, date of birth, social security
12 number and all other names of the following:

13 (A) Each person to be employed by the telemarketer;

14 (B) each person participating in or responsible for the management
15 of the telemarketer's business; and

16 (C) each person, (office manager, supervisor) principally responsible
17 for the management of the telemarketer's business;

18 (7) the name, address and account number of every institution where
19 banking or any other monetary transactions are done by the seller; and

20 (8) a copy of all scripts, outlines or presentation material the tele-
21 marketer will use when soliciting as well as all sales information to be
22 provided by the telemarketer to a purchaser in connection with any tele-
23 marketing contract.

24 (c) (1) The application for registration or renewal shall be accom-
25 panied by a surety bond in the amount of \$100,000. The bond shall pro-
26 vide for the indemnification of any person suffering a loss as the result
27 of violation of any provision of this section or K.S.A. 50-671 through
28 50-675, section 3 or 4 or K.S.A. 50-692, and amendments thereto. The
29 surety for any cause may cancel the bond upon giving 60-days written
30 notice by certified mail to the principal and to the office of the attorney
31 general. Unless the bond is replaced by that of another surety before the
32 expiration of the 60 days, the registration of the principal under this act
33 shall be treated as lapsed. The surety bond shall remain in effect for three
34 years after the period the telemarketer ceases to engage in business as a
35 telemarketer in this state.

36 (2) Any telemarketer required under this act to file a bond with a
37 registration application, may file, in lieu thereof, a certificate of deposit,
38 cash or government bond in the amount of \$100,000. The office of the
39 attorney general shall hold such cash, certificate of deposit or government
40 bond for three years after the period the telemarketer ceases to operate
41 (if registration lapses) in this state in order to pay claims made against
42 the telemarketer during the telemarketer's period of operation.

43 (3) The registration of a telemarketer will be treated as lapsed if, at

1 any time, the amount of the bond, cash, certificate of deposit or govern-
2 ment bond falls below the amount required by this subsection.

3 (4) The aggregate liability of the surety company to all persons in-
4 jured by a telemarketer's violations shall not exceed the amount of the
5 bond.

6 New Sec. 3. (a) A telemarketer shall keep for a period of 24 months
7 from the date the record is produced, records of all financial transactions,
8 written notices, disclosures and acknowledgments, in the form, manner,
9 format or place as the telemarketer keeps such records in the ordinary
10 course of business, including but not limited to:

11 (1) All substantially different advertising, brochures, telemarketing
12 scripts and promotional materials;

13 (2) the name and last known address of each customer, the goods or
14 services purchased, the date such goods or services were shipped or pro-
15 vided and the amount provided and the amount paid by the customer for
16 the goods or services;

17 (3) the name, any fictitious name used, the last known home address
18 and telephone number and the job title for all current and former em-
19 ployees directly involved in telephone sales but, if the telemarketer per-
20 mits fictitious names to be used by employees, each fictitious name must
21 be traceable to only one specific employee; and

22 (4) all written authorizations or confirmations required to be pro-
23 vided or received under this act.

24 (b) In the event of any dissolution or termination of the telemar-
25 keter's business, the principal of that telemarketer shall maintain all re-
26 cords as required under this section. In the event of any sale, assignment
27 or other change in ownership of the telemarketer's business, the successor
28 shall maintain all records required under this section.

29 Sec. 4. K.S.A. 50-675 is hereby amended to read as follows: 50-675.

30 (a) This act shall be part of and supplemental to the Kansas consumer
31 protection act.

32 (b) *Any* It is an unconscionable act within the meaning of K.S.A.
33 50-627 and amendments thereto for a telemarketer or a telemarketer's
34 agent to:

35 (1) Attempt to collect a fee, or enforce a credit card charge or trans-
36 action or ~~any refusal~~ refuse to make a refund to the consumer in violation
37 of this act is an unconscionable act within the meaning of K.S.A. 50-627
38 and amendments thereto;

39 (2) fail to register and maintain a surety bond or file other financial
40 ty as required by section 2 and amendments thereto or to misrep-
41 that the telemarketer is so registered;

42 (3) fail to maintain a certificate of registration issued pursuant to
43 section 2 and amendments thereto;

(d) Any firm regulated by the Federal Communications
Commission, Securities Exchange Commission,
or the Kansas Corporation Commission shall
be exempt from the provisions of this section.

12

- (4) include any false or misleading information on an application for registration pursuant to section 2 and amendments thereto;
- (5) fail to maintain any records as required by section 3;
- (6) represent that registration as a telemarketer constitutes an endorsement or approval by the state or a state agency;
- (7) obtain or submit for payment a check, draft or other form of negotiable paper drawn on a person's checking, savings or bankcard account without the consumer's express written authorization;
- (8) procure the services of any professional delivery, courier or other pickup service to obtain immediate receipt or possession of a consumer's payment; unless the goods are delivered with the opportunity to inspect before any payment is collected;
- (9) threaten, intimidate or use profane or obscene language in a telemarketing call;
- (10) cause the telephone to ring more than five times in an intended telemarketing call;
- (11) engage any person repeatedly or continuously in a telemarketing call with behavior a reasonable person would deem to be annoying, abusive or harassing;
- (12) initiate a telemarketing call to a person, when that person has stated previously that the person does not wish to receive calls from the telemarketer;
- (13) engage in telemarketing calls to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time, at the called person's location; or
- (14) engage in any other conduct in telemarketing calls that would be considered abusive to any reasonable consumer.

(c) It is an unconscionable act within the meaning of K.S.A. 50-627 and amendments thereto for any person to:

- (1) Assist, support or provide substantial assistance to any telemarketer when the person knew or should have known that the telemarketer was engaged in an act or practice described by subsection (b); or
- (2) request or receive payment in advance from a person, to recover or otherwise aid in the return of money or any other item lost by the consumer in a prior telemarketing transaction.

strike

insert

Sec. 5. K.S.A. 50-692 is hereby amended to read as follows: 50-692.

(a) As used in this section:

- (1) "Prize" means a gift, award or other item or service of value.
- (2) "Prize notice" means a notice given to an individual in this state which notifies all of the following:

Is or contains a representation that the individual has been selected or may be eligible to receive a prize; and

- (B) conditions receipt of a prize on a payment from the individual or

(d) It shall be an affirmative defense in any action brought under this subsection that the defendant has established and implemented reasonable business practices and procedures to effectively prevent telephone solicitations in violation of the regulations established in this section.

1 requires or invites the individual to make a contact to learn how to receive
2 the prize or to obtain other information related to the notice.

3 (3) "Solicitor" means a person who represents to an individual that
4 the individual has been selected or may be eligible to receive a prize.

5 (4) "Sponsor" means a person on whose behalf a solicitor gives a prize
6 notice.

7 (5) "Verifiable retail value" of a prize means:

8 (A) A price at which the solicitor or sponsor can demonstrate that a
9 substantial number of the prizes have been sold by a person other than
10 the solicitor or sponsor in the trade area in which the prize notice is given;
11 or

12 (B) if the solicitor or sponsor is unable to satisfy paragraph (A), no
13 more than 1.5 times the amount the solicitor or sponsor paid for the prize.

14 (b) If a solicitor represents to an individual, by oral or written com-
15 munication, that the individual has been selected or may be eligible to
16 receive a prize, the solicitor shall not request, and the solicitor or sponsor
17 shall not accept, a payment from the individual in any form and the so-
18 licitor shall not create the reasonable impression that such payment is
19 required before the individual receives a written prize notice that contains
20 all of the information required under subsection (c)(1) presented in the
21 manner required under subsection (c)(2) through (6).

22 (c) (1) A written prize notice shall contain all of the following infor-
23 mation presented in the manner required under paragraphs (1) through
24 (6):

25 (A) The name and address of the solicitor and sponsor.

26 (B) The *description and* verifiable retail value of each prize the in-
27 dividual has been selected or may be eligible to receive.

28 (C) *The actual number of each prize to be awarded.*

29 (D) If the notice lists more than one prize that the individual has
30 been selected or may be eligible to receive, a statement of the odds the
31 individual has of receiving each prize.

32 ~~(D)~~ (E) Any requirement or invitation for the individual to view, hear
33 or attend a sales presentation in order to claim a prize, the approximate
34 length of the sales presentation and a description of the property or serv-
35 ice that is the subject of the sales presentation.

36 ~~(E)~~ (F) Any requirement that the individual pay shipping or handling
37 fees or any other charges to obtain or use a prize.

38 ~~(F)~~ (G) If a receipt or redemption of the prize is subject to a *any*
39 *condition or restriction*, a statement that a *restriction applies restrictions*
40 *conditions apply*, a description of the *restriction all restrictions and*
41 *conditions* and a statement containing the location in the notice where
42 the *restriction is restrictions and conditions are* described.

43 ~~(G)~~ (H) Any limitations on eligibility.

(2) (A) The verifiable retail value and the statement of odds required in a written prize notice under paragraphs (1)(B) and (C) shall be stated in immediate proximity to each listing of the prize in each place the prize appears on the written prize notice and shall be in the same size and boldness of type as the prize.

(B) The statement of odds shall include, for each prize, the total number of prizes to be given away and the total number of written prize notices to be delivered. The number of prizes and written prize notices shall be stated in Arabic numerals. The statement of odds shall be in the following form: " (number of prizes) out of written prize notices."

(C) The verifiable retail value shall be in the following form: "verifiable retail value: \$ "

(3) If an individual is required to pay shipping or handling fees or any other charges to obtain or use a prize, the following statement shall appear in immediate proximity to each listing of the prize in each place the prize appears in the written prize notice and shall be in not less than 10-point boldface type: "YOU MUST PAY \$ IN ORDER TO RECEIVE OR USE THIS ITEM."

(4) The information required in a written prize notice under paragraph (1)(D) shall be on the first page of the written prize notice in not less than 10-point boldface type. The information required under paragraph (1)(F) and (G) shall be in not less than 10-point boldface type.

(5) If a written prize notice is given by a solicitor on behalf of a sponsor, the name of the sponsor shall be more prominently and conspicuously displayed than the name of the promoter.

(6) A solicitor or sponsor shall not do any of the following:

(A) Place on an envelope containing a written prize notice any representation that the person to whom the envelope is addressed has been selected or may be eligible to receive a prize.

(B) Deliver a written prize notice that contains language, or is designed in a manner, that would lead a reasonable person to believe that it originates from a government agency, public utility, insurance company, consumer reporting agency, debt collector or law firm unless the written prize notice originates from that source.

(C) Represent directly or by implication that the number of individuals eligible for the prize is limited or that an individual has been selected to receive a particular prize unless the representation is true.

(d) If a prize notice requires or invites an individual to view, hear or attend a sales presentation in order to claim a prize, the sales presentation shall not begin until the solicitor does all of the following:

(1) Informs the individual of the prize, if any, that has been awarded to the individual.

10-9

1 (2) If the individual has been awarded a prize, delivers to the indi-
2 vidual the prize or the item selected by the individual under subsection
3 (e) if the prize is not available.

4 (e) (1) A solicitor who represents to an individual in a written prize
5 notice that the individual has been awarded a prize shall provide the prize
6 to the individual unless the prize is not available. If the prize is not avail-
7 able, the solicitor shall provide the individual with any one of the following
8 items selected by the individual:

9 (A) Any other prize listed in the written prize notice that is available
10 and that is of equal or greater value.

11 (B) The verifiable retail value of the prize in the form of cash, a
12 money order or a certified check.

13 (C) A voucher, certificate or other evidence of obligation stating that
14 the prize will be shipped to the individual within 30 days at no cost to
15 the individual.

16 (2) If a voucher, certificate of other evidence of obligation delivered
17 under paragraph (1)(C) is not honored within 30 days, the solicitor shall
18 deliver to the individual the verifiable retail value of the prize in the form
19 of cash, a money order or a certified check. The sponsor shall make the
20 payment to the individual if the solicitor fails to do so.

21 (f) Nothing in this section shall be construed to permit an activity
22 otherwise prohibited by law.

23 (g) Any violation of this section is an unconscionable act or practice
24 under the Kansas consumer protection act.

25 (h) In addition to any other remedies, a person suffering pecuniary
26 loss because of a violation by another person of this section may bring an
27 action in any court of competent jurisdiction and shall recover all of the
28 following:

29 (1) The greater of \$500 or twice the amount of the pecuniary loss.

30 (2) Costs and reasonable attorney fees.

31 (i) The provisions of this section shall not apply to the sale or pur-
32 chase, or solicitation or representation in connection therewith, of goods
33 from a catalog or of books, recordings, videocassettes, periodicals and
34 similar goods through a membership group or club which is regulated by
35 the federal trade commission trade regulation rule concerning use of neg-
36 ative option plans by sellers in commerce or through a contractual plan
37 or arrangement such as a continuity plan, subscription arrangement or a
38 single sale or purchase series arrangement under which the seller ships
39 goods to a consumer who has consented in advance to receive such goods
40 and the recipient of such goods is given the opportunity, after examination
41 of the goods, to receive a full refund of charges for the goods or unused
42 portion thereof, upon return of the goods or unused portion thereof,
43 undamaged. A sponsor shall maintain, for a period of 24 months after the

award of a prize, a record of the name and last known address of the prize recipient and the prize awarded such recipient.

(j) This section shall be part of and supplemental to the Kansas consumer protection act.

Sec. 6. K.S.A. 50-672, 50-675 and 50-692 are hereby repealed.

Sec. 7. This act shall take effect and be in force from and after its publication in the statute book.



"The Future is Calling"

AMERICAN TELEMARKETING ASSOCIATION, INC.

4605 Lankershim Blvd., Suite 824 • North Hollywood, California 91602-1891
818/766-5324 • 800/441-3335 Fax: 818/766-8168

Testimony Of The American Telemarketing Association
Before The Senate Committee On Commerce
Regarding Senate Bill 580

Good Morning Chairman Salisbury and other members of the Committee, my name is Tyler Prochnow and I am here today representing the American Telemarketing Association. I am the ATA's legal counsel for legislative affairs in all 50 states. I appear here today to voice our opposition to Senate Bill 580 and offer our assistance to the Committee as you study this and other bills.

I would like to start today by offering some background on the Association.

The American Telemarketing Association was founded in 1983 to provide leadership and education in the professional and ethical use of the telephone. Our primary objective is to promote, through both business and consumer education programs, the highest standards of ethical practices throughout the industry. Thereby creating a positive image of telephone marketing. Today, the Association has more than 2,000 members in 43 states and 19 countries. Here in Kansas we have a number of members, including Sprint, Weight Watchers and the Bayer Corporation. What is important to note about our membership is the diverse nature of businesses that use the telephone to transact business. For nearly every business in this state, both large and small, uses the telephone as a sales or marketing tool at some point in the day. The issues we are discussing that have been proposed by House Bill 580 will impact, not the sleazy tele-thieves who are all too often depicted on TV as typical of all telemarketing, but rather the legitimate telemarketers who create economic growth and opportunity for everyone. And that is why this bill is a bad bill for Kansas.

The problems with this bill fall into three main categories: (1) Impossible; (2) Overburdensome; or (3) Redundant and Unnecessary.

By impossible, I mean, it would be nearly impossible for a legitimate telemarketer to comply with these provisions, and still be able to maintain a profitable business. One of the most troublesome provisions of this bill, that would fall into the impossible category, is New Section 3(a)(2). Today, a large percentage of telemarketing business is conducted by service agencies who are professional marketers selling goods or services on behalf of a manufacturer. In a typical outsourced transaction, the service agency would make a sale and then transmit that order to the manufacturer for fulfillment of the order and collection on the account. At that point,

Senate Commerce Committee

Date 2-13-98

Attachment # 11-1 thru 11-3

the agency is no longer a part of the transaction. The agency has no idea when the goods or services were shipped, whether the fulfillment company actually shipped all of the order and how much the consumer actually paid for the goods or services. Thus, it would be impossible for the service agency to maintain such records for a period of two years. They will never have that information.

The bill contains many onerous requirements as well. Requirements that, if enacted, would place an excessive burden on a company simply because it chose to offer the telephone as an easy option for consumers to make their purchasing decisions. For example:

New Section 2. This registration section singles out the telemarketers and places an incredible financial burden on them. Most of our members are small businesses. As you are well aware, small businesses are primarily responsible for the bulk of new jobs created in this country every year. The telemarketing industry is no exception. I know the industry basher's rhetoric would make it hard to imagine that anyone would want to receive a telephone solicitation, but the telemarketing industry is one of the fastest growing industries in the country. National job growth in this industry is more than three times that of the overall national job growth average. According to a recent survey, there are approximately 40,000 people in this state employed by the telemarketing industry. With those kind of numbers, it is obvious that someone is making use of the telephone to purchase goods and services, these people enjoy having that option and will continue to use it. Those numbers also suggest that the vast majority of telemarketing companies are doing it legally, ethically and responsibly.

This new section, however, insinuates that most telemarketing companies are doing it illegally and unethically. The basic premise of this section is that we know you are going to do something wrong and so you have to post \$100,000 bond so that when we catch you, we can return all the money you have stolen. That is a truly unfair assumption, that is made with no statistical data to support it.

Historically, the telemarketing industry has touted its ability to provide jobs for those who otherwise may not be able to maintain permanent employment. The flexible work schedules that allows parents to work around day care needs. The in-house sales environment that allows disabled individuals to work when they otherwise could not. In the past decade however, a large number of new telemarketing companies have been started by young entrepreneurs with MBA's, looking for a cost effective means to get their products before the public. These entrepreneurial endeavors have not only survived, they have flourished. By adding a \$100,000 bond to the bottom line of a new business's start-up costs, you will effectively eliminate many of these new companies and the jobs they create.

Finally, the redundant and unnecessary provisions are the ones that mirror existing federal regulations. Most of the new provisions added to Section 4, already have a parallel federal requirement that all legitimate telemarketers must comply with. If the Committee is interested in enacting legislation to codify the federal rules that already exist, we submit that Senate Bill 573 is a much better vehicle for achieving that goal.

I would like to conclude my remarks this morning by simply reiterating our pledge to assist the Committee in any way possible. As I have tried to show here today, Senate Bill 580 is not necessary for Kansas. We would urge you to ignore the rhetoric and look long and hard at the real telemarketing story of job creation, economic growth and consumer opportunity and act so as to support all three of these goals by voting against this bill.

I thank you for your time this morning. If you have any questions, I would be happy to answer them at this time.