SUBJECT: Regulation of telemarketing solicitation

COMMITTEE: Business and Industry — committee substitute recommended

VOTE: 5 ayes — Brimer, Dukes, Elkins, Solomons, Woolley

0 nays

4 absent — Corte, J. Davis, George, Giddings

WITNESSES: For — *(on original version):* Waggoner Carr, Jay Reynolds, Harold Rose, Barbara Vackar, American Association of Retired Persons; Carlos Higgins, Texas Silver-Haired Legislature; Reggie James, Consumer's Union

Against — Richard Evans, Texas Association of Business and Chambers of Commerce; Bo Gilbert, Independent Insurance Agents of Texas; Michael Harrison, West Teleservices; Michael Jewell, AT&T; Timothy Leahy, Southwestern Bell Telephone; Sally McMahon, MCI Worldcom; Tyson Payne, Texas Association of Insurance and Financial Advisors; Mike Pollard, Texas Association of Life and Health Insurers; Bill Stinson, Texas Association of Realtors; Jay Thompson, Texas Association of Life and Health Insurers and Prudential

On — John Capitano, Public Utility Commission; Esther Chavez, Brad Schuelke, Office of the Attorney General; Guy Joyner, Secretary of State's Office

BACKGROUND: Business and Commerce Code, chapters 37 and 38 establish guidelines for telemarketing solicitation. Regulation is spread among several state agencies, including the secretary of state, Office of the Attorney General (OAG), and Public Utility Commission (PUC). Telemarketers doing business in Texas must register with the Secretary of State's Office, pay a $200 annual fee, and post a $10,000 bond. Currently, 31 telephone solicitors are registered.

Chapter 35 regulates facsimile (fax) solicitations. Telemarketers may not transmit faxes without prior consent if the recipient would be charged and may not transmit faxes between 11 p.m. and 7 a.m. Fax transmissions must

include a working telephone number that the recipient could call to request that no more faxes be sent.

The Public Utility Regulatory Act requires telephone solicitors to make their best efforts to comply with customers' no-call requests. PUC rules specify that when making calls, telemarketers must identify themselves by name, identify the business for which they are calling, state the purpose of the call, and provide a working telephone number. Calls may be made between 9 a.m. and 9 p.m. Monday through Saturday and between noon and 9 p.m. on Sunday. Callers may not block identification by Caller ID units. Automatic dial announcing devices must disconnect within five seconds after the call ends, and a recorded solicitation message must be shorter than 30 seconds.

The PUC investigates and enforces complaints involving the repeated solicitation of consumers who have asked not to be contacted again. The commission is charged with enforcing the law that prohibits telemarketers from blocking their caller identification information. Companies that do not comply can be fined as much as $1,000 a day.

The OAG investigates consumer complaints of telemarketing activity that violate the Deceptive Trade Practices Act. The OAG may seek civil penalties against fraudulent telemarketers but not criminal penalties. The maximum civil penalty for violations is $10,000.

DIGEST:

CSHB 472 would establish the Texas Telemarketing Disclosure and Privacy Act (Business and Industry Code, chapter 43). It would require the PUC to establish a telemarketer "no-call" list containing phone numbers of residential customers who do not wish to receive unsolicited telemarketing calls. It would establish enforcement authority for the PUC, OAG, and state licensing agencies to investigate complaints and assess civil penalties, and it would increase public access to civil remedies.

No-call list. The PUC would have to establish the Texas no-call list for Texas residential customers who had asked to be on the list. A customer's listing would have to expire on its third anniversary but could be renewed for another three years. The PUC could not charge a customer more than $3 to be on the list or to renew an entry. The list would have to be updated and published quarterly, beginning on January 1 of each year. The bill would

require written notice from consumers who wished to change their numbers or remove them from the list. Telemarketers could not contact people on the list beginning 60 days after their numbers were published.

CSHB 472 would require the PUC to provide a request form for customers who wanted to be on the no-call list, plus a toll-free number and Internet mail address where customers could call or write to get a copy of the form. The toll-free number and Internet address would have to be displayed in the residential telephone directory.

The PUC could contract with a private vendor to maintain the no-call list if the vendor had maintained a national no-call list for more than two years that contained Texas consumers who had asked to be a national no-call list. The vendor would have to publish the Texas portion of the national no-call list in an electronic format. The list would have to be made available to any telemarketing concern that wanted to update its list of people with whom it did not have a prior business relationship.

By July 1, 2002, the PUC would have to adopt rules:

- requiring local-exchange telephone companies to inform customers of their options regarding telemarketing through annual inserts in billing statements or a publication in the information pages of local telephone directories;
- providing that an isolated solicitation by a telemarketer that otherwise had adequate procedures in place to comply with the bill's provisions would not be a violation;
- providing for the dissemination of the no-call list commonly used by telemarketers;
- providing that the fee for each distribution could not exceed $75; and
- allowing the PUC to conduct educational programs regarding rights and obligations.

The bill would require the Department of Information Resources to help the PUC administer the no-call list if asked.

Exemptions. A telemarketing call would not subject to the bill's provisions if it was made:

- regarding securities;
- by a state licensee under certain circumstances;
- in connection with an established business relationship or, under certain circumstances, a terminated business relationship;
- by a consumer as a result of a solicitation or advertisement;
- between a telemarketer and a business, unless the business had asked not to be called; or
- to collect a debt.

Caller identification. CSHB 472 would prohibit a telemarketer from blocking the identity of the telephone number from which a call was made and from interfering with the capability of a caller ID service. Telemarketers would have to provide caller ID information that was accessible by a caller ID service, if the capability was available.

Fax transmissions. CSHB 472 would require telephone fax transmissions to follow federal standards, to have a cover sheet stating the complete name of the solicitor and street address of the business, and to provide a toll-free number either answered by someone capable of responding to inquiries and available to recipients from 9 a.m. to 5 p.m. Monday through Friday or capable of automatically and immediately deleting a specified telephone number. Solicitors would have to acknowledge within 24 hours a recipient's request not to be faxed again and could not send any more faxes.

Penalties for violations. The PUC would have to investigate customers' complaints and could assess administrative penalties up to $1,000 per violation. The PUC would have exclusive jurisdiction if the violator was a telecommunications provider. If the violator was a state licensee, the state agency that issued the license would have to investigate the complaint and could assess administrative penalties not to exceed $1,000 per violation. If the agency found that a licensee willfully or knowingly violated the bill's provisions, the agency could suspend or revoke the license.

In case of a second or subsequent violation of the no-call provisions, a consumer could bring a civil action if the consumer had notified the

appropriate agency of the violation and the agency failed to take action. If a court found that the violator willfully and knowingly violated the no-call provisions, the court could award damages up to $500 per violation. For any violation of the unsolicited fax provisions, a consumer could bring a private right of action for the actual monetary loss or $500 for each violation, whichever was greater. If a court found that the violator willfully or knowingly violated the bill's provisions, the court could increase the amount to not more than three times the actual monetary loss. Actions brought under the provisions regarding unsolicited faxes received on or after January 1, 2000, could not be maintained as a class action suit.

The OAG also could investigate violations, could seek injunctive relief and attorney's fees, and could assess civil penalties not to exceed $1,000 per violation. If a court found that the violator willfully and knowingly violated the bill's provisions, it could increase the penalties up to $3,000 per violation.

CSHB 472 would establish guidelines relating to the determination of the amount of a civil penalty, contested cases, and situations in which a penalty could be stayed. Venue for an action based on violations of the no-call list and of the provisions regarding unsolicited faxes would be in the county where the telemarketing call or fax was made or received, or in Travis County if brought by the attorney general, PUC, or a state agency. Venue for an action based on a violation of the blocked caller ID provisions would be in Travis County.

Regulatory reports. CSHB 472 would require the PUC and OAG to submit reports before December 31 of each even-numbered year to the lieutenant governor and House speaker. The report would have to contain a list of complaints received, a summary of enforcement efforts, and recommendations for any changes. In addition, the PUC would have to report the number of telephone numbers on the no-call list, the number of lists distributed, and the amount of money collected.

This bill would take effect January 1, 2002. The provisions limiting judicial class actions regarding certain electronic communications made for sales purposes would take immediate effect if finally passed by a two-thirds

record vote of the membership of each house. Otherwise, those provisions would take effect September 1, 2001.

SUPPORTERS SAY:

CSHB 472 would establish better telemarketing regulations that would protect both legitimate businesses and consumers who are harassed and defrauded by unscrupulous telemarketers. It would allow consumers some control over who could contact them by establishing a statewide no-call list, as urged by the House Business and Industry Committee's interim report to the 77th Legislature. Consumers are spending millions of dollars for telephone equipment to protect their privacy. Under this bill, with one simple phone call or form, consumers could request that all solicitors in Texas cease contact with them via telemarketing.

In the absence of a federally mandated national no-call list, the focus of the provisions in CSHB 472 is to implement a Texas no-call list that protects all parties and is workable. Congress has authorized states to establish statewide no-call lists, so a Texas no-call list would not interfere with a company's right to market goods or services through interstate commerce. CSHB 472 is not meant to be a comprehensive effort but rather a first step toward controlling unsolicited telephone marketing. The bill's reporting requirements would help to highlight problem areas in the state that may need additional attention by the PUC or other state regulators.

Under SB 7 by Sibley, the 1999 law that restructured the electric utility industry, the PUC already must maintain a no-call list for utility customers who do not want to be contacted about electric service. The agency is familiar with the requirements of maintaining a no-call list and, assisted by the Department of Information Resources, could implement the bill's requirements adequately.

According to industry sources, the 10 largest telemarketing agencies each can make 560 random telephone calls per second. It is important to distinguish between fraudulent actors and legitimate businesses that are operating within the law. The widespread use of computers, credit cards, and toll-free telecommunications has made at-home shopping a welcome convenience for many consumers. However, even though some people enjoy receiving information about products or services in their homes over the telephone, many people consider even legitimate telephone solicitations a

nuisance, and many would like to receive fewer or no telephone marketing calls.

Telemarketing is a legitimate business practice, but some unscrupulous individuals are using high-pressure, deceptive tactics to defraud Texans of their money. The solicitor's anonymity makes it easy to commit telemarketing fraud. Consumers across the United States lose an estimated $40 billion a year through telemarketing fraud. The FBI estimates that about 14,000 illegal telemarketing establishments are operating throughout the country. Such fraud victimizes people of all ages, ethnic groups, educational backgrounds, and income levels, but especially the elderly. More than three-quarters of telemarketing victims are 55 or older.

The PUC reports that consumers have filed hundreds of complaints about telemarketers whom they have asked to stop calling them. One of the most repeated complaints is that solicitation calls often appear as "unknown caller" or "out of area" on caller ID devices.

In an effort to curb the problem, 27 other states have enacted laws to combat telemarketing fraud, and most others have a general telemarketing statute. The primary intent of the first no-call list law, passed in Florida, was to protect the elderly. Texas consumers want and need such a list.

CSHB 472 would not establish a new cause of action. The federal Telephone Consumer Protection Act prohibits unwanted faxes and already allows consumers to seek relief through the courts.

The Direct Marketing Association (DMA) maintains a Telephone Preference Service list and distributes it to telemarketing companies. However, with 4,600 members, DMA represents only a small portion of the estimated 140,000 telemarketers nationwide, and the list is made available only to members. Non-member companies do not have to abide by these rules.

Industry leaders admit that it is inefficient to contact consumers who have no desire to speak to them. Thus, a statewide no-call list would not drive companies out of the state nor would it deprive telemarketing employees of meaningful employment. If the only names on a statewide no-call list were residents who did not want to be contacted by telemarketers with unsolicited

offers, a no-call list would not hamper a company's ability to sell its products and services. People who were receptive to telemarketing would not be on the list.

As stated in the bill's fiscal note, it is assumed that the PUC would set fees to offset any costs associated with implementing this bill.

OPPONENTS SAY:

CSHB 472 would place overly burdensome restrictions on legitimate telemarketers and would impede future economic development in Texas. Telemarketing companies would think twice about locating in Texas, because a statewide no-call list would inhibit a company's ability to market to prospective customers by preventing initial contact with customers who might be receptive to receiving information about a product or service. This would be anticompetitive in preventing a new company from marketing its products or services. Under current law, if consumers receive initial calls from companies selling goods and services in which they are not interested, they can request to be placed on the company's in-house no-call list and will not be called again.

No-call lists should continue to be maintained by each separate business entity, as required by federal law. In-house no-call lists are a much more efficient and inexpensive way to protect customers from being contacted by specific companies. Forcing national companies to keep track of separate no-call lists for each state in addition to their own in-house lists would impose a large administrative burden.

Telemarketing has brought good things to both industry and consumers. Telemarketing companies do not have to locate in Texas to call Texans. When they do, they offer employment for many people. The telemarketing industry employs 275,000 people in Texas, and that figure is expected to grow between 3 percent and 5 percent annually over the next five years. According to industry sources, more than $80 billion in goods and services were sold in Texas via telemarketing in 1998. These employees often gain skills that allow them to move on to other jobs.

Reputable companies that market services and products over the telephone are committed to quality and customer satisfaction. Their quality-control initiatives include inspection, training, and complaint follow-up. Many

companies use an independent third-party verification process. New offerings are becoming available almost on a daily basis, and some people are open to receiving information about them

This bill would not prevent fraudulent telemarketing because the "bad actors" probably would not abide by any new law. Fraudulent companies come into a state and set up "boiler room" operations with 20 to 30 telephone lines. These operations involve high-pressure selling by banks of salespeople, sometimes in back offices or basements. They work for a few weeks and then move on. The state should concentrate its efforts on rooting out these operations.

CSHB 472 would affect companies that already comply with federal and state laws. Texas law already provides protections against telemarketing abuses. Most telemarketers must provide certain information when they make solicitation calls in Texas, and they may not call people who ask not to be called.

Consumers who put their numbers on a no-call list may be lulled into a false sense of security. They still could be called by all the entities that would not be covered under CSHB 472. If consumers want to screen their calls, caller ID devices and answering machines are a good solution. A resident who does not recognize a caller does not have to answer the call.

A better alternative would be to increase efforts to educate Texas consumers about fraudulent telemarketing and the national no-call list maintained by the DMA. A single letter to the DMA puts a customer on the national list at no cost. Consumers also may not be aware that they can ask to be placed on a specific company's no-call list. In addition, consumer information needs to be clear about exactly where to file complaints.

The provision allowing private causes of action to be brought could be interpreted as permitting a class action. Too many class-action lawsuits are filed in Texas already, costing millions of dollars.

Consumers can play a role in stanching the flow of fraudulent telemarketing. If, after asking to be placed on a company's no-call list, a consumer still receives calls from the company, the consumer should file a complaint with

the PUC. If consumers continue to receive calls from companies they are not familiar with, they should assume the calls are fraudulent. Common sense should prevail. If something sounds too good to be true, it probably is.

OTHER OPPONENTS SAY:

While CSHB 472 would be a good step toward strengthening telemarketing laws in Texas, the provisions regarding the implementation of the statewide no-call list are problematic as it pertains to the national no-call list. The bill would not specify who would compile the list of Texas names, and the dates when the PUC would have to update and publish the list would have to be compatible with the national list update and publication schedule.

The House Business and Industry Committee's interim report recommended requiring all telemarketers doing business in Texas to register. CSHB 472 would not address this recommendation at all.

It is not clear whether the provisions of CSHB 472 would apply to out-of-state telemarketers calling to Texas. In 1996, the governor of Rhode Island vetoed a telephone solicitation bill on the grounds that the legislation was likely unconstitutional under the First Amendment because it could infringe unreasonably on the rights of companies to communicate their messages by telephone. He also stated that the legislation violated interstate commerce laws by restricting out-of-state telemarketers engaging in interstate commerce.

NOTES:

According to the bill's fiscal note, the net cost to general revenue would be $82,679 in fiscal 2002 and $134,676 for each subsequent year, but it is assumed that the PUC would set fees to offset implementation costs.

The committee substitute made numerous changes to the original bill, including specifying what telephone solicitation calls would be governed by the bill; authorizing the PUC, OAG, and licensing agencies to investigate and assess administrative and civil penalties; authorizing the deletion of a telephone number from the no-call list; requiring the PUC to establish an Internet mail address to obtain a request form, prohibiting a judicial action relating to faxes from being maintained as a class action. Additionally, the substitute would allow the PUC to contract with a private vendor to establish the no-call list, and would prohibit telemarketers from calling a number on the no-call list 60 days after being published.

A similar bill in the 76th Legislature, HB 537 by Danburg, passed the House but died in the Senate Economic Development Committee during the last days of the session.

The companion bill to HB 472, SB 244 by Shapleigh, was referred to the Senate Business and Commerce Committee on January 6.