

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2255

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Deanna D. Smith
Operator's Signature

10/21/03
Date

2003 SENATE JUDICIARY

SB 2255

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10/21/03
Date

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2255

Senate Judiciary Committee

Conference Committee

Hearing Date 02/04/03

Tape Number	Side A	Side B	Meter #
1		X	0.0 - End
4	X		0.0 - End
5	X		26.9 - 50
Committee Clerk Signature			

Minutes: **Senator John T. Traynor, Chairman**, called the meeting to order. Roll call was taken and all committee members present. Sen. Traynor requested meeting starts with testimony on the bill:

Testimony Support of SB 2255

Senator John T. Traynor, Chairman Introduced the Bill

Representative Hawkins, Discussed her support and sited elderly example (meter .01)

Senator Elroy Lindaas - Discussed support an related stories. (meter 2)

Senator Karen K. Krebsbach - District 40, Discussed support (meter 3.8) Read Attachment #a.

Wayne Stenehjem - Attorney General, (meter 6.5) placed a "Do Not Disturb" hotel room sign on a phone. This bill will give telephone subscribers the option of posting a do not disturb sign on their telephone and stop most unwanted telemarketing calls to their residence. Many ND have told me that they pay to have phone service at their expense and for their convenience. They want the option available, as in most other states, to subscribe to a list that telemarketers are

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Page 2
Senate Judiciary Committee
Bill/Resolution Number SB 2255
Hearing Date 02/04/03

required to avoid when making there calls. I want to caution you! You will be subjected to a number of individuals coming in asking for an exemption to the statute. Spoke of the many ways we prevent solicitors from harassing us. Do not shoot the bill full of exemptions. sited charity examples. (meter 8.4) The state of MN has an exemption and have lived to regret it. Discussed who is making calls (meter 9.2) and only exemptions on the bill. How to get on a list and list process.

Senator John T. Traynor, Chairman asked how SB 2192 -reverse 911 calls would be affected by this legislation. (meter 13.8)

Senator Dick Dever wanted to know how this bill will affect the small business owner? You may call people you have had a relationship with in the past two years.

Senator Thomas L. Trenbeath discussed name usage (meter 16.9)

Howard Snortland - Member of AARP ND, (meter 18.7) Read Ms. Eldra Forsgren's written testimony - Attachment #1

Perrell Grossman - Director of the consumer Protection and Antitrust Division of the Attorney General's Office (meter 22.0) Read Testimony - Attachment 2a and handed out a Supreme Court Case Attachment 2b.

Senator Dick Dever asked in the states with this legislation how many people utilize the lists? In MN 1.23 Million -half of MN was on the list within the first three months.

Discussion on the Fiscal Note and FTE's

Senator Thomas L. Trenbeath discussed revenues generated designation. (meter 48.3)

Jim Billey - Member of AARP ND, Government Affairs Committee (meter 50.9) Read Attachment #3

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Senate Judiciary Committee
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Clause Lembhe - ND Association of Realtors (meter 1.8) we formed a coalition of retailers, petroleum retailers and National Federation of Independent Business People, Financial Advisors, Insurance Agencies, Insurance Companies, main street business persons, Chamber of Commerce and GNDA. We support this legislation with out a but!

Representative Warner - (meter 3.0) This bill is not intend as an assault on the telemarketing industry. Discussed this. This gives them a tool to use for people who want to receive calls and weed out the ones that don't for them. No exemptions please!

ADDITIONAL TESTIMONY SUBMITTED

Illona Jeffcoat-Sacco - Director, Public Utilities Division, Public Service Commission -
Attachment #8

Testimony in opposition of SB 2255

Laura Sweep - Circulation Manager of the Bismarck Tribune (meter 6.7) Read Attachment #4
Discussion on using names/location when soliciting (meter 7.9)

Discussion of direct mail marketing (meter 9.9) Sen. Traynor asked if Ms. Sweep had discussed her concerns with the Attorney Generals Office. She referred it on to Jack McDonald.

Mike Geiermann - Bismarck Attorney representing the ND State Lodge, Fraternal Order of Police. (meter 10.5) Read Attachment #5

Senator Dick Dever sited cases that take business away from this organization falsely.

Senator Thomas L. Trenbeath was empathetic but discussed protecting the elderly.

Jack McDonald - Bismarck Attorney representing ND Newspaper Association (NDNA) (meter 16.9) Read Testimony - Attachment #6

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12/21/03
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Hearing Date 02/04/03

Senator John T. Traynor, Chairman asked if Mr. McDonald had discussed his concerns with the Attorney General office. We have discussed it briefly with them.

Brenda Disette - Executive Director of ND Association of Non Profit Organizations Attachment #7, (tape 4, side 1, meter .3)

Sen Lyson discussed how much a non profit organization receives for each dollar donated when using a telemarketer. Discussion on irrefutable organizations.

Christopher Dobbsin - Catholic Diocese, (meter 5.2) sited problems with bills on a Federal level and proposed to submit amendments. Discussed 501-C-3's

Ron Schatz - Diocese of Bismarck (meter 7) described there process and why they do it the way they do, including what it costs them.

Discussion on if a member of the church would that qualify a person as being an established customer. (meter 9.8)

Stacey Fliger - Executive Director of "Right to Life" organization (meter 31.5) This bill will make us unable to function. Discussed the inability to get volunteers and the cost to purchase a list.

Senator Thomas L. Trenbeath discussed what MN diocese with 501-C-3's (meter 40.6)

Testimony Neutral to SB 2255

ADDITIONAL TESTIMONY SUBMITTED

Marilyn Foss - MCI World Comm - Prefer a National No Call List - Attachment #9

Senator John T. Traynor, Chairman closed the hearing

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10/21/03
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2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2255

Senate Judiciary Committee

Conference Committee

Hearing Date 02/05/03

Tape Number	Side A	Side B	Meter #
5	X		26.9 - 32.5

Committee Clerk Signature *Maria L. Solberg*

Minutes: **Senator John T. Traynor, Chairman**, called the meeting to order. Roll call was taken and all committee members present. Sen. Traynor requested meeting starts with committee work on the bill:

Discussed amendment submitted by Christopher Dobbson via Attorney General's office. (meter 28.0). Discussed any type of amendment being a problem down the line. If you let one in you have to let them all.

Motion Made to accept the second and third part of amendment submitted by the office of Attorney General and strike the first one by Senator Thomas L. Trenbeath and seconded by Senator Stanley W. Lyson, Vice Chairman

Roll Call Vote: 5 Yes. 0 No. 1 Absent

Motion Passed

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10/21/03
Date

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Senate Judiciary Committee

Bill/Resolution Number SB 2255

Hearing Date 02-5-03

Motion Made DO PASS SB 2255 with amendment submitted by the office of Attorney

General by Senator Stanley W. Lyson, Vice Chairman and seconded by Thomas L.

Trenbeath

Roll Call Vote: 5 Yes. 0 No. 1 Absent

Motion Passed

Floor Assignment Senator John T. Traynor, Chairman

Senator John T. Traynor, Chairman closed the hearing

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Deanna Ballantyne
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10/21/03
Date

FISCAL NOTE
 Requested by Legislative Council
 03/26/2003

Amendment to: SB 2255

1A. **State fiscal effect:** Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.

	2001-2003 Biennium		2003-2005 Biennium		2005-2007 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues				\$80,000		\$80,000
Expenditures		\$104,798		\$394,984	\$322,000	
Appropriations		\$104,798		\$394,984	\$322,000	

1B. **County, city, and school district fiscal effect:** Identify the fiscal effect on the appropriate political subdivision.

2001-2003 Biennium			2003-2005 Biennium			2005-2007 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

2. **Narrative:** Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.

This bill limits the ability of a number of entities represented by telemarketers to call consumers who have requested that their telephone number be added to a list of consumers that telemarketers are unable to contact. The 2003-05 biennium budget estimate for this proposal includes two FTE's and associated expenses, which will be funded from the Consumer Protection Refund Fund. For the 2005-07 biennium, this program may require General Fund support.

3. **State fiscal effect detail:** For information shown under state fiscal effect in 1A, please:

A. **Revenues:** Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.

The estimated revenues reflect anticipated list sales of \$20,000, civil penalties from adjudicative proceedings of \$10,000, attorneys fees of \$10,000, civil penalties assessed by the court of \$20,000, and \$20,000 for recoverable court costs.

B. **Expenditures:** Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.

The 2003-05 biennium budget estimate for this proposal includes two FTE's and associated expenses, which will be funded from the Consumer Protection Refund Fund. For the 2005-07 biennium, this program may require General Fund support.

C. **Appropriations:** Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.

The 2003-05 biennium budget estimate for this proposal includes two FTE's and associated expenses, which will be funded from the Consumer Protection Refund Fund. For the 2005-07 biennium, this program may require General Fund support.

Name: Parrell Grossman/Kathy Roll	Agency: Office of Attorney General
--	---

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Deanna D. Roll
 Operator's Signature

10/21/03
 Date

Phone Number: 701-328-3404/328-3622 | Date Prepared: 03/26/2003

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Deanna D. Smith
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10/21/03
Date

FISCAL NOTE
 Requested by Legislative Council
 01/24/2003

Bill/Resolution No.: SB 2255

1A. **State fiscal effect:** Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.

	2001-2003 Biennium		2003-2005 Biennium		2005-2007 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues				\$80,000		\$80,000
Expenditures		\$105,000		\$394,984	\$310,000	
Appropriations		\$105,000		\$394,984	\$310,000	

1B. **County, city, and school district fiscal effect:** Identify the fiscal effect on the appropriate political subdivision.

2001-2003 Biennium			2003-2005 Biennium			2005-2007 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

2. **Narrative:** Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.

This bill significantly limits the ability of telemarketers to call consumers who have requested that their telephone number be added to a list of consumers that telemarketers are unable to contact. A 2003-05 biennium budget estimate for this proposal includes two FTE's and associated expenses, which is to be funded from the Consumer Protection Refund Fund. For the 2005-07 biennium, this program will require General Fund support.

3. **State fiscal effect detail:** For information shown under state fiscal effect in 1A, please:

A. **Revenues:** Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.

The estimated revenues reflect anticipated list sales of \$20,000, civil penalties from adjudicative proceedings of \$10,000, attorneys fees of \$10,000, civil penalties assessed by the court of \$20,000, and \$20,000 for recoverable court costs.

B. **Expenditures:** Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.

The 2003-05 biennium budget estimate for this proposal includes two FTE's and associated expenses, which is to be funded from the Consumer Protection Refund Fund. For the 2005-07 biennium, this program will require General Fund support.

C. **Appropriations:** Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.

The 2003-05 biennium budget estimate for this proposal includes two FTE's and associated expenses, which is to be funded from the Consumer Protection Refund Fund. For the 2005-07 biennium, this program will require General Fund support.

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Operator's Signature: Deanna D. Waller Date: 12/21/03

Name:	Parrell Grossman/Kathy Roll	Agency:	Office of Attorney General
Phone Number:	701-328-3404/328-3622	Date Prepared:	01/28/2003

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10/21/03
Date

38308.0101
Title.0200

Adopted by the Judiciary Committee
February 5, 2003

JCB
2-6-03

PROPOSED AMENDMENTS TO SENATE BILL NO. 2255

Page 2, line 11, replace "telephone solicitor" with "subscriber"

Renumber accordingly

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Deanna Wallcraft *10/21/03*
Operator's Signature Date

REPORT OF STANDING COMMITTEE (410)
February 10, 2003 11:16 a.m.

Module No: SR-25-2100
Carrier: Lyson
Insert LC: 38308.0101 Title: .0200

REPORT OF STANDING COMMITTEE

SB 2255: Judiciary Committee (Sen. Traynor, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS and BE REREFERRED to the Appropriations Committee (5 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2255 was placed on the Sixth order on the calendar.

Page 2, line 11, replace "telephone solicitor" with "subscriber"

Renumber accordingly

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Operator's Signature

10/21/03
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2003 SENATE APPROPRIATIONS

SB 2255

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10/21/03
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2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2255

Senate Appropriations Committee

Conference Committee

Hearing Date 2-12-03

Tape Number	Side A	Side B	Meter #
2	X		903-5585
Committee Clerk Signature <i>Sandra Dawson</i>			

Minutes: Chairman Holmberg called the committee to order. SB 2255 relating to telephone solicitations and to provide a penalty. Chairman Holmberg spoke about the amendments that were proposed by Judiciary committee that need review. (Meter 969) Attorney General Wayne Stenejheim: His testimony gave examples of placing a DO NOT DISTURB sign on the outside of your hotel door and this is honored and you can place a NO SOLICITOR sign on the outside of your home and no one will come to bother you but there is nothing in place for your telephone for solicitation. This bill was passed by Judiciary committee and referred to the Appropriation committee for the fiscal impact. Then continued to explain the purpose and fiscal implications of this bill. This bill will prohibit most telephone solicitations to consumers who place their names on a no call list with the Attorney Generals office. We anticipate people will sign up on that list by applying on the Internet, with a toll free number, or in writing. The AG's office will establish and maintain that no call registration without charge. Those who sign up will remain on the list for four years. People who wish to conduct telemarketing will be required to purchase that list

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Dennis D. Hall
Operator's Signature 10/21/03
Date

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Senate Appropriations Committee
Bill/Resolution Number SB 2255
Hearing Date 2-12-03

on a quarterly basis and refrain from making those calls to people who have taken the step of asking that they not be called with telemarketing calls. There will be fines of up to \$2,000 for violations of the provisions of the legislation. This is similar to the legislation passed by the state of Minnesota. Proves to be extremely effective in Minnesota with a sign up rate of 1 million households signed up within the first three months. Twenty seven states have adopted this same type of bill. . There are certain exceptions such as people who have prior permission or an invitation to call, calls where you have a previous business relationship, calls from charitable organization if those organizations use their own employees or volunteers but not if they hire an outside telemarketing firm to make those calls. And calls that are not for the purpose of selling but for the expressing ideas such as urging you to get out and vote, asking for polling information but not asking for money, is necessary. (Meter 1899) Senator Christmann: Is there an industry standard how these lists get distributed to each telemarketer or are you using one format so a small town telemarketer is going to find themselves purchased it and followed the law and then having sit and manually look up and cross reference to see if that number is on the list. (meter 1944 AG Wayne Steneheim) The FTC will have a list and this legislation will duck tail with the Federal legislation that is being put in place. He gave reasons why it is important to have our own state legislation. He also explained some statistics for the people buying this list. This is funded by consumer funds. (Meter 1994) Senator Mathern is concerned with provisions of privacy does this bill provide? (Meter 2037) Wayne: The list of the telephone numbers would be established by the consumer, this is not a public record, people have to buy it. (Meter 2077) Senator Mathern: What would keep those purchasing this list from encouraging them to use this list as a mailing list then? (Meter 2111) Wayne: This list would only include the telephone number and

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Senate Appropriations Committee
Bill/Resolution Number SB 2255
Hearing Date 2-12-03

not an address. He spoke to college in other states and have not heard of any discussion on that being a problem. (Meter 2216) Linda Johnson Wirtz, AARP: She believes this is a privacy issue and consumer protection issue. More than 505 of the people who are affected by telemarketing fraud are 50+. We would strongly support SB 2255. (Meter 2276) Senator Andrist: Attorney General stated that fiscal note would be explained. (Meter 2303) Representative Warner: Just to support this issue. It is not an intended to attack the telemarketer industry. This is a tool that the industry can better utilize their time. There are no going to make a lot of false calls. This is a good bill for the consumers of North Dakota. (Meter 2427) Kathy Roll, Financial officer for the AG's office: She explained the fiscal note and the impact on the general fund that would allow for two FTEs. One an attorney position and the other a paraprofessional position, those positions would handle the complaints and enforcements. Also associated operating costs and assets necessary to enact this legislation. Also provides for \$80,000 for costs incurred by penalties that would be charged and the reasonable fees that are charged and recovered. (Meter 2533) Senator Andrist What would the explanation be of spending \$400,000 to enforce a law that will return \$80,000 in penalties? (Meter 2563) Kathy Roll: She believes that gets into more of a philosophical or policy issue. She stated a personal note that she is very frustrated receiving those calls herself and believes she can't put a price tag on the time that it takes away from her at home. It is just good policy. (Meter 2605) Senator Grindberg: What is the 2005-2007 general fund budget expectation? (Meter 2641) Kathy Roll: The fiscal note indicates the \$310,000 will be needed to continue this effort. In the event we will have moneys available in our refund fund, those moneys could potentially be used for that purpose as they are being used in the '03-'05 biennium. (meter 2687) Senator Christmann: What is the consumer protection refund fund?

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Hearing Date 2-12-03

Where does that come from? (Meter 2687) Kathy Roll: Those moneys are collected as a results of penalties that are assessed against companies who violate like antitrust, status that are not sustained. We receive reimbursement of our costs for pursuing those kinds of actions. There are also multi-state actions that the AG participates in and often we receive a portion as a result of that action. (Meter 2777) Senator Christmann: what has that money usually been used for in the past? (Meter 2776) Kathy Roll: That amount has varied substantially, previous to having an attorney as the division director, we saw a lot less moneys collected. The moneys are appropriated to various agencies, the Health Dept, the Ag Dept, to purchase some land for the extension services. It depends on what sorts of things are happening normally. We receive the majority of those moneys from multi-state actions. (Meter 2867) Senator Tallackson: Shouldn't there be an emergency clause on the bill? (Meter 2875) Kathy Roll: We are able to use those moneys to fund certain activities that the consumer protection division and this no call legislation that it provides for, is an acceptable use of those moneys. That money is available now. (Meter 3000) Carl Roxell, ND Association of Insurance and Financial Advisors: Stated he believes this is an excellent bill. Gave a personal account of telemarketing calls. (Meter 3216) Senator Christmann: Do you know how many of the telemarketing calls were from North Dakota? (Meter 3225) Carl Roxell: No idea, all for the purpose of credit cards. No idea if they were from in state or out of state. (Meter 3276) Brenda Dissett, Executive Director of the ND Association of Nonprofit Organizations: See written testimony Exhibit 1. (Meter 3345) Joanne Newberry, Mandan, private citizen: Supports this bill and strongly objects to telemarketers and politicians to leaving messages on her answering machine. (Meter 3561) Michael Geiermann, North Dakota State Lodge Fraternal Order of Police: See written Exhibit 2, his organization is 99% in favor of

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Senate Appropriations Committee
Bill/Resolution Number SB 2255
Hearing Date 2-12-03

the bill but opposes the nonprofit organizations must have either their own employees or volunteers do the fund raising. (Meter 4117) Mike Geierman: Stated that organizations that are huge can still call you because they are exempted from the bill. Just because you get on a list, does not guarantee that you will not be called. As long as they are doing the calling with their own people. (Meter 4247) Senator Krauter asked if there were any other states that this has been tested on. (Meter 4261) Mike Geiermann: Only litigation he was aware of was in Indiana, there nonprofit bill is almost identical to this bill. It allows an exempt for charitable but not if you are using professionals for fund raising (Meter 4400) Senator Grindberg stated that to be fair, should the bill state that all telemarketing being banned even nonprofit. (Meter 4405) Mike Geierman: There would be law suits. There has to be a balance.

There was more discussion about nonprofit exemptions. Attorney General stated his experience of speaking with other states about a similar bill in their states.

Chairman Holmberg closed the hearing to SB 2255. (Meter 5525).

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Deanna O'Neil
Operator's Signature

12/21/03
Date

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2255 vote

Senate Appropriations Committee

Conference Committee

Hearing Date 2-12-03

Tape Number	Side A	Side B	Meter #
3	X		136-275
Committee Clerk Signature <i>Sandra Davison</i>			

Minutes: Chairman Holmberg opened the hearing for the voting for SB 2255. A bill relating to telephone solicitations. (Meter 168) A motion was made by Senator Robinson for a DO PASS with a seconded Senator Lindaas. No discussion. (Meter 216) A roll call vote was 10 yeas, 0 nays, 4 absent. Chairman Holmberg stated that the Judiciary committee, Senator Lyson to carry that to the Senate floor. Closed the hearing on SB 2255.

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Deanna Ballantyne
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10/21/03
Date

Fifty-eighth
Legislative Assembly

Senate Appropriations Committee

PROPOSED AMENDMENT TO SENATE BILL NO. 2255

Page 7, after line 30, insert:

"51-26-23. Political Activity – Exception. The provisions of this chapter shall not apply to the activities of a political party or candidate as defined in chapter 16.1-08.1."

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10/21/03
Date

2255

Date: 2/12/03
Roll Call Vote #: 1

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

Senate Appropriations Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Robinson Seconded By Lindaas

Senators	Yes	No	Senators	Yes	No
Senator Holmberg, Chairman	✓				
Senator Bowman, Vice Chair					
Senator Grindberg, Vice Chair	✓				
Senator Andrist					
Senator Christmann					
Senator Kilzer	✓				
Senator Krauter	✓				
Senator Kringstad	✓				
Senator Lindaas	✓				
Senator Mathern					
Senator Robinson	✓				
Senator Schobinger	✓				
Senator Tallackson	✓				
Senator Thane	✓				

Total (Yes) 10 No 0

Absent A

Floor Assignment Jud & L Lyson

If the vote is on an amendment, briefly indicate intent:

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Deanna Wallerth 10/21/03
Operator's Signature Date

REPORT OF STANDING COMMITTEE (410)
February 12, 2003 4:17 p.m.

Module No: SR-27-2494
Carrier: Lyson
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE
SB 2255, as engrossed: Appropriations Committee (Sen. Holmberg, Chairman)
recommends **DO PASS** (10 YEAS, 0 NAYS, 4 ABSENT AND NOT VOTING).
Engrossed SB 2255 was placed on the Eleventh order on the calendar.

(2) DESK, (3) COMM

Page No. 1

SR-27-2494

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2003 HOUSE JUDICIARY

SB 2255

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2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2255

House Judiciary Committee

Conference Committee

Hearing Date 3-10-03

Tape Number	Side A	Side B	Meter #
1	xx		22.9-end
1		xx	0-end
2	xx		0-18

Committee Clerk Signature *J. Penrose*

Minutes: 12 members present, 1 member absent (Rep. Klemin)

Chairman DeKrey: We will open the hearing on SB 2255.

Rep. John Warner: Introduced the bill. You don't have to let just anybody into your living room, and you should have the same opportunity to keep the salesman out of your home by phone.

Chairman DeKrey: Thank you.

Rep. Kathy Hawken: Introduced the bill. I am a part of this bill because I had a constituent who called many months ago, and said there are other states that have this, why don't we. I picked up the phone and called the AG's office. They had already begun working on this. It is important for a number of reasons, especially the vulnerable seniors. We think this bill will help, it won't solve the problem, but it is a step in the right direction.

Chairman DeKrey: Thank you.

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Bill/Resolution Number SB 2255
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Wayne Stenehjem, AG: I will go through the bill. This is one of those bills that touches everyone in the state. This legislation will bring some peace and quiet to the family dinner tables, and return the ownership of our telephones to the people who pay the monthly bill for those services. We are telling ND citizens that it is OK to put a Do Not Disturb sign on your telephone. Approx. 26 states have Do Not Call lists, with two more states awaiting signature from their Governors. These 26 states, include the big states, California, New York, Illinois, Texas, Indiana, Ohio, with some of the largest populations in the country. This legislation, I submit, is an idea whose time has come. In addition, the Federal Trade Commission has recently adopted its Telemarketing Sales Rule with a national Do Not Call Registry, but is set to be established at some time in the next few months. When Minnesota recently adopted its Do Not Call legislation, over 1 million subscribers, over 1/2 of the total in Minnesota, signed up within two months. This law will help protect ND senior citizens from telemarketing fraud. There are thousands of telemarketing firms engaged in hundreds of variations of telemarketing fraud. Our North Dakota senior consumers, however, are often isolated, easy targets for smooth talking con artists who fleece their pockets with slick pitches. These victims often become fearful of abusive, harassing and threatening telemarketers. They can now be placed on ND's Do Not Call list, and avoid many of these calls. ND's Do Not Call list, that you have before you, is patterned after Minnesota, and it is consistent with the FTC's proposed rule. However, I think this bill is better because it allows for enforcement here in ND, and it covers intrastate calls within the state of ND that are not covered by the FTC's rules. The FTC rules also does not prohibit calls from banks, insurance companies, and telephone carriers. This legislation brings our law to the people here in ND, which would be enforced in our state courts, rather than in the federal courts.

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Subscribers won't have to go to Washington, DC to enforce the federal law. This law has some important exceptions, where we worked as closely as we could with many of the folks who were previous opponents of the bill, so that telephone solicitations will not include calls to subscribers with the subscriber's prior invitation or permission, calls by someone with a prior established business relationships, calls by charitable organizations when a charity uses its own volunteers or employees, calls that solicit the expression of ideas, opinions, or votes; calls for sales that won't be completed until a later face-to-face meeting between the person making the call and the subscriber. We have worked closely with many of our small business state organizations to address their concerns. These exceptions, I think, will allow our small, North Dakota businesses, to continue in the traditional manner and will allow those charities, using their own employees or volunteers to continue to raise funds. Charities using professional fundraisers can continue solicitations to consumers who have not signed up on the Do Not Call list. Here are some important provisions in the bill. Callers cannot make any telephone solicitation to a subscriber who places their number on the Do Not Call list. Callers may not use automatic dialing announcing devices, or make any telephone solicitations before 8:00 a.m. or after 9:00 p.m. Callers may not use any method to block a subscriber's caller ID service, callers cannot use prerecorded voice messages. Callers must state their name, telephone number, city and state of location, and the business on behalf the telephone solicitation is being made. Private citizens can enforce the law and in addition to that, my office can enforce the law and obtain penalties up to \$2,000 per violation. This legislation will protect our citizens and put them back in charge of their telephone. This bill has the unanimous support in the Senate Judiciary committee and also in the Senate Appropriations Committee, and a strong vote out of the Senate, and I hope that you

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will see right to pass SB 2255. I know that you will hear some arguments that perhaps certain provisions of this bill are unconstitutional, as a violation of the first amendment. I can tell you that in most of the states that have adopted similar legislation, there have been court challenges, I'm not aware of a single one that was set aside on a constitutional basis, and I am certainly comfortable as the need arises to defend the statute that you have before us. Those of us that run for office, would not think twice about going up to a door where there is a sign that says "no solicitors" or "no politicians permitted". That is certainly acceptable for a person who owns a home to put a sign up saying you don't want anybody to come to their door. I think when you install, at your expense and for your convenience, a telephone in your home, there is nothing wrong with putting a Do Not Disturb sign on the telephone.

Rep. Wrangham: On page 2, (b), "by or on behalf of any person with whom the subscriber has an established personal or business relationship". Can you tell us a little more about what that means. For instance, do you have to be an established customer with the business.

Mr. Stenejem: I think it would be a customer. I think what comes to my mind is when my dentist calls and tells me it is time for me to come in for my six month cleaning. That's certainly permissible. If I work with somebody in the recent past, two years in the recent past, and paid or worked with a business, they would be permitted to call.

Rep. Wrangham: If I had made a donation to a fund, within the last year, would that give them the right to call you.

Mr. Stenejem: I think so, if you donated to a cause, or have a business or personal relationship, those are the kinds of things that we want to permit.

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Rep. Bernstein: If you have a list of previous donees, that made donations to your party, and you call these people?

Mr. Stenehjem: You call. We might need one minor amendment to make an exemption that allows employees or volunteers to make the call, include 501(c)3 corporations, and we were intending by that to include political parties. I'm told now that political parties are actually 529 nonprofit organizations and we'll be presenting an amendment to make sure that that will be permissible.

Rep. Delmore: Is there a place where the public to call to find out exactly how it goes out, the process of getting on the No Call list.

Mr. Stenehjem: Yes, one section of the bill requires that it is established in my office and that people will be permitted to sign up either on-line or by telephone, or in writing.

Rep. Onstad: Business relationship, let's say your own telephone company, they in turn increase services and hire a telemarketing firm to let you know of the changes. Is that covered.

Mr. Stenehjem: Parrell, what section is that in.

Rep. Maragos: Section 7b.

Mr. Stenehjem: Section 7b. Does that answer your questions.

Rep. Onstad: It talks about established prior business relationship. If that is a company who you send telephone bills too, that is your company of service, and they in turn look to expand those services, but they go out and hire telemarketing firm to make contact with all of their customers. If you are on the Do Not Call, would that eliminate those people.

Mr. Stenehjem: Parrell will answer that.

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Parrell Grossman, Director of the Consumer Protection Division: I think that would be included as long as they were calling by or on behalf of the organization you had that relationship with. I, as a subscriber in a relationship with that telephone company, and then they employed telemarketers to call me, I believe, as long as it has been within that 24 month period, that would constitute an exception under the established business relationship.

Rep. Delmore: On the part that talks about the 501 of the Internal Revenue Code, in looking at charitable organizations, is there a requirement that those organizations are paying out the money to the people. I can think of one group that calls me, that I have a little handout in front of me, that I know only 10-13% actually goes to the organization. Does this protect us from people calling and soliciting funds when the funds don't go to the charitable organizations.

Mr. Stenehjem: What you are talking about is the issue of those folks entirely of telemarketers, who are not using their own volunteers or employees, this bill would inhibit calls if you are on the Do Not Call list from paid telemarketers.

Chairman DeKrey: I am reading about the license requirements, there are a lot in agriculture that use Farm Plan. Farm Plan is a popular John Deere financing. They do something every month and you'll pick up the phone and it will say, please hold for an important message from Farm Plan. You know they are using a dial-up machine and a recorded voice, but they aren't saying what the purpose of the message is, but I know what the purpose of the message is, remind me to pay by bill. I don't know what the rest of the recording is, because I have always hung up on it. Would they be able to continue that business practice.

Mr. Stenehjem: There is a section of the bill that has to do with those kinds of messages. We tried to think of every useful exemption that we could. For example, some schools will call all

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the households where there are students and tell them there is no school today, or delayed by an hour or two, those kinds of things are permissible. But if they are soliciting for, that's prohibited. If they are calling to collect a debt, I think they can do that because that is not a sale of merchandise as defined under the bill. The whole bill is designed for those soliciting money, or selling goods and services.

Rep. Galvin: Just about every small community in North Dakota has telemarketing firms as employers in the towns. How is this legislation going to impact them, or if it would.

Mr. Stenejem: There are many communities in ND who have on this issue made suggestions. I would say that a number of them are not making calls in ND, they are calling citizens in other states, and that's why I mentioned that most of the other states have a Do Not Call registration. Most of the states have large populations to which those firms are calling have Do Not Call legislation. Those companies in North Dakota that are making those calls already have to comply with those requirements in other states and of course, there will be a federal rule coming into play, and they will have to comply with those requirements all across the nation. We didn't want to enact a bill that was too restrictive or oppressive, for businesses that are trying to operate in the state of ND. But, at the same time, there are a number of ND citizens who are tired of being bothered on their telephone. All this bill asks is that when people have politely suggested, like signing up for the Do Not Call list, that they don't be called, that people don't call them.

Rep. Delmore: Capsulize what this does to calls by political parties.

Mr. Stenejem: What this does to calls by political parties. We do need to adopt the same kind of nonprofit exception for political parties, so that we can call and remind people to donate to their party. There are a lot of people who are against this bill because they want exemptions for

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their business. I think prerecorded calls are pesky, and I know that some political parties think they are useful and cheap. Parties won't be able to do that. They will not be able to call people on the Do Not Call list, if they have paid telemarketers, they would not under this legislation be allowed to call. There are restrictions. People are going to ask for exemptions for their organizations. I hope you will be very careful about adding additional exemptions, if you pass and add too many exemptions, the bill won't do anything, and will make people angry. I recommend that you are very careful about granting the exemptions. We put certain exemptions into the bill, that seemed to make sense. It makes sense, that when they are using their own volunteers or employees, that it's more likely than not, that these are ND people, ND charities that are making the call, not calling from other states. The abuses that we see, tend to be those who are using the telemarketers. There are telemarketers who are good and decent, and those who are not. We want to have a useful bill. The citizens of ND want this bill.

Chairman DeKrey: Thank you.

Parrell Grossman, Director of the Consumer Protection and Antitrust Division, AG's office: Support (see attached testimony).

Rep. Onstad: On page 5, line 13 #6, what are the fees to get the Do Not Call list?

Mr. Grossman: That is one of the issues that I am eluding to. It has not been decided by the FTC, we have put sort of a maximum amount for fees in here to say that the fee for the acquisition list may not exceed \$200 per quarter or \$800 for the year. We also, built in the flexibility to use the FTC list, so that telemarketers soliciting in ND should not be required to purchase both the FTC list and the ND list. They will purchase one or the other. This will allow subscribers to sign up with the FTC list or we will be able to download those names into the ND

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database and likewise, when ND subscribers sign up in ND we will upload their names to the FTC list, so that we always have the FTC names and the FTC always has the ND ones.

Rep. Delmore: I have a question about the amendments that you passed out, they don't seem to match up, we have the engrossed bill, so that may be why, but the line items don't line up. I guess it seems to be the first three don't match up. Before we move amendments, we need to make sure that they match.

Mr. Grossman: I will look at those and get those to you. I put those together rather quickly after I started having computer problems and had to reconstruct that.

Rep. Delmore: Again, they may have been on the first bill, not the engrossed copy. How often will those lists have to be bought, say by a company that wishes to get the No Call list.

Mr. Grossman: That is again one of the issues that we looked at under the current statute, it indicates that you would have to buy that list quarterly. Then you would have, as a telemarketer, a grace period of 10 days to get a new list. So if that name had appeared on there, in that particular time, you wouldn't be in violation of that statute. Under the FTC rule, they are going 90 days from the date that the telemarketer has to obtain a new list, 90 days from the date that the telemarketer last obtained that list. Then they wouldn't be in violation if they call somebody on that list.

Rep. Kretschmar: Is there any provision in this law, or can we put something in, so that a consumer could sign up and say I want absolutely no calls from anybody.

Mr. Grossman: There is no provision like that, though no doubt there are consumers that would like that bill.

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Rep. Kingsbury: I am looking at page 4, and the establishment of the No Call list and it says it will be in effect for five years. What happens at the end of five years. Do you have to resubscribe or is that going to be looked at again.

Mr. Grossman: You would have to resubscribe at that time.

Mr. Stenehjem: Some states charge people to sign up for the list. We are not going to charge people. We intend to make it as user friendly to sign up, either by phone, in writing, or on-line, or if you sign up for the FTC list, we'll use that, and after five years you would resubscribe.

Rep. Kingsbury: Is there a possibility that you could start charging if this starts looking like a huge problem.

Mr. Stenehjem: We thought about that, and just decided that this is really something that I think ND people want and if we start getting into the business of charging, what would you charge, a couple bucks, hardly worth it to go through the billing process, and I really think that in the interest of the consumer, I think that having a free list is better, plus the federal list might be free, and then we'd have that issue. But obviously, at some point down the road, we could do that.

Rep. Bernstein: Along the line of Rep. Kingsbury's question, you are going to have to resubscribe after 5 years, are you going to be notified that the first five years has run out and need to go through the process again.

Mr. Stenehjem: I think what we are going to do initially is have people sign up and then after the five years is up, you will begin to notice that your listing has expired.

Chairman DeKrey: Thank you. Further testimony in support.

Klaus Lembke, ND Association of Realtors: Support.

Chairman DeKrey: Thank you. Further testimony in support.

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Dick Weber, AARP Executive Council: Support (see attached testimony).

Chairman DeKrey: Thank you.

Ilona Jeffcoat-Sacco, Director of Public Utilities Division, Public Service Commission:

Support (see attached testimony).

Chairman DeKrey: Thank you. Further testimony in support.

Karen Voecks: Support, I have a real problem with politicians being able to leave messages on my machine, is that my understanding?

Mr. Stenejem: No, not prerecorded messages.

Ms. Voecks: Then I have no issue with the bill.

Chairman DeKrey: Thank you. Further testimony in support.

Jack McDonald, ND Newspaper Association: Support (see attached testimony and amendments).

Chairman DeKrey: Thank you. Further testimony in support? Testimony in opposition?

Brenda Dissette, Executive Director of ND Association of Nonprofit Organizations: Oppose (see attached testimony).

Rep. Delmore: I can empathize - as someone who is called regularly by charitable organizations that I support, I always ask for the information to be sent in writing anyway. Could not some of these campaigns be sent out through mailings. I don't think that most people give over the phone anymore. They aren't excited about giving out that information and making a specific donation to you and say, I'll send you the money, give me the address. Is that a way to try and address part of the problem, do more mailings. Would that not be a possibility for your organization.

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Ms. Dissette: I think it would. Personally I have donated to charitable nonprofits who would call, and the first question I ask them is if they are a registered 501(c)3, or what is their charitable nonprofit status. If it's not 501(c)3, they're not going to get my money, then it's not deductible for me and they are not a charitable nonprofit organization. My next question is are they registered with the Secretary of State's office, and if they can't answer that question, then there is a #2 red flag. Most of the time I do donate to the nonprofits who have called, they do send out an envelope for you to send the money to them. But what you are talking about is a direct mail, and I believe a lot of our nonprofit organizations already utilize that. I want you to know that we are 99% in favor of this legislation. It's really hard to get up and talk against a bill that will help people.

Chairman DeKrey: Thank you. Further testimony in opposition.

Michael Geierman, Fraternal Order of Police: Opposed (see attached testimony).

Rep. Delmore: I am supportive of police officers. I am familiar with this particular call; however, I would like to know how much is raised in ND, how much is actually given to police officers in ND and how much of what is collected goes to my police officers in Grand Forks, as far as percentages, dollar amounts, whatever.

Mr. Geierman: I can get those figures for you. I don't have them available right now. But what we do is with the funds we raise, not only do we support the charities that I made reference to, but we also because of the fact that in most budgets, there isn't money for training. We take some of the money that we raise through charitable solicitations for training, where we send police officers off to training in various locations, but I can certainly get you that information.

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Rep. Delmore: Do you have any idea what percentage would go to the people who do the telemarketing and the percentage that goes to police officers.

Mr. Geleman: I don't have those figures in front of me. I can assure you that it's not the horror stories of the 95% that you've heard.

Chairman DeKrey: Thank you. Further testimony in opposition.

Stacy Pfliger, Executive Director of ND Right to Life: I am going to one-up these guys, I am 99.1% in favor of this. I guess I may not be here to oppose the bill, but more for clarification purposes. We are also a nonprofit organization, and we're small. We have done the in-house telemarketing, but we have had to move to professional fundraisers, because we just don't have the staff or the volunteers to do that, so we would also be in that category. Last week I did meet with Mr. Grossman, and asked if nonprofits would be covered under page 1, number 4, the established business relationship. I was told no. This morning, I believe it was Rep. Wrangham, who asked that of the Attorney General and he thought it might be. So if we could have that clarified, I would be happy to be able to call my members who have been members in the last 24 months. I am not talking about calling someone who has donated to our organization in the past, I am not talking about that kind of solicitation. I'm talking about being able to contact my members. If you can make that clarification, the best idea that I came up to was on page 1, line 19 after sellers, insert "or is a member of the nonprofit". That would allow us to call people who have been members within the last 24 months.

Rep. Bernstein: Just out of curiosity, when you use the professional fundraiser, what is the split.

Ms. Pfliger: When we have used the professional fundraiser, our contract is 35% goes to the fundraiser. On the Senate side, we had the discussion about that vs. the direct mail approach,

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which Rep. Delmore just talked about. There are so many different variables to consider that I can tell you that the last two direct mail appeals that I have done, one cost me 30% on the dollar and the other one cost me 52%, to do the direct mail, depending on how many people were sent to.

Rep. Delmore: You're saying that a phone call to people, you collected more money than you did through direct mail and you didn't have to follow that phone call up with direct mail, an envelope whatever to get that money.

Ms. Pflilger: Part of our contract is that our professional fundraiser pays for all of that. What we do is, they ask for a pledge by phone and say pledge \$10 a month, they do follow up that up with an invoice, and we respect people if they decide they can't pay. That's fine. If we call them and they pledge, but say don't call again, we prefer to deal with direct mail, they are on a Do Not Call list with our organization. But all of those costs are in that 35%.

Chairman DeKrey: Thank you. Further testimony in opposition. Neutral.

Jason Stverak: Neutral (see attached testimony).

Rep. Delmore: I guess I find it interesting that a neutral party would bring amendments onto this bill. What is your response to people such as the citizens we have had here today. Myself and the Attorney General do find them pesky no matter who is calling.

Mr. Stverak: If you receive one of those calls from us, at the North Dakota Republican Party, and you said I don't want to receive another call from the party, you have chosen not to associate with the party. We will tell our groups. Any firm that we use, we tell them please don't call this person; but you are not even giving us the right to call you first, to encourage you to get out to vote.

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Rep. Delmore: How many people, I receive from both parties so I am not picking on either political party, I do find them annoying; but I don't think most people are going to take the time to call one or the other or both political parties and say, please quit calling me. There is nothing in the message that says if you don't want to hear these types of messages, do this. So I don't think most citizens know what they can do to avoid these calls.

Mr. Stverak: We did have people that requested a Do Not Call, and we told our telemarketers not to call them. I would have to say that we only do these activities once every two years. We're not going to call into person's houses to sell them anything, we are not calling for a commercial purpose, we're trying to get you out to vote and to vote for our candidates. I think that should be put on a different setting than the commercial activities that we support that the bill is going to happen.

Rep. Eckre: We talked about political parties being in the public interest. I think the Attorney General is also putting something together about the political interests. Most of the political calls are so intense, even if it is only every two years. I believe that they would rather have political parties off here, than almost anything else.

Mr. Stverak: Thank you for your comments. I agree it is intense for that time period, but if the bill as proposed is passed, we will have to have members or volunteers to call. You're asking us to set up a telemarketing organization within our building, have paid staff, which we don't have the funds or resources to do, to call once every two years. I understand where some people would not want any calls, or they don't want any piece of mail. But the freedom of association, the freedom to contact those people, needs to be available.

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Rep. Onstad: You mentioned that businesses use this for business. The businesses contribute to political parties for favorable votes. So how do you, do you run it through a third party, comes in there, how do you distinguish it.

Mr. Stverak: I am not sure I understand where you're question is coming from. If you are referring to corporations setting up political action committees, 5.7 set up under there, third party interests, yes they can do that, and it will not change under the federal law. I disagree with the fact that people make political contributions to get specific goals or steps taken by members of the committee, members of the body at the congressional level.

Rep. Onstad: I guess the point is that I don't see the difference. You're saying give us an exemption so we can make the initial contact; but the businesses, they want this position so that they can make the initial contact. I don't see the difference here.

Mr. Stverak: I understand where you are coming from on the issue. But we operate for no other purpose than to elect Republicans and in the Kennedy's case, elect Democrats, they are not selling a product, they aren't asking you to join anything, get a credit card or buy a beach house down in Florida; what we attempt to do through these get out the vote campaign or the telemarketing, is to remind people to get out and vote. That is different than what businesses do.

Rep. Onstad: When you get the list, call the other half.

Mr. Stverak: I believe that our telemarketers would be able to purchase that list and call the other half, but then that would prohibit us from contacting people who said, I'm a Republican, you are not allowing us to contact them and say "I'm a Republican, get out and vote for our candidate".

Chairman DeKrey: Thank you.

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Rep. Delmore: According to this bill, you can still make those communications, just not use the telephone. Maybe both parties are just going to have to find a better way to make those contacts than mass producing messages.

Mr. Stverak: There is the opportunity to use live calls, but in certain situations like the weekend before the election, where you can't find or purchase 300 people to make those live calls in a 2 hour time span.

Chairman DeKrey: Thank you.

Rep. Wrangham: I have a question for the AG's office, would polling not be allowed.

Mr. Stenehjem: No, polling would be allowed under the exception in the bill, you can call to solicit opinions, ask people to get out to vote and not asking for money, that is specifically permitted. What you are not allowed to use is prerecorded messages. Those are not permitted. Those are first amendment protected issues. When you are raising money, that is not strictly first amendment issues, that is commercial in nature, and there are additional restrictions that are permissible. All this bill does is ask that people who have gone to the trouble of asking not to be bothered, that they don't be bothered.

Chairman DeKrey: Further testimony on SB 2255.

Marilyn Foss, MCI WorldCom: I am proposing two amendments to this bill (see attached testimony and amendments). I understand from Mr. Grossman that the second amendment might be already addressed in some that he is proposing.

Chairman DeKrey: Thank you. Further testimony in neutral, opposition, support, or just want to talk?

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Joan Newberry: I am not in opposition to the bill, I am against something that was previously talked about. I can personally testify that your request to have your number deleted will be ignored. I did that last year. I called the Republic Headquarters three times to have my number deleted, and it did not happen. They still left messages on the answering machine about getting out to vote and so forth. Don't allow political messages, you are allowing yourselves to be above the law. You are passing a law and don't want to be a part of it. I think the way it reads now, I think it is great, because it is not allowing political messages. Anyone or a party who leaves a message on my machine, I can say you have just lost my vote.

Chairman DeKrey: Thank you. Further testimony on SB 2255. We will close the hearing.

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2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2255

House Judiciary Committee

Conference Committee

Hearing Date 3-18-03

Tape Number	Side A	Side B	Meter #
1		xx	14.7-end
2	xx		0-19.2
Committee Clerk Signature <i>A. Penrose</i>			

Minutes: 13 members present.

Chairman DeKrey: We will work on SB 2255.

Parrell Grossman, AG's office: (see attached testimony that was read at the original hearing and amendments). He explained the amendments, going line by line.

Rep. Grande: So we are to disregard the first set of amendment that were given at the initial hearing?

Mr. Grossman: Yes.

Chairman DeKrey: The first set.

Mr. Grossman: Yes.

Chairman DeKrey: So we're working on the one dated March 18, 2003.

Mr. Grossman: Yes. Then there are several changes in there that simply replace no call with "do not call" so that the terminology is consistent with do not call as is used in a lot of states.

That's the only purpose of those amendments. (continued detailing line by line).

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Rep. Klemin: I've got two questions, the first question on the amendments, the last one you were talking about pg 5 line 22, state or federal list. In the Attorney General's discretion, why should it be in the Attorney General's discretion. Can't we just say that so that everyone knows that it is that one or not. Is it going to be on a case-by-case basis that he exercises this discretion.

Mr. Grossman: I think there are simply too many questions unsettled with the FTC list. I've had this discussion within our office many times, the federal government has promised a program, a benefit or something else would be up and running at a particular time. I would imagine that the Attorney General, after determining that they are in fact, on time with their program and determining that there aren't going to be a lot of snags and glitches with the national system, will strongly lean towards using that list; but there remains a possibility that that list won't be up and running, could be challenges to the federal law, there could be a number of things that could happen between now and time the FTC has promised to have that list up and running and then we would not have the ability to use that particular list. So we didn't see any way, other than to get the Attorney General that discretion.

Rep. Klemin: So is it on a case-by-case basis or across the board.

Mr. Grossman: No, the Attorney General, at the appropriate time, when he has all of the information and the FTC has addressed all of his concerns, as well as similar concerns raised by the other states, will then make the decision to either use ND list maintained by the Attorney General or to defer to the FTC. If he decides it is appropriate to defer to the FTC for all the reasons discussed, then there will be a lot of public comment on that, and a lot of consumer education indicating the Attorney General's is in fact the FTC, he would have the ability to maintain a toll free number that will link directly to the FTC, for those consumers that wish to

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sign up by telephone, and also would have the ability on the AG's web site to link those individuals accessing the Attorney General's web site to link those signing up to the FTC list. It will either be one or the other, but I do have to say there is substantial debate going on throughout the country amongst the Attorney Generals and it's being discussed at the very meeting he's at with the National Association of Attorneys General, what is really the best way to proceed. The FTC is certainly strongly encouraging harmonization of the list, not necessarily the law, but they are saying that consumers should really sign up with one or the other, but not both. I think there are really a lot of unsettled questions about whether that will work as efficiently as has been promised by the FTC.

Rep. Klemm: How do you address the question of whether there is an unconstitutional delegation of legislative authority to the Attorney General to decide what to do with this list.

Mr. Grossman: We have looked at it and I don't think that is the case. I've had some discussions with Legislative Council. I've looked at some of the similar statutes that are currently being proposed by other states that are now in their legislative sessions, and they have all done something similar to this. I think some may have said that if the FTC has a list, it will be the list, but others have said that in the Attorney General's discretion, and I think for the same reasons we have discussed. I think one probably could have enumerated specific factors for the Attorney General to look at and say that the Attorney General shall determine whether it's necessary to avoid duplication of costs, etc. and could have enumerated a number of factors, but it did not seem like that was necessary.

Rep. Klemm: I don't see anything in here to explain the differences between this bill and the federal law that was just signed last week, to convince me that we really need to have a state list

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rather than just going with the federal one. Have you done any kind of side-by-side analysis or comparison to show what's in here that's not in the federal list.

Mr. Grossman: There is also another place where we have inserted a change here, if I could direct the committee to that, that would be on page 4, line 16, where it says that the Attorney General may fulfill the requirements of this section by contracting with an agency, establishment and maintenance of a list, and the enclosed amendment would say, "or by using the national FTC list". I don't think that would be an unconstitutional delegation of that authority. I would rather have it in there twice, than not have it in there at all, but I think on that stand alone provision, that provides clear authority for the Attorney General. It is no different than if the Attorney General were maintaining that list and then hired a local ND organization to establish and maintain that database. Then as to your next question, if I'm understanding it, are you asking about the substantive differences between the FTC law and the ND law.

Rep. Klemin: I guess what I am saying is, we now have the federal law, which I understand was just signed by the President last week, and so have you done any side-by-side comparison between what we've got here and what the federal law is to show what is different, or what's more stringent, so that we have some basis for determining that we actually need this, instead of just going with the federal list.

Mr. Grossman: I have not done my personal one, there was one that the FTC did, but they didn't specifically compare to our state, I think they compared some changes I think that were made to the old telemarketing bill and the amended rule. I have not done a chart like that but I think I could certainly highlight to the committee, the benefit of what those significant changes are and the reasons and I think it comes down to an issue of this is a decision that should be left,

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on a state by state basis. I don't know that Congress represents all of the interests of the citizens of North Dakota or the other states. I think that this Legislature does that and if I could point out some of the substantial differences are that Congress has done a number of things differently. They have excluded the face-to-face transactions. So, if in fact, you are going to complete that sales transaction at a later face-to-face meeting, Congress has said that will not be subject to the Do Not Call provision and the sponsors of this legislation, as well as the majority of the public, have said and clearly spoken in this issue, and we think that this should be a very limited restriction. We think that only those individuals that call you and will later personally conduct that face-to-face meeting should be exempt. We don't want that broad, open exception and that's currently what Minnesota has. The problem in MN, is that you can have a bank of telemarketers that call you and then as long as somebody will come out later and make a face-to-face presentation, it would not be an exception. So you can be selling timeshares in Florida and then you would be exempted from this, as long as somebody later follows up with you either here or in Florida to make that final sales pitch. The current legislation is currently crafted that says it has to be that same person. Another significant different is in the area of charities. After a lot of discussion and one where I think a number of states that substantially disagreed with the position that the FTC took. It amended the telemarketing sales rule and that is in regard to the charitable solicitations. The FTC decided that any charity...

Rep. Klemin: Is what Congress adopted, and signed by the President, is that the FTC rule.

Mr. Grossman: In fact what Congress is doing is funding the FTC rule. It is a FTC rule. There is already an enacted statute and then they have amended the telemarketing sales rule that is subject to the Telephone Consumer Protection Act, I think is what it is.

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Rep. Klemm: I just wanted to be sure that you are comparing a bill to their bill, rather than our bill to a rule.

Mr. Grossman: Yes, I am comparing our legislation to their rule, but that is really the only comparison you can make. All of the FTC provisions are contained within that rule. It is in fact, the amended telemarketing sales rule that controls the Do Not Call registry and places the exceptions within that statute, or makes it a violation, etc. So I think I have commented on the charity. That is probably the significant differences that again the sponsors feel strongly that because of the potential for fraudulent charitable solicitations, etc. that the professional fundraisers should have to honor the Do Not Call list. They can still certainly call those consumers that have not placed on the registry, but it is only going to be those charities that use their own employees or volunteers that are going to be exempted from that. Frankly as I read the 150 pages of comments to the amended telemarketing sales rule, there was a lot of discussion about that and I think that the FTC, frankly, could have gone either way on that issue. After a lot of weighing and a lot of hemming and hawing, they decided to give the broad exemption, but they've said that they too would be looking at this and if they determine that there appears to be abuses by professional fundraisers, they might go the other way and simply not provide the exemption and do what North Dakotans and several states have done, and that is limited to those organizations using their own volunteers. I think that probably the most significant difference is the enforcement of the Senate bill 2255 as opposed to the enforcement of the amended telemarketing sales rule maintained by the FTC, and that is 1) that has to be enforced in federal court; 2) as stated as the Attorney General, we could only seek on behalf of our consumers' injunctive relief, so we would have to wait until there are hundreds of phone calls and then go

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into a federal district court and seek an injunction. We just don't think that is appropriate relief. We have no ability, under federal legislation or the federal amended telemarketing sales rule, to obtain attorney's fees, or to obtain penalties. So it strikes me as rather odd that we could do a case in conjunction with the federal government and they could get penalties in the amount of \$11,000 per call, and the Attorney General could get absolutely nothing on behalf of the citizen or the coffers of the state of North Dakota. It is only the federal government and Dept. of Justice that could get those penalties. I have had this discussion again with a significant number of states that are adopting their own legislation and none of us, could frankly imagine, why you would opt to use the FTC amended telemarketing sales rule, unless the legislature simply chose not to have this legislation and not enforce it in state court on behalf of their own citizens. So I think that is probably the most substantial differences that, like many other states, this is intended to be tailored to meet the specific needs of the telephone subscribers in our state, rather than telling our citizens that if you don't want these calls, you can talk to the FTC. I literally each year, get hundreds of calls on matters that were, in fact, potential violations of the telemarketing sales rule and when those folks have called the FTC, their response is call your Attorney General. They want us to report their statute. Again, we can only enforce that by going to federal district court, getting injunctive relief and I just don't think that this is a wise use of the Attorney General's resources.

Rep. Wrangham: On page 2, line 11, a couple of questions involving the definitions that we have defined "established business relationship", but we did not define established personal relationship. We need clarification on that and also when we're talking about a business relationship, I'm still not clear. I would like to propose an example and maybe that can help

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clear up my mind. If I gave to the March of Dimes within the last 24 months, does that make it OK for them to call me, not make it a telephone solicitation. If I've given to them in the last 24 months, do I have an established business relationship with them.

Mr. Grossman: Let me address those questions. First, there is, in fact, no definition for personal relationship and I couldn't find other states that had defined that. There might be some other states, but I think it's one of those commonly understood words what the personal relationship or an organization together and I call you, I think that's a personal relationship and I can't imagine that we're going to get into those kinds of dichotomies. I think most of us know what a personal relationship is, but I would certainly grant you that could attempt to define it. I don't think it is necessary. I think it is in fact self-defining. As to the second portion, I would have to say that, no, that in and of itself would not constitute a prior business relationship, and I think the concern would be there, that if in fact it did, then what you have is a perpetuating list of victims, and that's the Attorney General's concern. He and I discussed this at length, that if you had donated to the Association for Disabled Fire Fighters and they had tricked you into doing that donation, and you donated because they told you, you had donated the year before, when in fact you hadn't, or didn't recall that, now you've donated and now you have a business relationship. We didn't think that that should be brought within the terminology of an established business relationship, but what we did recognize is that there are some unique relationships there where the organizations sort of expressly or implicitly, make you a member of that organization by having donated. You donate to the Special Olympics, or some organization like that. I think that for all intents and purposes, you may well be a member of that organization. You are one of their regular donors. But to just say because you have donated on

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one particular occasion, that that's a prior business relationship. We would not consider that as a prior established business relationship.

Rep. Wrangham: If the March of Dimes sent me a receipt, which said you were a member for two years, could they get around it that way.

Mr. Grossman: I think it would depend on whether you agreed that you were in fact a member. I don't think that they could just send you a receipt and say that you're a member if it was not expressed to you at the time you gave your donation that you would in fact be a member by donating. I suppose if they had expressed to you in their literature, or on the telephone, that you are in fact a member of that organization, one could argue that you are a member and that is a prior established business relationship.

Chairman DeKrey: If there are no more questions, does someone care to move the AG's amendments.

Rep. Delmore: One more question, it seemed that you were favorable to the ones that the Newspaper Association with the free trial newspaper subscription.

Mr. Grossman: Yes, we really thought those were clarifications that were probably excepted, but again I think they just provide some additional clarification in that respect. Yes, the AG does not have any objections to those proposed amendments from the Newspaper Association.

Rep. Eckre: I move the AG amendments dated 3/18/03.

Rep. Maragos: Seconded.

Voice vote: Carried.

Rep. Delmore: I move the Newspaper Association amendments by Jack McDonald.

Rep. Maragos: Seconded.

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Voice vote: Carried.

Chairman DeKrey: These amendments that were handed out by the Majority Leader's office appear to me to be already contained in the Attorney General's amendment.

Mr. Grossman: I'm not sure that would be case.

Chairman DeKrey: They have it on a different line, but the wording in the same, "on behalf of a political party, ..."

Mr. Grossman: Can I see one of those. If I could just explain the difference, as I indicated, those proposed by the Attorney General would exempt those calls when they were made by employees or volunteers. So it is a more limited version. The proposed amendments that are before you would add a whole new exception as "f.". So if you looked at the exceptions starting on page 2, section 7, it has a., b., c., d., e. and that includes all the particular exceptions for written invitation, established business relationship, calls by charities employing their own calls for the purpose of polling or soliciting the expression of ideas, and then face-to-face. Those are all exceptions, this would make it a complete exception and would exempt all of those calls by or on behalf of a political party, candidate, or other group with a political purpose as defined in chapter 16.1-08.1, so it would not be limited to calls made on behalf of political candidates, committees, or parties when they use their own employees or volunteers.

Ms. Tabor: One other comment on that, that particular amendment, there has been some confusion that the Attorney General (can't hear) and I had a discussion with him yesterday, (can't hear).

Chairman DeKrey: That was stated in the Majority Leader's office this morning, that the Attorney General is not supporting the amendment.

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Rep. Grande: I have some amendments.

Rep. Eckre: I remember when we had the initial hearing on this bill, and I heard from a lot of people that one of things they do not want to get calls from. I don't like the amendment.

Chairman DeKrey: Anybody else have some proposed amendments.

Rep. Grande: I have some amendments to put forward that were asked by the smaller charity organizations that really fall through the cracks on this. In the other states, especially those surrounding us, MN, SD, MT and so forth, have passed, and I have copies of the MN statute, if anyone wants to look at it. Our small groups, such as our Rural Firefighters or our County Sheriffs, when they want to do any type of solicitation they don't have the manpower nor the ability to draw up on a volunteer base, what they do is get together when they need their funding and I know one of the rural firefighters groups get together and do a fundraiser to get the masks with the infrared ability, and they are very costly. So when they did the fundraiser, they hired an organization to do it, because they don't have the base to work out; especially in rural areas. This bill, as proposed, stops them from that ability to do that. They would like to have that exemption and these amendments that I will pass out to you addresses that. (see attached amendments).

Rep. Eckre: Is this opening up, if you open up to these, where do we, I think we are talking about more than just our local police or fire hall, can't this open up a whole wide range of people that can do this. Don't get me wrong, I like my local police and fire, and I help work on their fundraiser.

Rep. Grande: Well the other guys are already in here, Cancer Society, Heart Association, Alzheimer's, all of those groups with a national base, they can come in and set up their own

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private phone thing and work within the bill as it stands. They can already do all that. But the little guy can't.

Chairman DeKrey: That was the testimony from the attorney who was here.

Rep. Eckre: What about the Black Panthers, etc. some of those groups are national, I know it is an extreme, but some of those groups really take things to the extreme now.

Rep. Grande: From what I have understood from the people who came forth to me, and they deal also with the MN side, they do not have that as necessarily an issue. The main issue was that actually for the local peace officers.

Rep. Delmore: Is this what is written in the MN statute, is that what you're saying.

Rep. Grande: Yes.

Chairman DeKrey: So you want to make a motion to pass the Grande amendments.

Rep. Grande: I move the Grande amendments.

Rep. Bernstein: Seconded.

Rep. Delmore: I would like to hear from someone in the Attorney General's office. I know a lot of the bill was based on what was MN law, and maybe they can tell us a little about why they drafted the language the way they did.

Mr. Grossman: I think the Attorney General has expressed very strongly his understanding of sort of the dilemma that this unfortunately creates for some of our small, reputable organizations, but this is the exception that swallows the rule. It is MN's law, like a few of the other states, it just simply says that if you are a nonprofit organization, you can make these calls and you don't have to honor the Do Not Call list. So I would encourage you, if necessary, to review our testimony about all of the fraudulent solicitations that you have, when you really open the door to

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those solicitations where ND donors and contributors send hundreds of thousands of dollars out of state.

Rep. Grande: We just kicked out a bill yesterday dealing with if there were fraudulent type things that the Attorney General has the ability to put a cease and desist in. We have safeguards in place, and we've been working with those safeguards and I think that we're looking at being able to prosecute those people, we're looking at all these other avenues, and I think that if we make this so strict that our small charities, because ND is a small state, we have small population and we rely upon each other. In a lot of instances, we are able to call our local people and say, we would like to have an opportunity to raise some money because we need a new fire truck.

Ms. Tabor: I think that Rep. Grande is correct, we do have bills. I think the real bottom line on this is that this bill doesn't prohibit small group, from calling people with telemarketing help to people who aren't on the No Call list. I think that the Attorney General's real message is that if someone doesn't want phone calls, they don't have phone calls, not from charities, I think that that has been made clear on, this bill doesn't prohibit those small charities from making phone calls to people who aren't on the list. They can even use telemarketers to help them. What this bill does is when someone calls in and says I don't want any more phone calls during supper, I don't want any more phone calls on Sunday morning at 9:00 a.m. That's what this bill does.

Rep. Grande: I completely understand where the Attorney General is coming from. We're here to discuss what we as the legislative body want to see as policy put in place and what we think is going to be best for our constituents.

Rep. Delmore: One of my concerns about some of those we're going to allow in here, I did some research of my own on the Fraternal Order of Police, they take 17% to the local people.

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Deanna Ball
Operator's Signature

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House Judiciary Committee
Bill/Resolution Number SB 2255
Hearing Date 3-18-03

This bill as written, is going to prevent people like them coming in with telemarketers and taking a majority of the funds. If that is all an organization is getting, they're not getting a fair shake anyway. They might be better off doing a mailing or having as many volunteers call as they can.

Rep. Grande: That's up to the Fraternal Order of Police, as to who they hire to do telemarketing.

Rep. Wrangham: I understand, but just for clarification, Rep. Delmore, I understand that some of these groups charge only 35% or less. I guess if that's the issue, then maybe we should be passing some legislation that puts a maximum on what they can charge. I don't think that's the issue. I'm not sure that local small charities are the ones that these people want to stop from calling.

Chairman DeKrey: The clerk will call a recorded roll call vote on the Grande Amendments.

Roll call vote: 6 to 5 to 2 absent.

Chairman DeKrey: We will come back in to committee this afternoon after the floor session and retake the vote on the Grande amendments.

(Reopened later in the afternoon session)

Chairman DeKrey: Rep. Grande, please explain your amendments to the committee again, for the benefit of Rep. Klemin and Rep. Kingsbury.

Rep. Grande: The amendments are to have the smaller charities such as the Peace Officers, the Rural Firefighters, the sheriffs to be able to do some fundraising. They don't have enough people to have employees or volunteers to fund raise, so they hire a telemarketers to do it for them. They can't do that according to this bill. This exemption allows them in, that's the way all the surrounding states do it. I believe that is actually how the federal law says it too.

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10/21/03
Date

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House Judiciary Committee
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Hearing Date 3-18-03

Rep. Kingsbury: This includes all the nonprofit organizations. Every group that is nonprofit.

Chairman DeKrey: Correct.

Rep. Eckre: So it could be huge ones.

Chairman DeKrey: They already can.

Rep. Grande: The big ones are already in. We are trying to open a little door for the little guy to come through too.

Rep. Klemin: Could you explain why the big guys can.

Chairman DeKrey: The way the bill is now, you can do fundraising, but you have to do it in the state, with your own employees or volunteers. What the little charities testified to is that they aren't big enough that they can afford to hire people to come in and do that. Whereas the American Cancer Society, The Heart Association and the Red Cross, can come into ND and set up phone bank and hire someone to run it and do their fundraising. Small charities testified that they didn't have the ability to do that because they didn't have the financial wherewithal to put something like that together. Rep. Grande's proposed amendments would allow that to happen. They could contract with an outfit to assist them, such as the Fraternal Order of Police are doing right now.

Rep. Klemin: So are you with us or against us.

Chairman DeKrey: You can go through the vote and then they can decide, because they weren't here to hear how the committee voted.

Clerk read the vote, then Rep. Kingsbury voted yes, Rep. Klemin, yes. The vote was 8 to 5.

Chairman DeKrey: That amendment passes 8 to 5. Are there any further amendments.

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10/21/03
Date

Page 16
House Judiciary Committee
Bill/Resolution Number SB 2255
Hearing Date 3-18-03

Rep. Wrangham: I would like to move the Majority Leader's amendments, on page 2, line 30 insert "f ...".

Rep. Kingsbury: Seconded.

Rep. Eckre: The one thing we heard about most, was people complaining about the political parties, because they are so concentrated. I remember the gentleman who testified for this amendment, he even admitted that they are extremely in the month or two month period preceding an election. People don't want it. That's the purpose. The Attorney General introduced this bill in the interests of the people of ND. I just believe that this shouldn't be a part of this thing. People don't want this on there.

Rep. Kingsbury: I guess I get some calls too, and even the recorded ones. But then again I think it is pretty wonderful that we have that freedom, it is only for a short time of the year and it is very important.

Rep. Klemin: There was a letter to the editor in the Bismarck Tribune today, from a lady talking about this bill, she said she didn't want to get telemarketing calls or calls from people begging for some votes or some other stupid thing. That kind of offends me because I think it is a very important process and if they think voting is stupid, well they can exercise their right not to vote at the same time.

Rep. Eckre: I think there are other ways of getting word out to the corporations as well as us. You can go door-to-door. I don't mind if somebody comes to my door, it's calling me all the time. We have newspaper ads, we have signs up and everything else in our society. There are so many ways to find out about people running for office and I understand the freedom context, but I also have the freedom that I don't want to be bothered all the time, either.

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House Judiciary Committee
Bill/Resolution Number SB 2255
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Chairman DeKrey: Further discussion on the amendment, clerk will call the roll. 9 Yes and 4 No. Motion passes. Further amendments.

Rep. Boehning: I don't have anything prepared, but I would like to look at the option of putting a Sunset Clause after the new federal standards come out and have it reviewed at that time, take a look at the law.

Chairman DeKrey: When would the Sunset Clause end.

Rep. Boehning: At the end of the biennium.

Ms. Tabor: I guess I would hesitate and caution you not to do that. We will be expending money to put into place a state program, and if you sunset it, it will be a waste of money. I would caution you to be careful about resources. I'm not sure if I really understand why you want it.

Rep. Klemin: We can always change our minds, I guess if it were always that way, we would never have any appropriation if we couldn't change our mind later.

Ms. Tabor: If the issue is that if you want to do something from the federal list rather than the state list, then that is the decision you should make, because this bill will also include us hiring some people to help input the information. With what you're suggesting is that we lay those people after two years, how are we going to hire anyone.

Rep. Klemin: I think that what Rep. Boehning is looking at, with the Sunset Clause, that we have to come back and take another look at whether to continue the program or not. If the decision is to continue it, then we just remove the Sunset Clause.

Ms. Tabor: I understand, I guess the question is that maybe I'm not understanding the purpose of the Sunset Clause. I guess if the question is that if we use the federal list, then it wouldn't be an issue.

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10/21/03
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Hearing Date 3-18-03

Chairman DeKrey: Well we have a motion of the floor, do we have a second.

Rep. Kretschmar: Seconded.

Chairman DeKrey: We now have a motion for a sunset clause to end at the end of this biennium. Further discussion. Roll call vote taken. 4 yes 9 no. Motion fails. Further amendments. What are the committee's wishes on the bill.

Rep. Grande: I move a Do Pass as amended and rereferred to Appropriations.

Rep. Wrangham: Seconded.

Rep. Kretschmar: Can anyone briefly explain to me now who can't call me.

Rep. Delmore: I think that while Rep. Kretschmar's remarks are humorous are very true. We put enough things on this bill to drive a mack truck through and if that's the case, we don't have a No Call bill, don't kid yourself.

Rep. Klemin: To the extent that this is more open than the federal law. The state can be more stringent than the federal but not less stringent.

Mr. Grossman: The FTC rule does not preempt state law in any aspect of this legislation.

Rep. Klemin: I'm still confused then. I thought that the bill that was signed by the President last week related to this. Am I misunderstanding this.

Mr. Grossman: That was money, just the funding to set up the Do Not Call list.

Chairman DeKrey: Clerk will call the roll.

10 YES 3 NO 0 ABSENT DO PASS AS AMENDED CARRIER: Rep. DeKrey

Chairman DeKrey: I understand that you want a Minority Report.

Rep. Delmore: We do? Not at this time.

Rep. Maragos: You can just pull off the amendments on the floor.

*Grade
Amendments*

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2255

Page 2, line 13, replace "a charitable organization that is exempt from federal" with "an organization that is identified as a nonprofit organization under state or federal law."

Page 2, line 14, remove "income taxation under Section 501 of the Internal Revenue Code."

Page 2, remove lines 16 and 17.

Page 2, line 18, replace "(2)" with "(1)".

Re-number accordingly.

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10/21/03
Date

Date: 3/18/03
 Voice Roll Call Vote #: 1

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2255

House Judiciary Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Grande Amendment

Motion Made By Rep. Grande Seconded By Rep. Bernstein

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Rep. Delmore		✓
Vice Chairman Maragos		✓	Rep. Eckre		✓
Rep. Bernstein	✓		Rep. Onstad		✓
Rep. Boehning	✓				
Rep. Galvin	✓				
Rep. Grande	✓				
Rep. Kingsbury	✓				
Rep. Klemin	✓				
Rep. Kretschmar		✓			
Rep. Wrangham	✓				

Total (Yes) 8 No 5

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Passed.

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Operator's Signature Deanna D. [Signature] Date 10/21/03

*Majority
office Amendment*

Fifty-eighth
Legislative Assembly

House Judiciary Committee

PROPOSED AMENDMENT TO SENATE BILL NO. 2255

- 1 Page 2, after line 30, insert the following:
- 2 "f. By or on behalf of a political party, candidate or other group with a political
- 3 purpose as defined in chapter 16.1-08.1."
- 4 Renumber accordingly.

Page No. 1

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12/21/03
Date

Voice Date: 3/18/03
Roll Call Vote #: 2

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2255

House Judiciary Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Majority Leader Amendment

Motion Made By Rep. Wrangham Seconded By Rep. Kingsbury

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Rep. Delmore		✓
Vice Chairman Maragos		✓	Rep. Eckre		✓
Rep. Bernstein	✓		Rep. Onstad		✓
Rep. Boehning	✓				
Rep. Galvin	✓				
Rep. Grande	✓				
Rep. Kingsbury	✓				
Rep. Klemm	✓				
Rep. Kretschmar	✓				
Rep. Wrangham	✓				

Total (Yes) 9 No 4

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Passed.

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Deanna Waller 10/21/03
Operator's Signature Date

Voice Date: 3/18/03
 Roll Call Vote #: 3

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
 BILL/RESOLUTION NO. 2255

House Judiciary Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Boehning Amendment

Motion Made By Rep. Boehning Seconded By Rep. Kretschmar

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey		✓	Rep. Delmore		✓
Vice Chairman Maragos		✓	Rep. Eckre		✓
Rep. Bernstein		✓	Rep. Onstad		✓
Rep. Boehning	✓				
Rep. Galvin		✓			
Rep. Grande		✓			
Rep. Kingsbury		✓			
Rep. Klemin	✓				
Rep. Kretschmar	✓				
Rep. Wrangham	✓				

Total (Yes) 4 No 9

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Failed.

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 Operator's Signature Date

Date: 3/18/03
 Roll Call Vote #: 4

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2255

House Judiciary Committee

Check here for Conference Committee

Legislative Council Amendment Number 38308.0201 . 0300

Action Taken Do Pass as Amended & Rerefer to Approp

Motion Made By Rep. Grande Seconded By Rep. Wrangham

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Rep. DeImore		✓
Vice Chairman Maragos		✓	Rep. Eckre	✓	
Rep. Bernstein	✓		Rep. Onstad		✓
Rep. Boehning	✓				
Rep. Galvin	✓				
Rep. Grande	✓				
Rep. Kingsbury	✓				
Rep. Klemin	✓				
Rep. Kretschmar	✓				
Rep. Wrangham	✓				

Total (Yes) 10 No 3

Absent 0

Floor Assignment Rep. DeKrey

If the vote is on an amendment, briefly indicate intent:

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Deanna Wallis Operator's Signature 10/21/03 Date

REPORT OF STANDING COMMITTEE (410)
March 20, 2003 7:18 a.m.

Module No: HR-50-5276
Carrier: DeKrey
Insert LC: 38308.0201 Title: .0300

REPORT OF STANDING COMMITTEE

SB 2255, as engrossed: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS and BE REREFERRED to the Appropriations Committee (10 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2255 was placed on the Sixth order on the calendar.

Page 1, line 18, after "on" insert "a free trial newspaper subscription or on"

Page 2, line 9, after "written" insert "request, consent," and after "invitation" insert a comma

Page 2, line 13, replace "a charitable organization that is exempt from federal" with "an organization that is identified as a nonprofit organization under state or federal law"

Page 2, line 14, remove "Income taxation under section 501 of the Internal Revenue Code"

Page 2, line 15, remove "following applies:"

Page 2, remove lines 16 and 17

Page 2, line 18, remove "(2) The"

Page 2, line 20, replace "(a)" with "(1)"

Page 2, line 21, replace "(b)" with "(2)" and remove "charitable"

Page 2, after line 30, insert:

"f. By or on behalf of a political party, candidate, or other group with a political purpose, as defined in section 16.1-08.1-01."

Page 3, line 29, replace "no-call" with "do-not-call"

Page 4, line 5, replace "is" with ", for at least ninety days before the date the call is made, has been"

Page 4, line 6, replace "no-call" with "do-not-call", after "maintained" insert "or used by the attorney general", and after "51-26-09" insert "or the national do-not-call registry established and maintained by the federal trade commission under title 16, Code of Federal Regulations, part 310"

Page 4, line 14, replace "no-call" with "do-not-call", after "list" insert "- Federal trade commission do-not-call registry", and after the second boldfaced period insert:

"1."

Page 4, line 17, after "list" insert "or by using the national do-not-call registry established and maintained by the federal trade commission under title 16, Code of Federal Regulations, part 310"

Page 4, line 18, replace "no-call" with "do-not-call"

Page 4, line 21, replace "1." with "a."

Page 4, line 26, replace "2." with "b." and replace "shall be" with "is"

Page 4, line 30, replace "3." with "c."

(2) DESK, (3) COMM

Page No. 1

HR-50-5276

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Operator's Signature

10/21/03
Date

REPORT OF STANDING COMMITTEE (410)
March 20, 2003 7:18 a.m.

Module No: HR-50-5276
Carrier: DeKrey
Insert LC: 38308.0201 Title: .0300

Page 4, line 31, replace the first "or" with a comma and after "telephone" insert a comma

Page 5, line 1, replace "4." with "d."

Page 5, replace line 5 with:

"e. The"

Page 5, remove line 6

Page 5, line 7, remove "subscribers who object to receiving telephone solicitations, the"

Page 5, line 8, after "include" insert "in the list established under this section" and after "national" insert "do-not-call registry established and maintained by the federal trade commission under title 16, Code of Federal Regulations, part 310"

Page 5, line 9, remove "list in the list established under this section" and replace "also" with "provide to the federal trade commission the telephone numbers of North Dakota subscribers who are in the attorney general's do-not-call list or who have otherwise notified the attorney general of the subscriber's objection to receiving telephone solicitations for inclusion in the national do-not-call registry."

Page 5, remove lines 10 through 12

Page 5, line 13, replace "6." with "f."

Page 5, replace lines 17 through 22 with:

"2. Notwithstanding any other provision of this chapter, the attorney general may designate the national do-not-call registry established and maintained by the federal trade commission under title 16, Code of Federal Regulations, part 61, as the state do-not-call list."

Renumber accordingly

2003 HOUSE APPROPRIATIONS

SB 2255

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12/21/03
Date

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2255

House Appropriations Committee

Conference Committee

Hearing Date 03-27-03

Tape Number	Side A	Side B	Meter #
1	X		19.2 - 32.5

Committee Clerk Signature *Chris J. Nyberg*

Minutes:

Chairman Svedjan Opened SB 2255 for discussion. A quorum was present.

Rep. Duane DeKrey Introduced the bill. This is the No-Call bill. It has a #394,000 fiscal note on it and the money is not in this bill, it is in the 2003 Attorney General's bill.

Rep. Wald This is a waste of time and money. We should kill this.

Rep. Carlson Maybe someone from the office of the Attorney General would clarify this.

Rep. Timm What about the federal bill on this?

Sandy Taylor, Deputy Attorney General It is not as restrictive as this.

Rep. Skarphol What do you use the fund for now?

Taylor That fund is created by fees and we use it to fund the Consumer Protection Division.

Rep. Wald We're creating an unneeded bureaucracy.

Rep. Skarphol How much money is in the fund?

Taylor \$800,000 as of now.

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10/21/03
Date

Page 2
House Appropriations Committee
Bill/Resolution Number SB 2255
Hearing Date 03-27-03

Rep. Skarphol This will be turnback if it doesn't pass?

Taylor Not all of it, there are expenditures it may have to go for.

Rep. Warner The federal legislation on this is flawed regarding bank and credit cards.

Rep. Rennerfeldt Something has to be done.

Rep. Brusegaard I move a Do Pass. 2nd by Rep. Gulleson. Motion Carries 16-5-2. Rep.

DeKrey will carry this bill on the floor.

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Operator's Signature

10/21/03
Date

38308.0203
Title.0400

VR
3/25/03
1082

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2255

Page 1, line 18, after "on" insert "a free trial newspaper subscription or on"

Page 2, line 9, after "written" insert "request, consent," and after "invitation" insert a comma

Page 2, after line 30, insert:

"f. By or on behalf of a political party, candidate, or other group with a political purpose, as defined in section 16.1-08.1-01."

Page 3, line 29, replace "no-call" with "do-not-call"

Page 4, line 5, replace "is" with ", for at least ninety days before the date the call is made, has been"

Page 4, line 6, replace "no-call" with "do-not-call", after "maintained" insert "or used by the attorney general", and after "51-26-09" insert "or the national do-not-call registry established and maintained by the federal trade commission under title 16, Code of Federal Regulations, part 310"

Page 4, line 14, replace "no-call" with "do-not-call", after "list" insert "- **Federal trade commission do-not-call registry**", and after the second boldfaced period insert:

"1."

Page 4, line 17, after "list" insert "or by using the national do-not-call registry established and maintained by the federal trade commission under title 16, Code of Federal Regulations, part 310"

Page 4, line 18, replace "no-call" with "do-not-call"

Page 4, line 21, replace "1." with "a."

Page 4, line 26, replace "2." with "b." and replace "shall be" with "is"

Page 4, line 30, replace "3." with "c."

Page 4, line 31, replace the first "or" with a comma and after "telephone" insert a comma

Page 5, line 1, replace "4." with "d."

Page 5, replace line 5 with:

"e. The"

Page 5, remove line 6

Page No. 1

38308.0203

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Operator's Signature

Date

2 of 2

Page 5, line 7, remove "subscribers who object to receiving telephone solicitations, the"

Page 5, line 8, after "include" insert "in the list established under this section" and after "national" insert "do-not-call registry established and maintained by the federal trade commission under title 16, Code of Federal Regulations, part 310"

Page 5, line 9, remove "list in the list established under this section" and replace "also" with "provide to the federal trade commission the telephone numbers of North Dakota subscribers who are in the attorney general's do-not-call list or who have otherwise notified the attorney general of the subscriber's objection to receiving telephone solicitations for inclusion in the national do-not-call registry."

Page 5, remove lines 10 through 12

Page 5, line 13, replace "6." with "f."

Page 5, replace lines 17 through 22 with:

- "2. Notwithstanding any other provision of this chapter, the attorney general may designate the national do-not-call registry established and maintained by the federal trade commission under title 16, Code of Federal Regulations, part 61, as the state do-not-call list."

Renumber accordingly

REPORT OF STANDING COMMITTEE (410)
March 27, 2003 9:41 a.m.

Module No: HR-55-5888
Carrier: DeKrey
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE
SB 2255, as engrossed: Appropriations Committee (Rep. Svedjan, Chairman)
recommends **DO PASS** (16 YEAS, 5 NAYS, 2 ABSENT AND NOT VOTING).
Engrossed SB 2255 was placed on the Fourteenth order on the calendar.

(2) DESK, (3) COMM

Page No. 1

HR-55-5888

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Operator's Signature

10/21/03
Date

2003 TESTIMONY

SB 2255

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Deanna D. White
Operator's Signature

10/21/03
Date

Att # a

SB 2255
District 40 Senator Karen K. Krebsbach

As legislators we have many opportunities to make North Dakota a better place to live for our constituents. We have limited resources as a state and our actions often require difficult choices within competing priorities. Occasionally, without extraordinary expense, we can improve the quality of life for everyone in North Dakota. The Do Not Call legislation is one of those opportunities to do something both popular and important for the people in this state. I am happy to be one of the sponsors of this legislation.

Approximately 26 states have Do Not Call legislation with similar legislation pending or being considered in numerous other states. The Federal Trade Commission has adopted a Do Not Call registry as part of its amended Telemarketing Sales Rule. Whether or not North Dakota enacts Do Not Call legislation the telemarketers will be required to honor the requests of North Dakota telephone subscribers who enroll with the FTC. We should not defer to the federal government in a role that is best determined by our legislature in North Dakota.

Our legislation is consistent with the FTC Rule and will be enforced in a similar manner. Telemarketers will be able to obtain a list of North Dakota Do Not Call subscribers from either the FTC or the Attorney General. The FTC legislation does not cover intrastate calls, but the North Dakota legislation will include these calls.

This legislation will help protect some of our consumers from telemarketing fraud. Charities using their own employees or volunteers for soliciting donations will not be affected by this legislation. Those charities employing professional fundraisers can still engage in charitable solicitations in this state, but will be required to comply with the Do Not Call provisions. The legislation provides reasonable accommodations for our small North Dakota businesses who conduct business by telephone.

This legislation also provides some other benefits. It will prohibit caller ID blocking and will prohibit pre-recorded voice messages without our consent or unless preceded by a live operator.

I'm pleased to be a sponsor of Senate Bill 2255. I respectfully ask this committee to give this legislation a "do pass" recommendation. Thank you.

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Karen K. Krebsbach
Operator's Signature

12/21/03
Date

AARP North Dakota

AH #1

SB 2255 – Do Not Call

February 4, 2003

Senate Judiciary Committee

Testimony provided at the request of Eldra Forsgren, Mayville, ND

Chairman Traynor and members of the Senate Judiciary Committee, my name is Howard Snortland. I am a member of the AARP North Dakota Government Affairs Committee. I am here today to provide testimony on SB 2255 at the request of Ms. Eldra Forsgren. Thank you for the opportunity to share the experience Ms. Forsgren had with a telemarketer.

One evening I answered the phone to a telemarketer. He identified himself from a company from which my husband had a credit card. He asked for my husband by name. I said, "I am sorry he is not home, Good bye" and hung up the phone.

With in a minute the phone rang again, when I said, "hello" The man said, "I don't like being hung up on" and "I know where you live". My first instinct was to argue I hadn't hung up on him but decided that wouldn't do any good. I was angry and scared (I was home alone that evening). I said to this man "I don't like being threatened" and "my next phone call is going to be to the police". I then hung up the phone. If I had lived in a large town or a town that had a company that did telemarketing I would have called the police. One of the reasons it frightened me so was I had just heard that some telemarketers use prisoners to make the calls. The fact that someone had that much information on my family and me scared me. I emailed the company that evening and explained what had happened. I received a polite answer the next day that they were sorry and it would never happen again. Within the next 6 months I received at least 2 more calls from that same company. I finally asked for a supervisor told her my blood ran cold at the mention of her company, what had happened to me and I never wanted a call from them again. That has stopped that company from calling.

I have visited with other people who have had similar experiences. It is very frightening to receive telemarketing calls like the one I received. I know all telemarketers are not like this one. However, I believe, as a private citizen, I should be the one to decide if I want to receive telemarketing calls. If I do receive such calls I consider it an invasion of my privacy in my own home.

I ask that you support SB 2255 with a Do Pass. Thank you for your time.

107 West Main Avenue, Suite 125 | Bismarck, ND 58501 | 701-221-2274 | 701-255-2242 fax | 1-877-434-7598 TTY
James G. Parkel, President | William D. Novelli, Executive Director and CEO | www.aarp.org

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Deanna Ball
Operator's Signature

10/21/03
Date

HH # 1 2/5

PROPOSED AMENDMENTS TO SENATE BILL NO. 2255
SENATE JUDICIARY COMMITTEE
JOHN T. TRAYNOR, CHAIRMAN
FEBRUARY 5, 2003

PRESENTED BY
OFFICE OF ATTORNEY GENERAL

Page 1, line 20, after the period insert "~~Membership in an entity or organization engaged in charitable, religious or educational activities and exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code is an established business or personal relationship for purposes of this section.~~"

Page 2, line 11, after "person" insert "or entity"

Page 2, line 11, overstrike "telephone solicitor" and insert immediately thereafter "subscriber"

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Deanna D. Smith
Operator's Signature

10/21/03
Date

AH #2a

SENATE JUDICIARY COMMITTEE
JOHN T. TRAYNOR, CHAIRMAN
FEBRUARY 4, 2003

TESTIMONY BY
PARRELL D. GROSSMAN
DIRECTOR, CONSUMER PROTECTION AND ANTITRUST DIVISION
OFFICE OF ATTORNEY GENERAL
IN SUPPORT OF
SENATE BILL NO. 2255

Mr. Chairman and members of the Senate Judiciary Committee. I am Parrell Grossman, Director of the Consumer Protection and Antitrust Division of the Attorney General's Office. It has been my pleasure to serve in this position for the past seven years. I appear on behalf of the Attorney General to support Senate Bill No. 2255.

I reviewed most of the Do Not Call statutes in effect in states throughout the country on behalf of the Attorney General in recommending appropriate legislation to the sponsors of this legislation. The Attorney General ultimately patterned most of the substantive provisions regarding telephone solicitations, *et cetera*, after the recently enacted Minnesota Do Not Call statutes. These statutes appear to be some of the most straight forward and easily understood statutes, they are consistent with the Federal Trade Commission's Amended Telemarketing Sales Rule and its Do Not Call Registry, and with Minnesota as a bordering state, it creates ease of consistent application, operation and enforcement between our two states.

One very important difference and distinction for North Dakota is the exception for telephone solicitations by callers who will complete the sale at a later face-to-face meeting. In Minnesota one caller could make the telephone solicitation and a separate or different person could make the later face-to-face sales presentation. In other words a Florida telemarketing company employing legions of telemarketing callers could make solicitations in North Dakota for timeshares because any sale would not occur until a later face-to-face sales presentation in Florida. The sponsors of the North Dakota legislation narrowed this exception to require that the exception only apply when the initial caller and the individual conducting the later face-to-face sales presentation and meeting are the same individual. The Minnesota exception has been described as the exception "you can drive a truck through" and it was reported to the Attorney General Stenehjem this result was not the intent of the sponsors of the Minnesota law. The FTC has the same overly broad exception.

Senate Bill No. 2255 is North Dakota's proposed Do Not Call Legislation which prohibits most telephone solicitations to telephone subscribers, including residential, wireless or mobile telephone services, who place their names on a no-call list established and maintained by the Attorney General.

Telephone solicitations do not include calls: 1) to subscribers with the subscriber's prior invitation or permission; 2) by someone with a prior established business relationship; 3) by charitable organizations when the caller is a volunteer or employee of the charitable organization; 4) that solicit the expression of ideas, opinions or votes; and 5) for sales that

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Deanne D. [Signature]
Operator's Signature

10/21/03
Date

won't be completed until a later face-to-face sales presentation or meeting between the person making the call and the telephone subscriber.

The legislation restricts the use of prerecorded or synthesized voice messages unless the subscriber has either consented to the message or the message is immediately preceded by a live operator who obtains the subscriber's consent. The message must contain disclosures about the identity of the solicitor, the purpose of the message and the identity of goods or services the message promotes, and whether the message intends to solicit payment.

Callers may not use an automatic dialing-announcing device unless it disconnects within ten seconds after the subscriber terminates the call.

Callers may not use an automatic dialing-announcing device that calls random or sequential numbers unless it excludes calls to subscribers on the no-call list, emergency phone numbers, hospitals, nursing homes, cellular telephones and paging services.

Callers may not use an automatic dialing-announcing device nor make any telephone solicitations before 8:00 a.m. or after 9:00 p.m. at the subscriber's location.

Callers may not make any telephone solicitations to the telephone line of any subscriber who is on the Attorney General's no-call list.

Callers must clearly state their identities at the start of calls including the caller's name, telephone number, city and state of location, and the business on whose behalf the telephone solicitation is made.

Callers may not use any method to block or otherwise deliberately circumvent the subscriber's use of caller identification service.

The Attorney General shall establish and maintain a no-call list and shall provide to and receive from the Federal Trade Commission and Federal Communication Commission all North Dakota subscriber telephone numbers maintained on these lists so that subscribers will only have to sign up with either the federal agencies or the Attorney General.

The Attorney General may charge fees for the list not to exceed \$200 per quarter or \$800 per year.

The Attorney General may promulgate rules as necessary governing the establishment, operation and maintenance of the no-call list.

The Attorney General's rules will provide that businesses may purchase the list from either the Attorney General, the Federal Trade Commission or the Federal Communications Commission; provided, however, that the caller may not call a telephone subscriber on the Attorney General's list whether or not the subscriber's telephone number is on the FTC or FCC lists.

Any person who receives a telephone solicitation in violation of the do not call law may bring an action for injunction, damages or both and may be awarded actual damages or damages up to \$2,000 for each violation, whichever is greater.

The legislation provides a one-year statute of limitations.

The Attorney General may enforce violations of the law using the powers and remedies provided to the Attorney General in chapter 51-15, commonly referred to as "the consumer fraud law."

The Attorney General may issue cease and desist orders for violations of the law. Aggrieved parties may request a hearing in an adjudicative procedure in accordance with chapter 28-32. The Attorney General may also impose civil penalties of up to \$2,000 in an adjudicative proceeding. The Attorney General may recover reasonable attorney's fees and hearing costs incurred in an adjudicative proceeding if the Attorney General prevails.

In a court action the Attorney General may seek civil penalties up to \$2,000 per violation. A violation of this law constitutes a violation of chapter 51-15 and the court may award civil penalties pursuant to chapter 51-15. The Attorney General, however, would not anticipate seeking penalties pursuant to chapter 51-15, unless the violations also included misleading, deceptive or fraudulent conduct.

The Attorney General is entitled to an award of reasonable attorney's fees, investigation fees, costs and expenses in an action brought pursuant to this legislation. All fees, penalties and recoveries pursuant to violations of this law will be collected and retained by the Attorney General for enforcement of this legislation.

The civil penalties imposed for violations of this legislation are in line with the civil penalties imposed by other states for violations of their Do Not Call statutes.

California, Illinois, Louisiana, Minnesota, Texas, Wisconsin, and \$1,000 or less per violation of Do Not Call statutes. Illinois imposes \$2,500 for subsequent violations. Wyoming imposes \$2,500 for second violations and \$5,000 for third and subsequent violations.

Alabama, Colorado, Georgia, Kentucky, New York and Tennessee impose civil penalties of \$2,000 per violation. Colorado imposes an additional \$10,000 in civil penalties if the victim is elderly.

Alaska, Connecticut, Idaho, Massachusetts and Missouri impose civil penalties of \$5,000 per violation.

Arkansas, Florida, and Kansas impose civil penalties of \$10,000 per violation. Arkansas imposes an additional \$10,000 in civil penalties if the victim is elderly.

Oregon imposes civil penalties of \$25,000 per violation. Indiana imposes \$25,000 for repeat offenders.

The FTC may collect civil penalties of up to \$11,000 per violation for calls in violation of its Do Not Call registry. North Dakota, in an action brought pursuant to the FTC Amended Telemarketing Sales Rule cannot obtain any civil penalties for violation of the federal law.

The fees to purchase the list, as delineated in this legislation, are the maximum amounts. The actual amounts provided pursuant to rules adopted by the Attorney General could be less depending upon costs incurred in developing, establishing and maintaining the list. The Attorney General hopes to be able to provide certain accommodations for small businesses such as culling a list by local telephone pre-fix numbers, etc. and those capabilities may provide a less expensive alternative to such businesses.

This Committee in this hearing is considering what may be, if enacted by the 58th Legislative Assembly, one of the most popular and important and pieces of legislation this legislative session.

When Pennsylvania enacted its DNC legislation, 1.62 million telephone subscribers enrolled in Pennsylvania within the first six weeks of registration in that state. Minnesota's DNC law went into effect January 1, 2003. Registration for the DNC list in Minnesota began November 4, 2002. On January 1 almost one million twenty three thousand residential telephone subscribers were registered on the list, representing nearly half of Minnesota's 2.2 million residential phone lines.

I have been involved in numerous multi-state working groups throughout the country in regard to existing, contemplated or pending Do Not Call legislation in the many states and the federal government, with the Do Not Call Registry that has not been adopted as part of the Federal Trade Commission Telemarketing Sales Rule. Whether the DNC legislation is within the authority of the Attorney General's office, Public Service Commission, or as in Minnesota, the Minnesota Department of Commerce, public officials in other states have stated this legislation is tremendously popular with their state's citizens.

Approximately 26 states currently have DNC laws including Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Minnesota, Missouri, Montana, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Wisconsin, and Wyoming. Legislation is pending or being introduced in several states.

The prospect of avoiding irritating, bothersome and unwanted telemarketing calls tends to overshadow the more important role of DNC legislation, which is protecting consumers and most often, vulnerable seniors.

Telemarketing fraud is a significant problem in this country. According to the American Association of Retired Persons (AARP), it is estimated that up to ten percent of the 140,000 telemarketing firms operating in the United States in 1996 were fraudulent. There are hundreds of variations of telemarketing fraud in which high-pressure sales persons solicit funds or sell products based on misleading, false or deceptive statements or claims. In North Dakota these scams might include sales of magazine subscriptions, bogus travel

opportunities, bogus sweepstakes, worthless credit card protection plans and illegal lotteries. We have many elderly victims in North Dakota that have lost \$10,000 to \$100,000 or more to scams that started with small amounts of money sent in response to telemarketing purchases. Telemarketing leads are purchased by and shared among scam artists.

These telemarketers are very smooth and court their victims over time. When consumers' instincts cause them to question the pitches, these telemarketers quickly become very abusive and threatening. If you are an elderly person, often isolated, living in rural North Dakota, you will do exactly what these telemarketers tell you to do, including sending large sums of money.

The most blatant and ruthless crooks will not honor DNC lists and this legislation will not stop that activity. However, many of the questionable or fraudulent sales are shrouded with some suggestion of legitimacy. Violations are often difficult to prove because of lack of evidence, unavailability of records, etc. Many of these telemarketers are actually more concerned about violating DNC laws because of the penalties and ease of proving violations. In a recent raid by the Louisiana Attorney General's office in that state, the investigators seized records of blatantly illegal activity. These investigators discovered a Louisiana DNC list on location. The defendants actually stated to investigators they did not want to be in violation of the DNC law.

Many Do Not Call list subscribers will not like any exceptions and may not want to receive telephone solicitations for any purposes including charitable purposes. However, the limitation of the exception for charities to only those charities using their own employees or volunteers is a reasonable compromise. North Dakota and other charitable organizations that employ professional fundraisers will be concerned that the DNC law applies to those organizations. However, the Attorney General firmly believes this is an important policy decision by this legislature because the broader exception will swallow the rule that attempts to prevent subscribers from receiving unwanted calls.

The Attorney General recognizes there are many reputable charitable organizations in North Dakota and elsewhere that employ reputable professional fundraisers. This office does not regularly examine those relationships or the allocation of donations between the charity and the fundraiser because we have no reason to concern ourselves with reputable charities. Nonetheless, we occasionally receive a public inquiry expressing concern or asking questions about a particular charitable fundraising activity in North Dakota. In reviewing some of the charitable solicitations we have discovered that, in some instances, the benefits to the local organization are nominal. The responses from the local organizations and charities indicate that the several thousand dollars the local organization received is money that organization otherwise would not have received. This is a decision within the purview of the charity that employs the professional fundraiser. When some portion of the proceeds are used for a legitimate charitable purpose, the debate is more about whether the donors would make such contributions in circumstances in which a majority of the donations do not actually go to the charity. In our experience and according to information gleaned through investigations most donors indicate they would not have contributed when the majority of their donations go to the professional fundraiser.

During my years with the Attorney General's office, I have learned that some of the most abusive telemarketing practices include charitable solicitations by questionable professional fundraisers on behalf of questionable charities. These callers often use names similar to bona fide charities or reputable organizations. The caller might represent "The Cancer Society of America" as opposed to the well-known "American Cancer Society." Donors often do not realize the subtle distinctions. My division investigated a case involving a professional fundraiser named Gecko Communications raising funds in North Dakota on behalf of "Fondest Wish Foundation" making wishes come true for seriously or terminally ill children. Oddly enough, the name was similar to the "Make-A-Wish Foundation" with the same mission but a familiar and reputable organization that actually spends the majority of its contributions on terminally ill children. The fundraiser retained about 90 percent or more of the money. The fundraiser was investigated or prosecuted by the federal government and we were unable to recover any of those donations. We, however, recovered approximately \$10,000, a small portion of the total donations, from the "Fondest Wish" charity.

Questionable professional fundraisers and charities, located primarily out-of-state, frequently take advantage of generous North Dakota citizens and consumers who open their checkbooks to give substantial money pursuant to many charitable pitches. These donors contribute hundreds of thousands of dollars to organizations they are not familiar with because they want to help when told, for example, the money will be used for disabled firefighters and law enforcement officers, etc. Unfortunately, in many instances, 95 percent of the money goes directly into the pockets of the professional fundraiser. The remaining amount of the donation may actually be used for charitable purposes, depending upon one's definition of "charitable purposes." The Attorney General's concerns are regarding the misrepresentations that often occur during the solicitations. According to the Attorney General's investigations and experience in the area of charitable solicitations, consumers would not contribute but for the misrepresentations or deception by the fundraisers and charities.

In October 2002 the Attorney General initiated legal action against two out-of-state professional fundraisers, Public Awareness, Inc. and Duane Kolve, who were conducting charitable solicitations on behalf of four nonprofit organizations including the Association for Disabled Firefighters, Inc., Coalition of Police and Sheriffs, Inc., American Veteran Relief Foundation, Inc. and ADSA, Inc. (an acronym for American Deputy Sheriffs Association.) The lawsuit alleges that the professional fundraiser and the four associated charities engaged in misrepresentations during the solicitations including that the donations would be used to fund nonexistent burn camps in North Dakota and falsely stating that the consumers solicited previously had contributed to the organization. Pursuant to a court order, the Attorney General took possession of at least one thousand five hundred checks that were sent by North Dakota donors to local mail processing centers during the weeks following the initiation of the legal action. Those checks range from \$15 to \$30 or more and probably total between \$22,000 and \$40,000. These defendants would have cashed those checks, if the Attorney General had not intercepted these checks pursuant to a court order. The checks are sent in envelopes provided by the fundraisers to the local address of the mail-processing center, but do not include the name

of the mail-processing center in order to create the false impression that the "charity" has a local address. Questionable charities routinely employ this practice. The donations involved in our pending legal action are a drop in the bucket in comparison to the total amount of charitable solicitations sent by consumers to other professional fundraisers in similar circumstances.

The Attorney General has joined in an amicus curiae brief in a case before the United States Supreme Court involving the states' interests in regulating of fraudulent charitable solicitations or fundraising. The case involves the State of Illinois versus Telemarketing Associates, Inc. It will result in a very important decision regarding states' authority in the regulation of charitable solicitations. The amicus curiae brief was joined by approximately 46 states and Puerto Rico. The amicus curiae brief provides an interesting and poignant discussion of questionable or fraudulent charitable solicitations. I have provided copies of the brief, as you will find the discussion enlightening in this area.

The FTC has adopted Do Not Call provisions as part of its Final Amended Telemarketing Sales Rule published in the Federal Register January 29, 2003. However, the FTC Amended Telemarketing Sales Rule, including the Do Not Call registry is not a solution for North Dakota. North Dakota requires state legislation for several reasons. First, financial institutions, insurance companies and long-distance carriers are not subject to the FTC TSR. Next, implementation of the FTC DNC registry could be many months away, if at all. Funding has not yet been approved. After funding approval it will take approximately 7 months or more before it is in effect. Next, two lawsuits were filed in federal court on January 29, 2003 challenging the DNC requirements on constitutional concerns that it violates the first amendment on prior restraint and content based restrictions, protections for commercial speech, etc. and various other federal claims that certain provisions of the TSR unrelated to the DNC registry exceed the FTC's authority. These challenges are likely to delay the implementation of the DNC registry. Furthermore, the FTC rule violations in North Dakota must be enforced in federal court with the approval of the FTC. The state of North Dakota could not impose any penalties or collect any investigation costs or attorney's fees. The state can only obtain injunctive relief, a very costly option. Our North Dakota citizens have a right to expect swift, effective enforcement in our local courts.

The FTC TSR DNC requirements do not significantly vary from the proposed North Dakota legislation, except as to charitable solicitations and the broader exemption for calls leading to a later face-to-face sales presentation. Under the FTC Rule, professional fundraisers soliciting on behalf of charitable organizations may contact subscribers on the DNC registry, unless those telephone subscribers have separately notified the charitable organization or professional fundraiser not to call.

For these reasons, the Attorney General respectfully urges this committee to give Senate Bill 2255 a "do pass" recommendation.

Thank you for your time and consideration and I will be available to try and answer any questions.

72, 55
Sen. Judiciary

AH 2b.

No. 01-1806

Supreme Court of the United States

THE PEOPLE OF THE STATE OF ILLINOIS *et rel.* JAMES E. RYAN,
ATTORNEY GENERAL OF THE STATE OF ILLINOIS,

Petitioner.

TELEMARKETING ASSOCIATES, INC., RICHARD TROIA, AND ARMET,
INC.,

Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF OF THE STATES OF FLORIDA, ALABAMA, ALASKA,
ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT,
DELAWARE, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA,
KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND,
MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI,
MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW
HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK,
NORTH DAKOTA, OHIO, OREGON, PENNSYLVANIA, RHODE
ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE,
TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST
VIRGINIA, WYOMING, THE DISTRICT OF COLUMBIA, AND
THE COMMONWEALTH OF PUERTO RICO AS *AMICI CURIAE*

IN SUPPORT OF PETITIONERS

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MATTHEW J. CONIGLIARO
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JONATHAN A. GLOGAU
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Deanna Waller
Operator's Signature

10/21/03
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Deanna D. [Signature]
Operator's Signature

10/21/03
Date

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INTEREST OF THE AMICI

The essence of the question presented by this case is whether States may bring prosecutions for fraud against persons who obtain charitable donations by misrepresenting the specific uses to which those donations will be put. The *amici* are 40 States, the District of Columbia, and the Commonwealth of Puerto Rico (the "*amici* States"), that believe the answer to this question is yes and that the decision of the Supreme Court of Illinois in *Ryan v. Telemarketing Associates, Inc.*, 763 N.E. 2d 289 (Ill. 2001), should accordingly be reversed.

The *amici* States are witnesses to a troubling development in the world of charitable solicitations. Individuals are using "charitable" fundraising as a "cover" for converting charitable donations to personal funds. These individuals include professional fundraisers, and, in some cases, directors and officers of purportedly charitable organizations themselves. All too often, these individuals invoke the First Amendment as a shield from otherwise legitimate enforcement efforts. They assert that the First Amendment fully protects their activities, as long as they provide token dollars to charitable purposes and token statements of "public awareness" to members of the donating public. *Amici* States do not mean to imply that a majority of charities are infected with this problem, but rather that the injection of fraud into the realm of charitable giving, immunized by the First Amendment, will chill charitable giving to the detriment of society as a whole.

This proceeding stands to affect two specific interests shared by the *amici* States. First, as with any situation involving fraud, the *amici* States have a strong interest in protecting their citizens from solicitations that procure donations through false pretenses regarding how donated funds will be used. This Court has previously recognized the constitutionality of States' efforts to prevent and punish fraud in the context of charitable solicitations. See, e.g., *Village of Schaumburg v. Citizens for a*

Better Environment, 444 U.S. 620, 637-38 (1980) ("Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly.").

Second, the *amicici* States share a strong interest in ensuring that charitable assets are duly administered in a manner that encourages charitable donations and thereby maximizes the public benefits that may be offered by beneficent charitable organizations. Charitable contributions represent a significant public resource. They promote a wide range of important initiatives in areas such as medical and scientific research, social services, public health, education, the environment, civil rights, and legal aid. Yet these initiatives cannot succeed without popular support, and such support will come only where the public trusts that its donations will be used for purposes that donors intend to sponsor and are led to believe their donations will in fact sponsor.

SUMMARY OF ARGUMENT

The facts in *Ryan* exemplify a disturbing phenomenon: a fundraiser solicited financial contributions by leading donors to believe that donations would be used to provide specific charitable services, though the fundraiser knew an overwhelming percentage of the donated funds would never serve any such purposes. The Supreme Court of Illinois affirmed the dismissal of a fraud action against the fundraiser because, in that court's view, the fundraiser's actions were protected by the First Amendment. The court did not hold, or even suggest, that the claim brought by the Illinois attorney general was not a valid claim for fraud under state law. Rather, the decision relied solely upon this Court's First Amendment decisions to hold that the First Amendment negates an otherwise valid fraud prosecution under Illinois law. That decision was incorrect because this Court has never interpreted the First Amendment to bar an action for common law fraud and because all fundraising efforts are not entitled to the full protections of the First Amendment.

ARGUMENT

I. RYAN PRESENTS AN INCREASINGLY COMMON EXAMPLE OF FRAUD IN THE CONTEXT OF CHARITABLE SOLICITATION.

The facts underlying the complaint in *Ryan* are not complicated. Since 1989, and continuing through the present, Respondents contracted with VietNow to solicit funds on VietNow's behalf. The relevant contractual language obliged the fundraiser to remit to the charity only 15 percent, and in some cases only 10 percent, of the funds collected. Under the contracts, VietNow had no access to the names or addresses of its donors.

Based on these contracts, Respondents raised funds through telephone solicitors who contacted potential donors and told them that their donations would provide hungry, homeless, or injured Vietnam War veterans with food, shelter, and financial support. Donors were not told that less than 15 percent (or, in some cases, less than 10 percent) of their donations would be passed on to the charity, let alone that only part of that amount would eventually be used to support the charity's services, depending on the charity's practices. The affidavits attached to the Amended Complaint show that none of the donors would have given to VietNow had they known that so little of their charitable dollars would be applied to the described veterans programs. [J.A.107-94]

Although VietNow's contracts provided that Respondent was to "increase public awareness" of veterans' needs, the record shows that the content of the solicitation pitches delivered was *ad hoc* and not something that Respondents or VietNow prepared. (J.A. 32; 83, ¶ 67E) According to the Questionnaires, the actual solicitations on behalf of VietNow conveyed only enough information to enable the solicitor to make his pitch for money. In addition, none of the donors were told that their donation would be used for a public awareness campaign.

As the *amici* States show in the following sections, similar fund raising campaigns are increasingly common, and States must have the opportunity to pursue fraud claims where the facts warrant.

A. THE CONDUCT AT ISSUE IN RYAN IS INCREASINGLY PREVALENT AND THREATENS TO REDUCE THE PUBLIC BENEFITS GAINED FROM POPULAR SUPPORT OF CHARITABLE FUNDRAISING EFFORTS.

Modern solicitation efforts routinely evoke images of desperation in which persons will suffer cruel, undeserved hardships unless someone intervenes to alter that course -- intervention that will come, so the solicitor says, if donors will make the requested charitable contributions. This technique is applicable in many contexts. Potential donors may be told, for instance, that children in an area are starving and that donations will be used to provide them with life-sustaining food. Donations may be said to provide victims of abuse with care, counseling, or shelter from their abusers. Or, as in *Ryan*, solicitors may claim that donations will provide hungry, homeless, or injured Vietnam War veterans with food, shelter, and financial support. See generally Nicholas Barborak, *Saving the World, One Cadillac at a Time: What Can Be Done When a Religious or Charitable Organization Commits Solicitation Fraud?*, 33 AKRON L. REV. 577 (2000).

By painting a picture of the charitable works that donated funds will serve, fundraisers play directly upon the emotions of potential donors. Giving in response to such appeals is understandable, as support for persons less fortunate is a particularly noble and common human trait. Unfortunately, it is also a trait that may be exploited by those who would mislead donors about the uses intended for their contributions.

Professional fundraisers exploit the good-will of our citizens by picking the most popular charitable causes -- veterans relief, families of firefighters killed in the line of duty, terminally-ill children -- and enter into contracts with charities where the fundraiser receives an exorbitant percentage of the funds collected. Not surprisingly, these fundraisers are able to raise millions of dollars nation-wide.¹

¹ According to New York's most recent annual report on telemarketing, paid fundraisers received \$125.8 million, or 68.1% of the \$184.7 million raised in 588 telemarketing campaigns that targeted New Yorkers and others throughout the country. See NEW YORK STATE ATTORNEY GENERAL, PENNIES FOR CHARITY (2002), <www.oag.state.ny.us/charities/charities.html>. Of the New York campaigns, 73% resulted in payment to the fundraiser of at least 60%, and 25% resulted in the fundraisers' receiving over 80%. Accord, CONNECTICUT ATTORNEY GENERAL & CONSUMER PROTECTION COMMISSIONER, 2001 TELEMARETERS REPORT, <www.esib.org/atygen/mainlinks/tabindex8.htm> (of \$11,330,315 contributed by Connecticut residents in response to solicitations by paid telephone solicitors, \$7,424,324, or 65.5%, was paid to fundraisers); COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL, THE ATTORNEY GENERAL'S REPORT ON TELEMARETING FOR CHARITY (2002), <<http://www.ago.state.ma.us/charity/telrep01.pdf>> (65% of all charitable contributions went to paid fundraisers; of 445 campaigns, 48% involved payment to fundraiser of over 70% of contributions, and 24% involved payment to fundraiser of over 90% of contributions); NORTH CAROLINA DEPT. OF SECRETARY OF STATE, ANNUAL REPORT OF THE CHARITABLE SOLICITATION LICENSING SECTION (2001), <www.secretary.state.nc.us/CSL/reports.asp#> (\$66,554,046 raised in 437 campaigns, of which paid fundraisers retained \$39,815,490 or 60% of funds contributed). A review of all fundraising campaign reports filed with the Pennsylvania Office of the Attorney General from January 1988 through December 17, 2002, shows 2,249 separate campaigns with gross contributions of \$1,384,169,056; of that amount, only \$631,474,266, or 45.6%, went to the charities, with the professional fundraisers retaining the

An increasing number of fundraisers are soliciting funds by touting specific services that donations will serve under circumstances where, as in *Ryan*, the fundraisers have full knowledge that an overwhelming percentage of the funds will not be used to support those services. For instance, federal officials in New York recently indicted an individual who formed a charitable organization purportedly to assist families of New York City police officers killed in the line of duty. *USA v. Justin Patrick White*, No. 02 Cr. 1111 (KTD), *Indictment* at ¶ 1 (S.D.N.Y. filed Aug. 19, 2002). He hired telemarketers who solicited donations by expressly inviting potential donors to ease the hardships on surviving widows and children through financial contributions, knowing that less than five percent of the funds collected would be used in that manner. *Id.* at ¶ 26. In fact, the telemarketers' script sheets told them to end calls quickly once a potential donor asked about the percentage of contributions provided to the widows and children because, the supposed charity presumed, persons with such knowledge would have no interest in donating funds. *Id.* at ¶ 13.

The Vermont Attorney General recently settled a charities fraud dispute involving three charities and a fundraiser who solicited donations on the charities' behalf. The fundraiser had represented to potential donors that money was being raised for particular services -- such as to provide urgent pain medication to critically ill cancer patients, to help local paralyzed veterans, and to provide medical equipment for local disabled children -- but, in addition to other concerns, the fundraiser kept between 84 and 91 percent of all donations, and with respect to one supposed service, no money whatsoever was used in its support. Consent Decree and Stipulation, *State of Vermont v. Civic Development Group et al.*, No. 863-98CaC (Chittenden Super. Ct. filed Jan. 22, 2001).

remaining 54.4%, or \$752,694,740.

Similar circumstances can be seen in recently reported case law. For example, the opinion in *People v. Orange County Charitable Services*, 73 Cal. App. 4th 1054 (Cal. App. Ct. 1999), depicts the sordid tale of a individual who formed a network of charities in order to enter fundraising contracts with them and further subcontract the fundraising work to other entities. Under the contractual arrangements, the charities actually received 10 percent or less of the funds that were donated to the charities, despite the fact that donors were directly led to believe that their contributions would be spent on specific charitable services.

Charitable donors are particularly vulnerable to fraudulent misrepresentations by professional fundraisers because, in contrast to a purchase of a product or an investment, the donor does not receive anything in exchange for his or her donation. Thus, it is harder for the donor to verify the veracity of a particular solicitation. Justice Kennedy notes this situation in his concurrence to *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) where he argues that the State's interest in protecting charitable donors is greater than the State's interest in protecting the purchasers of products or services because "[t]he danger of a fraud arising from such sales is much more limited than from pure solicitation, because in the case of a sale the nature of the exchange tends to be clearer to both parties. *Id.* at 708.

With alarming frequency, persons are establishing fundraising businesses for the purpose of retaining 80 to nearly 100 percent of funds raised despite the fact that donors are led to believe that their donations will be used to help particular services performed by the charities the fundraisers purportedly seek to aid. To a somewhat lesser extent, the same is true with respect to so-called charities created for no purpose other than to serve as income sources for their creators, with nearly all donations being used for purposes other than the charitable services touted in the charities' fundraising efforts.

Citizens who have learned of these situations have begun complaining loudly for States to take action. The *amici* States have received a large number of complaints regarding solicitations to collect funds ostensibly intended to aid the victims of the September 11, 2001 terrorist attacks on the United States but which result in the fundraisers keeping substantially all of the donated funds. The Attorneys General of numerous States have begun the process of prosecuting those who mislead donors regarding the intended uses of their donations.

These complaints and prosecutions have apparently provoked the interests of the news media, which have begun to conduct independent investigations and to publicize deceptive charitable solicitation practices. For example, the front cover of a recent edition of the *St. Petersburg Times* ran a story entitled, "Charity 10%, firefighters union 90%." The article reported that, for the past five years, a Tampa, Florida firefighters union has used telemarketers to promote a camp for children burned by fire but spent less than 10 percent of the funds raised on that charitable service. The article begins:

The callers ask for donations for Camp Hopetake, a summer retreat where children burned by fire get a once-a-year escape from the rest of the world. The Tampa firefighters union raises more than a half-million dollars in the name of these children every year. But most of the money doesn't go to the kids. Last year, for every \$100 donated, less than \$10 went to Camp Hopetake and other charities. Ninety percent went to the union.

David Karp, *Charity 10%, firefighters union 90%*, *ST. PETERSBURG TIMES*, at 1A (Jun. 30, 2002). The article continues with a detailed report of the union's solicitation practices, including an account of how the union's telemarketers made potential donors believe that the union's costs were below average, when in fact they were not, by emphasizing that the union did not utilize professional fundraisers. See also, Richard

T. Pieniak, *1.2M Raised but WTC Kin Get Zip*, *NEW YORK DAILY NEWS*, at 4 (Sept. 9, 2002). This article describes how only 4% of all donations received in 2001 were given out for scholarships for families of New York firefighters.

The public benefits when it learns that all charitable fundraisers are not necessarily credible regarding how donations will be used or that asking specific questions regarding the intended uses of funds is advisable by allowing individuals to avoid making contributions to finance activities they do not wish to support. At the same time, declines in the public's perception of charitable solicitors' trustworthiness play a direct role in reducing the overall amount of charitable support. See *THE 21ST CENTURY DONOR: EMERGING TRENDS IN A CHANGING MARKET* (Epsilon & Bama Research Group, Ltd., Sept. 2002); see also Harvey Lipman, *Survey Identifies Troubling Trends for Nonprofit Organizations*, *CHRONICLE OF PHILANTHROPY*, at 13 (Nov. 14, 2002).² The public is thus collectively harmed to the extent that this public distrust dissuades charitable giving by those who would otherwise support legitimate, beneficent charities that provide tremendous services to society at large.

In order to ensure the public's ability to rely on the representations of charitable fundraisers, and thereby to permit the public to receive the full benefits of a thriving community of

² For additional survey results documenting the fragility of the public's trust in charities, see *PRINCETON SURVEY RESEARCH ASSOCIATES, INC., BBB WISE GIVING ALLIANCE DONOR EXPECTATIONS SURVEY, FINAL REPORT (2001) ("SURVEY")*, <<http://www.give.org/news/Donor%20Expectations%20Survey.pdf>>. According to the SURVEY, over a third of the adults polled believe that charities are less trustworthy than ten years ago (albeit a lower percentage than in 1993); 70% find it difficult to know whether a particular charity is legitimate; and three-fourths are of the opinion that at least 70% of a charity's expenditures should go toward programs as opposed to administrative and fundraising costs. See SURVEY at 10, 17 and 27.

charitable organizations, States must be able to hold charitable fundraisers legally responsible when they obtain donations through misrepresentations regarding how those funds will be used. Otherwise, fraudulent practices in the course of charitable fundraising will only continue to escalate, and the result will be an environment in which honest charities cannot maximize their ability to raise funds and provide charitable services, to the detriment of our entire society.

B. THE CONDUCT AT ISSUE IN RYAN SATISFIES THE COMMON LAW DEFINITION OF FRAUD.

If the statements allegedly made by the telemarketers in Ryan intentionally misled donors to believe that at least a substantial portion of their donations would actually be used to provide hungry, homeless, or injured Vietnam War veterans with food, shelter, and financial support, and if those donors relied on that understanding when they made their donations, then as asserted by the Attorney General of Illinois, the fundraiser committed fraud. The State of Illinois has given its Attorney General the authority to prosecute such conduct.

This result, under these facts, is not unique to the law of Illinois. Fraud is generally defined as a knowingly false representation of a material fact made with the intent to induce, and which does induce, another's detrimental reliance.³ *E.g.*, 37

³ Many jurisdictions impose liability for dishonest or misleading solicitations, but dispense with the common-law requirement of intent to defraud. *See, e.g.*, N.Y. EXECUTIVE LAW § 172-d(2). These laws were drafted this way in order to provide further protections to the donating public. The courts have upheld similar statutes in the consumer protection area on the theory that "defendants had created an atmosphere conducive to fraud." *People v. Compact Associates*, 22 A.D.2d 129, 131; 254 N.Y.S.2d 265, 267 (App. Div. 1964). Similar laws have been upheld by the federal courts.

AM. JUR. 2D *Fraud and Deceit* § 12 (1968); 37 C.J.S. *Fraud* §§ 2, 7 (1997); RESTATEMENT (SECOND) OF TORTS, § 525 (1977); *see also* RESTATEMENT (SECOND) OF TORTS, § 553 (defining liability for fraudulent misrepresentation inducing gift to third person). A statement's literal truth does not preclude the existence of fraud where the message taken as a whole carries a false implication of fact. 37 AM. JUR. 2D *Fraud and Deceit* § 42; 37 C.J.S. *Fraud* § 24; RESTATEMENT (SECOND) OF TORTS, § 529.

In addition to the common law claim of fraud, States have enacted statutory devices to protect the public from fraudulent activities. Statutes based on the Uniform Deceptive Trade Practices Act, adopted in a large number of States, routinely provide consumers general protection from unscrupulous business practices.⁴ Many States utilize charitable solicitation regulations to prohibit fraudulent acts in the specific context of charitable fundraising.⁵ Also, as in Illinois, States typically empower a state actor, such as the State's attorney general, to investigate suspected

See, e.g., *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 573-74 (7th Cir. 1989), *cert. denied*, 493 U.S. 954 (1989) ("[I]mposing a requirement that the FTC prove subjective intent to defraud on the part of the defendants would be inconsistent with the policies behind the FTCA and place too great a burden on the FTC.")

⁴ *See, e.g.*, FLA. STAT. § 501.201 *et seq.*; DEL. CODE ANN. tit. 6, § 2511 *et seq.*; IND. CODE § 24-5-0-5-2 *et seq.*; MICH. COMP. LAWS § 445.901 *et seq.*; OHIO REV. CODE ANN. § 1345.01 *et seq.*; S.D. CODIFIED LAWS § 37-24-6.

⁵ Florida's Solicitation of Contributions Act, for example, provides specific regulations regarding solicitors and is enforced by both the state's Attorney General and its Department of Agriculture and Consumer Services. FLA. STAT. Ch. 496. *See also, e.g.*, DEL. CODE ANN. tit. 6, § 2591 *et seq.*; IND. CODE § 23-7-8-7; KAN. STAT. ANN. § 17-1759 *et seq.*; MD. CODE ANN., BUS. REG. § 6-601 *et seq.*; MICH. COMP. LAWS § 400.271 *et seq.*; OHIO REV. CODE ANN. Ch. 1716; S.D. CODIFIED LAWS § 37-30-17.

fraudulent activity and, if appropriate, to initiate a suit in a *parens patriae*-type capacity for relief that may include an injunction, sanctions, or money damages.⁶

Under these common law and statutory actions, a fundraiser who tells a potential donor that his or her financial contribution will support a particular charitable service, and thereby represents that at least a substantial portion of the donation will be used in that manner, commits actionable fraud where the fundraiser knows that at least 85 or 90 percent of the funds will not be used to support those services.⁷ How that portion of the donation is in fact spent is *irrelevant* once it is established that this portion will not be used to support the service promoted to the donor at the time of the solicitation.

Accordingly, the fraud prosecution undertaken by the Illinois Attorney General in *Ryan* is representative of suits that could be brought in numerous states based on the same underlying conduct. As the *amici* States show in the following section, the Supreme Court of Illinois erred in determining that the First Amendment prevents such actions.

⁶ See, e.g., FLA. STAT. § 501.207; DEL. CODE ANN. tit. 6, § 2514; IND. CODE § 24-5-0.5-4; KAN. STAT. ANN. § 17-1773; MD. CODE ANN., BUS. REG. § 6-205; MICH. COMP. LAWS § 400.290; S.D. CODIFIED LAWS § 37-24-12 *et seq.*

⁷ A review of VietNow's most recent form 990 tax return (for the year ended June 30, 2001), reveals that, in actuality, only 3.5% of expenses were devoted to any program activity, and only 1.4% (\$48,793 of the \$3,540,451 raised), was used as grants to help needy veterans. VietNow's revenues, fundraising and program expenses are reported in its IRS Form 990 for 2000, which is published by the California Attorney General on the internet at <http://justice.hcdojnet.state.ca.us/charitys/default.asp>, and summarized by the Better Business Bureau Wise Giving Alliance at http://www.give.org/reports/care2_dyn.asp

II. THE ILLINOIS SUPREME COURT INCORRECTLY HELD THAT THE FRAUDULENT ACTS CHARGED BY THE ILLINOIS ATTORNEY GENERAL ARE IMMUNIZED BY THE FIRST AMENDMENT.

In *Ryan*, the Illinois Supreme Court reached its conclusion by relying upon a trilogy of this Court's cases culminating in *Riley v. National Federation of the Blind, Inc.*, 487 U.S. 781 (1988). That reliance was misplaced, as the *Riley* trilogy involved materially different circumstances and, indeed, the Court affirmatively stated in those cases that States may prosecute fraud in the context of charitable solicitations.

Each case in the *Riley* trilogy addressed concerns that are not present in *Ryan*. The first case, *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), involved a state law that prohibited certain solicitations by any charitable organization that did not use at least 75 percent of its receipts for "charitable purposes." The second, *Secretary of State of Maryland v. Joseph H. Hutson Co.*, 467 U.S. 947 (1984), involved a similar provision, except that it exempted charities that were effectively prevented from raising contributions. In both cases, the Court held that the asserted justification for the statutes -- protecting the public from fraud -- were insufficient to overcome the charities' First Amendment right to speech. The essence of the Court's concern was the impermissibility of categorically equating fraud with a particular level of expenses, given the wide range of interests served and activities undertaken by various charities.

Riley concerned a state law that presumed the existence of fraud once a fundraiser's fees exceeded 35 percent, although the presumption could be rebutted. The law further required fundraisers to inform potential donors of the percentage of donations the fundraiser turned over to charities in the preceding 12 months. This Court held that both aspects violated the First Amendment. The presumption was invalidated because its

premise — that use of more than 35 percent of donations towards fees alone suggested fraud — was flawed and because noncommercial speakers should not bear the burden of rebutting a presumption that their speech is unlawful. The Court rejected the percentage disclosure because compelling that disclosure did not meaningfully inform donors about the uses that donations would serve and only applied to professional fundraisers; thus, the requirement was not narrowly tailored to meet the state's goal of disclosing how much of a donation would actually benefit a charity.

Though the *Riley* trilogy of cases invalidated statutes that spoke to how charitable donations were utilized, those cases do not support the proposition that the percentage of funds retained by a fundraiser is beyond examination where a fundraiser in fact represents the uses to which donations will be put. Yet it was in this sense that the Illinois Supreme Court misinterpreted this Court's precedents. The Illinois court reasoned that the fundraiser in *Ryan* would not have committed fraud had it disclosed the percentage of funds it would retain, and the court read the *Riley* trilogy to forbid States from imposing liability for the failure to disclose such information.

The Illinois Supreme Court's interpretation is unsupported. At most, this Court's holdings preclude the use of certain percentages as a complete and independent basis for presuming fraud in charitable solicitations. By comparison, the Illinois Attorney General alleged in *Ryan* that the fundraiser had made misrepresentations regarding how donated funds would be used and that, among other things, the percentage of funds retained by the fundraiser pursuant to its contract with the charity demonstrated that the fundraiser's representations were false. Those misrepresentations, together with the specific circumstances of how donated funds were intended to be used and were in fact used, constitute additional facts that take this case far outside the circumstances at issue in *Riley*, *Munson*, and *Village of Schaumburg*.

The Illinois Supreme Court also ignored this Court's clear statements in those cases that States are free to prosecute fraud when it occurs in the context of charitable solicitations. *Village of Schaumburg* expressly stated that "[f]raudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." 444 U.S. at 537. In *Riley*, the Court stated:

[W]e do not suggest that States must sit idly by and allow their citizens to be defrauded. North Carolina has an antifraud law, and we presume that law enforcement officers are ready and able to enforce it.

487 U.S. at 795. In this case the Illinois Attorney General attempted to follow these pronouncements by bringing a fraud prosecution based on specific, completed events.

In holding that the *Riley* trilogy prohibited that prosecution, the Illinois Supreme Court did not find that the facts alleged by the attorney general failed to show fraud. Instead, the state court simply held that the First Amendment immunized the telemarketers against prosecution. The decision below, if upheld, would support the argument that even a major inconsistency between express or implied representations and actual use of donations is immune from challenge on grounds of fraud as long as the misrepresentations are somehow related to high fund raising costs. If this view were to prevail, nothing would prevent a paid fundraiser from telling prospective donors that their contributions will be used for denominated purposes when in fact, year after year, 85, 95 or 99 percent of those contributions are retained by the fundraiser—even if it is clear that donors were in fact misled by the statements.

The most disturbing implication of the Illinois Supreme Court's decision is that the "fundraising cost" argument may arguably trump any evidence that a state can offer at trial. Here, for instance, the Attorney General was not allowed to introduce evidence of a number of factors relevant to the existence of fraud:

the totality of the fundraiser's representations to donors⁸; the extent to which solicitations had (or lacked) informational or persuasive content⁹; whether and how telefundraisers departed from prepared scripts; how the solicitation message was understood by donors¹⁰; and the historic relationship between the fundraiser and the officers of the charity. Yet the development of a full factual record is essential to fair consideration of any First Amendment as-applied defense such as that involved here. See *Bartnicki v.opper*, 532 U.S. 514, 524 (2001).

⁸ For instance, Respondents sent donors an invoice stating that a "substantial portion" of the proceeds would be spent on program service. See State of Illinois' Complaint, Ex. F. [R.C. 113]

⁹ The court below was seemingly impressed with the fact that the fundraising contract called for a direct public awareness campaign on behalf of the charity. In light of the recognition in *Riley* that charities may reap substantial benefits from the dissemination of information, such provisions are regularly inserted in fundraising contracts. However, the inclusion of such a provision is not conclusive evidence that such a campaign is actually conducted, and the State of Illinois was not given the opportunity to document the non-existence or insignificance of such a campaign. Indeed, VietNow's IRS Form 990 for the year 2000 shows no such "program awareness" educational expense, casting doubt on the validity of the educational mission associated with the fundraising activity. See *supra*, note 7.

¹⁰ The Illinois Attorney General offered 44 affidavits of donors who believed that they were misled into contributing. [Joint Appendix at 107-94]

III. THE DECISION BELOW REFLECTS AN IMPROPER PERCEPTION THAT ALL FUNDRAISING EFFORTS CONSIST SOLELY OF NON-COMMERCIAL, FULLY PROTECTED SPEECH UNDER THE FIRST AMENDMENT.

In considering the specific facts presented by Illinois' appeal, the Court should revisit certain assumptions underlying its decision in *Riley* and inquire into whether these have proven to be accurate in light of the experience of State regulatory and law enforcement agencies. In particular, the Court should consider whether, in some cases, paid fundraiser solicitations on behalf of charities can be sufficiently devoid of informative and persuasive content, and so directed at profiting the fundraiser, as to take on the character of commercial speech.

In *Riley*, the Court sought to protect the "legitimate efforts of professional fundraisers to raise money for the charities they represent." 487 U.S. at 799. The Court paid particular attention to "the realities faced by small or unpopular charities, which must often pay more than 35% of the gross receipts collected to the fundraiser due to the difficulty of attracting donors." 487 U.S. at 793. The Court also noted that fundraising costs may be high because a charity chooses to receive a large sum as measured by the dollars donated rather than the percentage of donations remitted, or because a campaign is "designed to sacrifice short-term gains in order to achieve long-term, collateral, or non-cash benefits." 487 U.S. at 792.

The scenarios posited by the Court do occur. However, the States have witnessed another phenomenon in the field of charitable fundraising. A significant number of campaigns regulated by the States have turned out to involve charities that are not new or discernibly unpopular, on whose behalf fundraisers have had little trouble attracting donors, but which, year after year, have contracted with professional fundraisers who retain the

lion's share of the contributions made.¹¹ Indeed, such campaigns

¹¹ State records reflect percentages to many charities that are low year after year. For example, the New York Attorney General has examined 87 instances in which charities paid 75% or more of their gross contributions to the same professional fundraiser in each of 5 or more years during the period 1994-2001. See NEW YORK STATE ATTORNEY GENERAL, PENNIES FOR CHARITY (1995-2002), <www.oag.state.ny.us/charities/charities.html>. In 48 (55.2%) of these instances, the charity paid the same or a higher fundraising percentage in the most recent year than it paid in the initial year, and in 31 (35.6%) of these instances, the charity never reduced its fundraising percentage after the first year. Similarly, in Connecticut, of 110 in-state charities and public safety organizations identified from public filings with the Connecticut Attorney General's Office that conducted fundraising campaigns in three or more years during the period 1996-2001, 59 (53.6%) paid the same or a higher fundraising percentage in the most recent year than in the initial year, and 49 (44.5%) never reduced their fundraising percentage after the first year. The following are three of many specific examples from campaign reports on file with the States: AMVETS, American Veterans of WWII, Korea and Vietnam, utilizing the same professional fundraiser, American Trade and Convention Publications, reported gross contributions for the years 1999 through 2001 of \$2,758,368, \$4,443,094 and \$4,819,701, respectively, but received only \$500,000 for each reporting period, revealing steadily declining receipts as a percentage of gross contributions (18.1%, 11.3% and 10.4%, respectively), in spite of the fact that gross contributions increased each year (on file with Office of Minnesota Attorney General); American Health Assistance Association, utilizing Public Interest Communications for the years 1999 through 2001, reported gross contributions of \$261,356, \$269,474, and \$240,775, respectively, but receipts of only 17.7%, 2.8% and 1.7%, respectively (*id.*); Cancer Fund of America, utilizing Civic Development Group, reported gross contributions from September 2000 through September 2002 of \$1,008,102, \$890,549 and \$1,289,908, respectively, but receipts of only 12%, 12% and 11.6%, respectively, with the lowest percentage occurring in 2002, again the year in which gross contributions were highest (on file with Office of Pennsylvania

have stood on its head the "more than 35%" figure alluded to in *Riley*, by directing to the fundraiser 85% or more of donations on a repeated basis.¹² Moreover, in many campaigns, there has been virtually no public education or advocacy, only a passing, *pro forma* reference in a script to the charity and its mission.¹³

Attorney General).

¹² See, *supra*, note 1.

¹³ In general, telephone solicitation scripts begin by identifying the fundraiser and nonprofit client and end with a request for a donation. In between, something may be stated as to the organization's activities, mission, beneficiaries, etc., but in many instances, the informational and persuasive content is minimal. For example, in this respect the script for one of the fundraisers for VietNow states only, "The reason for the call is every year we help our disabled veterans in the area. VietNow helps homeless and disabled veterans in the State of Oregon and throughout the nation." Model script for Charity Services, Inc. (2001-2002) (on file with Oregon Department of Justice). Note that the script offers no explicit information regarding the plight of veterans, how an interested solicitor may help (beyond giving money), or even how the charity will assist veterans. For some of the many examples of publicly-accessible fundraising scripts that contain similarly perfunctory information, see Recce Brothers, Inc., on behalf of National Care Giving Foundation (2001-2003); Four Winds Marketing on behalf of Oregon Chapter of National Federation of the Blind (2001); Gatti Productions on behalf of Professional Fire Fighters of Grants Pass (2002); Legacy Telemarketing Corp. on behalf Lane County Chapter of American Red Cross (2000), and Suihkonen & Associates, Inc., on behalf of Douglas County Shrine Club (2002-2003) (all on file with Oregon Department of Justice); United Funding Organization, Inc., on behalf of Police Protective Fund (2000-2001) and Callan Publishing, Inc., on behalf of Virginia Association of Chiefs of Police (2001-2002) (both on file with Virginia Department of Agriculture & Consumer Services); All-Pro Telemarketing Associates Corp. on behalf of Children's Charity Fund (filed 2001); Fundraisers, Inc., on behalf of Coalition of Police & Sheriffs (filed 2002); TCI America,

Such fundraising campaigns raise an important issue for this Court: that of articulating the line between charitable speech to which the fundraiser's commercial involvement is ancillary—which is fully protected under the First Amendment—and commercial speech in which the charity is only a minor player. In *Riley*, the Court reasoned that the activity of professional fundraisers does not retain its commercial character when it is "inextricably intertwined" with otherwise fully protected speech. 487 U.S. at 796. There the Court declined to apply a lower degree of constitutional scrutiny to the commercial portion of the solicitation and a higher degree to the charitable portion. The Court focused instead on the overall character of the speech:

Our lodestars in deciding what level of scrutiny to apply [to the compelled disclosure] must be the nature of the speech taken as a whole and the effect of the [mandated disclosure] thereon. . . . Regulation of a solicitation "must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech . . ."

Id. (quoting *Schaumburg*, 444 U.S. at 632) (emphasis added).

State regulatory and law enforcement action has shed light on campaigns where the nature of the speech "taken as a whole" is arguably commercial, since year after year the solicitations have included only the barest reference to informative, much less persuasive, speech, and the vast majority of the donated dollars has gone to the fundraiser for reasons other than "getting one's message across." As the Court noted in *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 475 (1989), "communications can constitute commercial speech

Inc., on behalf of North Haven Fire Fighters Assn. (filed 2002), and East Coast Marketing Group, on behalf of East Lyme Police Union (filed 2002) (all on file with Office of Connecticut Attorney General).

notwithstanding the fact that they contain discussions of important public issues" (quoting *Bolger v. Youngs Drug Products, Inc.*, 463 U.S. 60, 67-68 (1983)). A campaign where 85 to 90 cents of every dollar contributed has gone to a paid fundraiser and the charity-related speech has been limited to a request for a contribution to support a given cause should be susceptible of being considered commercial speech for purposes of First Amendment analysis.

It should be stressed that the States seek no presumption of illegality here, no rule of thumb derived from the percentage split between fundraiser and charity. Rather, they wish to reaffirm their historic and Constitution-compatible role of protecting their citizens from fraud on a case-by-case basis. As the Court in *Riley* stressed, "we do not suggest that States must sit idly by and allow their citizens to be defrauded. [Each state] has an antifraud law, and we presume that law enforcement officers are ready and able to enforce it." 487 U.S. at 795. In undertaking such enforcement actions, however, the States need to be free to present in court all of the facts surrounding the fundraising campaign. They must have the opportunity to show that although a campaign is conducted in the name of a charitable organization, its primary and ongoing purpose is to benefit the fundraiser, with little in the way of informative or persuasive speech offered to the public; and in that case, a lower level of constitutional protection should apply. Finally, in such circumstances, depending upon the specific evidence presented, the fundraiser's unqualified representation, express or implied, that the donor's money will be used for a specific purpose—when in fact almost all of the funds will go to the fundraiser—should be sufficient to support a claim of fraud without running afoul of the First Amendment.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the decision of the Supreme Court of Illinois.

Respectfully submitted,

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AH # 3



Senate Judiciary Committee
February 4, 2003
REGARDING SENATE BILL 2255

Chair Traynor and members of the Judiciary Committee. My name is Jim Billey. I am a member of the AARP North Dakota, Government Affairs Committee. I appreciate this opportunity to testify on Senate Bill 2255 regarding the establishment of a telemarketing do-not-call list for North Dakota. AARP has been very active in working on telemarketing issues, and believes that establishment of a do-not-call list is the next logical step toward protecting consumers against unsolicited calls into their homes.

When Congress passed the Telemarketing and Consumer Fraud and Abuse Prevention Act in 1994, the legislative history cited privacy as one of the protections Congress sought to establish under the Act. However, the Telemarketing Sales Rule that was promulgated by the Federal Trade Commission in 1995 only gave consumers the right to give a do-not-call message to telemarketers on an individual basis. In response to the ineffectiveness of this provision, and the enormous public outcry against unwanted telemarketing, the FTC recently announced it was creating a national do not call registry. Consumers will have the opportunity to register their names with the Commission, and telemarketers will have to purchase this list, striking any of the names on the list from their directories. If they do call anyone on the list, the FTC has the authority to prosecute the telemarketer for violating the law. However, the FTC has *no* jurisdiction over certain industries, such as common carriers (e.g., telephone companies,) banks, or insurance companies, so state law is crucial to fill in this gap in protection. Further, only state law can control intrastate telemarketing calls, making state action in this area essential. It is anticipated telemarketers will

107 West Main Avenue, Suite 125 | Bismarck, ND 58501 | 701-221-2274 | 701-255-2242 fax | 1-877-434-7598 TTY
James G. Parkel, President | William D. Novelli, Executive Director and CEO | www.aarp.org

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10/21/03
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open call centers in states with no do not call regulation to avoid the FTC's new rule. In this case, only state law can stop unwanted calls.

A statewide list is a more effective method of preventing unwanted sales calls than requiring consumers to give an individual message to each telemarketer *after* they have already called. The telemarketing industry often makes the argument that consumers could screen calls through use of a caller ID system or an answering machine. We believe this is an unacceptable argument. Why should consumers be compelled to incur the inconvenience and expense of screening calls that are unsolicited and unwanted? Another argument made by the industry is that do-not-call lists are an infringement on their first amendment rights. This is clearly not the case. Commercial speech is regulated in myriad ways; otherwise, there could be no laws restricting false advertising or inadequate warning labels. Do-not-call lists are a necessary privacy protection for consumers who do not want unsolicited intrusions into their homes.

AARP commends the sponsors for introducing SB 2255 to protect residents of North Dakota from unwanted telemarketing calls. These laws are very popular in the states that have enacted them. In essence they protect not only consumers from unwanted calls, but also save businesses the time and expense of calling consumers who do not want to hear from them. As of December 2002, twenty-six states have Do Not Call laws (Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Minnesota, Missouri, Montana, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Wisconsin, and Wyoming.) In Michigan and New Jersey, bills have passed the legislature and are awaiting the Governors' signatures. AARP is currently working actively in several states to improve or defend Do Not Call laws (Alaska, Idaho, Kansas, Maine, Michigan, Missouri, Montana, Nevada, New Jersey, North Dakota, Oklahoma, South Carolina, and South Dakota.)

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When 1,000 Minnesota adults were questioned, researchers found that 95% of state residents strongly (89%) or somewhat (6%) supported a new state law that gives people the option of placing their name and phone number on a Do Not Call list. AARP members strongly (81%) support legislation in South Dakota that would create a "Do Not Call" list to keep telemarketers from calling them. Another 13% would somewhat support it. Only 3% are opposed to such a law.

While AARP recognizes the need for balancing the interests of business and consumers, do-not-call lists are only effective if they actually prevent unwanted telemarketing calls. Therefore, it is necessary to keep exemptions to a minimum. We must make note that Minnesota found the exemption regarding calls to make face-to-face appointments to significantly weaken their law. We believe the current language in this area provides a reasonable accommodation for business and consumers.

We support the exemption for North Dakota charitable organizations using their own employees or volunteers to make calls to North Dakota citizens. However, North Dakota citizens have legitimate concerns about charitable organizations using paid professional fundraisers for charitable fundraising in which the majority (often ninety-five percent or more) of the funds donated may go to the paid professional fundraiser and not to the charity. Charities that do not use their own employees or volunteers should be required to comply with the law. Overall we believe this legislation provides important protections for consumers and we would not favor further exemptions that would compromise the integrity of this bill.

Again, AARP thanks you for this opportunity to present our comments on this bill, and would be happy to answer any questions you may have about our position.

Att #4

Tuesday, February 4, 2003

Senate Judiciary Committee
SB2255

Chairman Traynor and Committee Members:

My name is Laura Sweep, and I'm the circulation manager of the Bismarck Tribune. I appear today to ask you to consider revisions to this bill.

We have concerns with SB2255 as it is currently written as it leaves some definitions vague and calls for certain procedures that we feel would be detrimental to business without diminishing the irritation factor this bill seeks to address. We would ask you to consider the following revisions:

- In defining the "established business relationship (51-26-01, No. 4)," we would request language that includes a consumer's request or written consent to be telemarketed regardless of whether a financial transaction based on purchase, rental or lease has occurred.

For instance, a standard practice in our industry is to offer free trial subscriptions to non-subscribers, with the full understanding that the recipient will receive a solicitation near the end of the term to become a regular subscriber. The consumer has requested the free trial subscription and thereby consented to be telemarketed, yet no financial transaction has occurred. There is language in No. 7(a) that allows "communication" with a consumer's "prior express written invitation or permission," but our concern would be that that language doesn't clearly fit the above situation.

- We would request that identification by the caller (51-26-06) not require the caller to identify his or her city and state of location, but rather identify the city and state of location of the business on whose behalf the telemarketer is calling. It is standard practice to employ outside vendors to handle calling for our business, and identifying the city and state they are calling from only injects confusion into the call and does nothing to diminish the number of calls a consumer will receive or provide the consumer with information necessary to make a buying decision.

- The fee for acquisition of the list (51-26-09, No. 6) is one of the highest in the country for a Do Not Call list, which, arguably, would be one of the shortest in the country. In Minnesota, for instance, the acquisition fee is \$125 a quarter for the first year (\$500 annually), \$90 a quarter for the second year (\$360 annually) and \$75 a quarter (\$250 annually) after that. In New York, a state with the potential for many more names on the list, the cost is \$800 a year. A fee in line with Minnesota's seems more appropriate.

- We have a concern that the civil penalties (51-26-15, 51-26-17) allowed in this bill are too high given that they will be paid directly to the complainant if he or she is successful and will entice consumers to "set up" telemarketers in order to collect the fee.

- Allowing the plaintiff to bring action in the consumer's county of residence (51-26-22), while convenient and consumer friendly, may make it financially prohibitive for telemarketing companies or businesses on whose behalf they are working to defend themselves, even in cases where the action is clearly defensible.

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5

**Testimony Presented on Behalf of the
North Dakota State Lodge, Fraternal Order of Police
In Opposition to Senate Bill 2255**

I am Mike Geiermann, an attorney from Bismarck, and I represent the North Dakota State Lodge, Fraternal Order of Police. The Fraternal Order of Police is the largest and most commanding voice on behalf of our nation's law enforcement officers. The North Dakota State Lodge consists of four lodges representing approximately 600 police officers and other law enforcement professionals. The North Dakota State Lodge is presenting this testimony in opposition to the passage of Senate Bill 2255. As a nonprofit, the State Lodge conducts fundraising campaigns to raise resources to support lodge activities. Those activities include attendance by FOP members at training conferences and seminars throughout the country to improve safety and law enforcement techniques used by members. While this practice has been ongoing for a number of years, this practice is more important than ever as the Attorney General has eliminated his training budget for the 2003-2005 biennium. In addition, money raised through fundraising by FOP goes to support programs which establish for youngsters a very positive image for law enforcement officers. These programs include Shop with a Cop, which allows underprivileged children to obtain Christmas gifts, the Bike Drive which allows underprivileged children to obtain bicycles, as well as Special Olympics, Easter Seals, Red Cross and Salvation Army. The only way these activities can be undertaken is through professional fundraisers. Police officers and members of the FOP do not have the time nor expertise to conduct these activities. Furthermore, FOP lodges cannot rely upon volunteers to do fundraising.

If Senate Bill 2255 is passed and enacted into law, it will have a devastating effect on the FOP's ability to raise funds for training and to support these local charities. The following are specific objections that the FOP has to the passage of Senate Bill 2255:

- Hundreds of North Dakota's nonprofit and charitable organizations rely on the expertise and operational efficiencies of professional fundraisers to conduct their fundraising campaigns and communicate their message. Telephones are the most practical and cost effective interactive medium for these organizations. Direct, face-to-face, solicitation is logistically impossible and direct mail programs are generally cost prohibitive.

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- Successful and cost effective fundraising requires basic resources and specialized knowledge that many nonprofit and charitable organizations lack. Most nonprofits cannot duplicate the efficiencies gained by using professional fundraisers. A professional fundraising capability permits the nonprofit to focus on its mission rather than spending time and money purchasing and maintaining expensive equipment and hiring, training and managing necessary personnel.
- It is estimated that the proposed state "do-not-call" program will eliminate telephone fundraising to approximately 50% of the potential contributors to nonprofit and charitable organizations in North Dakota. Accordingly, public financial support of the state's nonprofit and charitable community will be reduced substantially.
- The proposed state "do-not-call" program will place ND State Lodge, FOP, and nonprofit organizations at a competitive disadvantage against larger, out-of-state national nonprofits who have the resources to conduct in-house charitable solicitations.
- Nationwide, only a small percentage of the telephone calls to consumers are made on behalf of nonprofit or charitable organizations. Based upon recent studies of the Direct Marketing Association, more than 80% of the calls received by consumers are for commercial purposes to sell goods or services. As such, the interests of consumer privacy can be more than adequately served by limiting the "do-not-call" program to calls for commercial purposes only. Such a provision would strike a proper policy balance between the interests of consumer privacy and the rights of nonprofits to seek public support.
- The proposed do-not-call program is unconstitutional because it violates the First Amendment rights of the nonprofit community. The United States Supreme Court has repeatedly recognized that fundraising by professional fundraisers on behalf of nonprofit and charitable organizations is fully protected speech. As applied to nonprofit fundraising, the do-not-call program is constitutionally deficient because it is a content based restriction on speech, a prior restraint on fully protected speech, does not employ the least restrictive means available to further a legitimate state interest and is not narrowly tailored to further a compelling government interest.

- In the last few years, several states have adopted do-not-call list statutes. The overwhelming majority of these states have been sensitive to the constitutional and other issues involved and have enacted legislation that either specifically exempts nonprofits from the do-not-call requirements or limits statutory coverage to commercial calls made to private citizens for the purpose of selling goods and services. These states include Alabama, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Maine, Minnesota, Missouri, New York, Oklahoma, Pennsylvania, Texas, Vermont, Wisconsin and Wyoming. Both the Federal Trade Commission and the Federal Communications also have exempted calls on behalf of nonprofits from their respective do-not-call list regulations.

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AH #6

February 4, 2003

SENATE JUDICIARY COMMITTEE
SB 2255

CHAIRMAN TRAYNOR AND COMMITTEE MEMBERS:

My name is Jack McDonald. I'm appearing here today on behalf of the North Dakota Newspaper Association (NDNA). NDNA opposes the bill as introduced, despite its distinguished sponsorship and lineage, and respectfully request that it be amended.

We believe there should be an exemption for newspapers. Several states already provide this exemption to newspapers, including North Dakota under present law. Alabama, Arkansas and Florida exempt newspapers from the states' do not call (DNC) laws. Indiana exempts newspapers if they use their own employees for telemarketing, while Alaska, Idaho, Nevada, Oklahoma, Oregon and Washington are exempt from certain telemarketing regulations. The Louisiana Public Service Commission exempts newspapers.

Daily newspapers depend heavily on telemarketing. Weeklies also depend on periodic telemarketing campaigns. Without an exemption they would be penalized and less able to serve their local communities. Overall, this could have a negative economic impact on North Dakota businesses.

According to national newspaper research, telemarketing is the most efficient means for newspapers to gain circulation. 57.8% of subscriptions are gained through telemarketing efforts. If a newspaper is penalized in its subscription efforts, it could be a penalty on society.

Newspapers are educational tools for North Dakotans. They provide information on local governments, proposed legislation and state agency regulations. Newspapers help citizens make informed decisions on issues ranging from school board elections to grocery store purchases.

These new restrictions hinder a publisher's constitutional right to distribute newspapers and therefore violate quite possibly violate First Amendment.

Newspapers are responsible telemarketers. They have worked hard in North Dakota to comply with state and federal telemarketing laws and regulations, not only due to legal requirements, but also because good telemarketing practices make business sense. Unlike many other telemarketers, a newspaper bearing a community's name and reporting its news must engage in responsible marketing, or risk displeasing subscribers and prospective subscribers. Newspapers must respect local consumers. Indeed, newspapers' most important asset is their reputation for integrity and civic responsibility.

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Operator's Signature

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In addition to market forces, industry culture distinguishes newspapers from those telemarketers that do not invest in forming long-term relationships with consumers. The majority of newspapers are local businesses deeply rooted in the communities in which they publish, circulate and market. Newspapers cannot cover local news without becoming closely involved in local communities and their concerns. Close ties between a newspaper and the local community create compelling incentives to engage in responsible telemarketing practices.

NDNA members generally find that people who have recently moved into a community often appreciate the opportunity presented by a telemarketing call to subscribe to a local newspaper. Others welcome the calls as reminders to renew a subscription. In addition, consumers request placement on newspapers' company-specific "do not call" lists at relatively low rates. Consumer response to newspaper telemarketing demonstrates that these calls often provide a convenience and suggests that many consumers are willing to receive calls from newspapers when they would object to telemarketing from other businesses.

If you have any questions, I will be happy to try to answer them. THANK YOU FOR YOUR TIME AND CONSIDERATION.

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2255
Att #7

My name is Brenda Dissette, Executive Director of the ND Association of Nonprofit Organizations. Our organization represents over 270 charitable nonprofit organizations throughout the state. Charitable nonprofit organizations in North Dakota provide essential services to people and communities; they give citizens opportunity to volunteer, educate the public on important issues; they can leverage government funds with private donations.

SB 2255 is a bill that will protect consumers from fraudulent individuals and or businesses and exempts charitable nonprofit organizations from the "do not call" list. However, you will be hearing from some charitable nonprofit organizations in our state that do not have the staff or the volunteers to solicit donations over the telephone and rely on companies to assist them with their fundraising.

Recently, the Federal Trade Commission has dealt with this same issue; and exempted charitable nonprofit organizations from the proposed legislation. Charitable nonprofit organizations that utilize professional fundraisers will have a negative impact on charitable nonprofit organizations in North Dakota. Events in our country over the last year or so have effected charitable nonprofit organizations and their ability to serve their constituents; federal, state and foundation funding has dropped since 9/11, with the demand of more services by charitable nonprofits.

The ND Association of Nonprofit Organizations believes that the proposed legislation should be revised to include charitable nonprofit organizations registered in the state of North Dakota who depend on paid telemarketers.

Thank you for your time.

Brenda Dissette, Executive Director

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Brenda Dissette
Operator's Signature

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Date

AH # 8

SB 2255

Presented by: Illona Jeffcoat-Sacco
Director, Public Utilities Division
Public Service Commission

Before: Senate Judiciary Committee
Honorable John T. "Jack" Traynor, Chairman

Date: 4 February 2003

TESTIMONY

Mr. Chairman and committee members, I am Illona Jeffcoat-Sacco, director of the Public Service Commission's Public Utilities Division. The Public Utilities Division administers the Commission's jurisdiction over telephone, gas and electric public utilities in North Dakota. The Commission asked me to appear here today to support SB 2255.

The Commission handles many consumer contacts and complaints that are in reality telemarketing complaints. Quite often the Commission cannot help these consumers except to inform them about how the telemarketing industry works, the extent to which it is regulated and how, as consumers, they can exercise some measure of control over the telemarketing that affects them. Frankly, without a statute such as the one proposed here, consumers have very little control over telemarketing and little ability to impact how that telemarketing will affect them.

SB 2255 can change that, giving consumers the ability and means to exercise some measure of control over much of the telemarketing that may affect them. The "do not call list" concept will be one very good tool in every consumer's telemarketing toolbox. We believe this bill is an

Deanna O'Neil
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important and necessary step toward achieving a better balance between consumer and telemarketing interests.

Thank you for allowing me to appear here today. This completes my testimony. I would be happy to answer any questions you may have.

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HH #9

TESTIMONY OF MARILYN FOSS (FOR MCI WORLD COM) ON SB 2255

Mr. Chairman, members of the committee, I am Marilyn Foss. This morning I am appearing to testify on behalf of MCI World Com. MCI World Com is a company which uses telemarketing to sell its products. Indeed, telemarketing is the vehicle which enabled the company to become a national player in the telecommunication industry. However, the company recognizes many consumers are frustrated by what they see as an inability to avoid unwanted telemarketing calls. People who don't buy products and services as a result of telemarketing don't want us to call them. The catch is, we don't want to call them either. In past years I have appeared before this committee to tell you we think the best way to address the problem of unwanted calls is the use of a centralized, national do not call list and to make sure that you know there is such an animal in the form of the Direct Marketing Association's free registry for telephone, direct mail, and Email. From personal experience I can tell you that registration on the registries drastically cuts down on unwanted communications. Now, the telephone solicitations I receive are for political contributions, charitable contributions, and opinion surveys. What I can't tell you is why more people don't use the DMA services because they work.

Nonetheless, pressure for a government solution in the form of state specific Do Not Call lists continues. Our resistance to the state specific lists is based completely on cost and administrative difficulty. It's just expensive and difficult to follow 50 slightly different laws and processes for DNC lists, calling times, identification requirements, etc.

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If SB 2255 is enacted, MCI World Com will do its best to comply with its requirements. However efforts to develop a workable national DNC list are underway at both the FTC and the FCC. If a national government sponsored DNC list is implemented but we would like to be able to use that central, national list as the DNC data base, instead of being required to use the state specific North Dakota list and the national list. SB 2255 does permit the Attorney General to submit North Dakota names to the national list. This will be convenient for North Dakota customers. We think it is but one short step further to permit companies to comply with North Dakota law by obtaining the national DNC list from the federal agencies once an operating national DNC list is available and we would be happy to work with the AG's office to develop amendments to accomplish that end.

Thank you.

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March 10, 2003

HOUSE JUDICIARY COMMITTEE
SB 2255

CHAIRMAN DEKREY AND COMMITTEE MEMBERS:

My name is Jack McDonald. I'm appearing here today on behalf of the North Dakota Newspaper Association (NDNA). NDNA recognizes the reasoning behind this bill, even though it believes it goes a bit too far in restricting North Dakota businesses in their efforts to promote their own businesses. We respectfully request two amendments to ease the local burden somewhat. We've discussed these with the Attorney General's office, and that office has no objection.

Newspapers often send out free trial subscriptions to interest persons in subscribing to the newspaper. These free trial subscriptions are usually requested by the potential subscribers, but under the present bill they would not be considered as "prior relationships" since they weren't paid for. Our first amendment would cover these situations.

Our second amendment would cover instances when persons fill out coupons or registration blanks asking for additional information about certain products. By doing so, we believe these persons have given their consent and our amendments would just clarify this.

Newspapers are educational tools for North Dakotans. They provide information on local governments, proposed legislation and state agency regulations. Newspapers help citizens make informed decisions on issues ranging from school board elections to grocery store purchases.

Newspapers are responsible telemarketers. They have worked hard in North Dakota to comply with state and federal telemarketing laws and regulations, not only due to legal requirements, but also because good telemarketing practices make business sense. Unlike many other telemarketers, a newspaper bearing a community's name and reporting its news must engage in responsible marketing, or risk displeasing subscribers and prospective subscribers. Newspapers must respect local consumers. Indeed, a newspaper's most important asset is its reputation for integrity and civic responsibility.

In addition to market forces, industry culture distinguishes newspapers from those telemarketers that do not invest in forming long-term relationships with consumers. The majority of newspapers are local businesses deeply rooted in the communities in which they publish, circulate and market. Newspapers cannot cover local news without becoming closely involved in local communities and their concerns. Close ties between a newspaper and the local community create compelling incentives to engage in responsible telemarketing practices.

(OVER)

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NDNA members generally find that people who have recently moved into a community often appreciate the opportunity presented by a telemarketing call to subscribe to a local newspaper. Others welcome the calls as reminders to renew a subscription. In addition, consumers request placement on newspapers' company-specific "do not call" lists at relatively low rates. Consumer response to newspaper telemarketing demonstrates that these calls often provide a convenience and suggests that many consumers are willing to receive calls from newspapers when they would object to telemarketing from other businesses.

Therefore, we respectfully request your favorable consideration of the amendments listed below. If you have any questions, I will be happy to try to answer them. THANK YOU FOR YOUR TIME AND CONSIDERATION.

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL 2255

✓ Page 1, line 18, after "rental," insert "free trial newspaper subscription"

✓ Page 2, line 9, after "written" insert "request, consent,"

Renumber accordingly

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HOUSE JUDICIARY COMMITTEE
DUANE DEKREY, CHAIRMAN
MARCH 10, 2003

TESTIMONY BY
PARRELL D. GROSSMAN
DIRECTOR, CONSUMER PROTECTION AND ANTITRUST DIVISION
OFFICE OF ATTORNEY GENERAL
IN SUPPORT OF
ENGROSSED SENATE BILL NO. 2255

Mr. Chairman and members of the House Judiciary Committee. I am Parrell Grossman, Director of the Consumer Protection and Antitrust Division of the Attorney General's Office. I appear on behalf of Attorney General Wayne Stenehjem in support of Engrossed Senate Bill No. 2255.

The Attorney General reviewed most of the Do-Not-Call statutes in effect in states throughout the country in recommending appropriate Do Not Call legislation to the sponsors. The Attorney General ultimately patterned most of the substantive provisions regarding telephone solicitations, *et cetera*, after the Minnesota Do-Not-Call statutes enacted in 2002. Minnesota's statutes appear straight-forward and are easily understood. The statutes are consistent with the Federal Trade Commission's Amended Telemarketing Sales Rule and its Do-Not-Call Registry. North Dakota's similar legislation would create ease of consistent application, operation and enforcement between our two states.

One very important difference and distinction for North Dakota is the exception for telephone solicitations by callers who will complete the sale at a later face-to-face meeting. In Minnesota one caller could make the telephone solicitation and a separate or different person could make the later face-to-face sales presentation. Under a statute using the Minnesota exception language a Florida telemarketing company, employing legions of telemarketing callers, could make solicitations in North Dakota for timeshares without complying with Do-Not-Call legislation, because any sale would not occur until a later face-to-face sales presentation in Florida. The North Dakota legislation sponsors narrowed this exception to require that the exception only apply when the initial caller and the individual conducting the later face-to-face sales presentation and meeting are the same individual. The Minnesota exception has been described as the exception "you can drive a truck through." Attorney General Stenehjem learned this result was not the intent of the sponsors of the Minnesota law. The FTC has the same overly broad exception.

Senate Bill No. 2255 is North Dakota's proposed Do-Not-Call Legislation which prohibits most telephone solicitations to telephone subscribers, including residential, wireless or mobile telephone services, who place their names on a no-call list established and maintained by the Attorney General.

Telephone solicitations do not include calls: 1) to subscribers with the subscriber's prior invitation or permission; 2) by someone with a prior established business relationship; 3) by charitable or political organizations when the caller is a volunteer or employee of the charitable or political organization; 4) that solicit the expression of ideas, opinions or votes;

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and 5) for sales that won't be completed until a later face-to-face sales presentation or meeting between the person making the call and the telephone subscriber.

Telephone solicitations would not include debt collection activity by or on behalf of any person with whom the subscriber has an established business relationship.

The legislation restricts the use of prerecorded or synthesized voice messages unless the subscriber has either consented to the message or the message is immediately preceded by a live operator who obtains the subscriber's consent. The message must contain disclosures about the identity of the solicitor, the purpose of the message and the identity of goods or services the message promotes, and whether the message intends to solicit payment.

Callers may not use an automatic dialing-announcing device unless it disconnects within ten seconds after the subscriber terminates the call.

Callers may not use an automatic dialing-announcing device that calls random or sequential numbers unless it excludes calls to subscribers on the no-call list, emergency phone numbers, hospitals, nursing homes, cellular telephones and paging services.

Callers may not use an automatic dialing-announcing device nor make any telephone solicitations before 8:00 a.m. or after 9:00 p.m. at the subscriber's location.

Callers may not make any telephone solicitations to the telephone line of any subscriber who is on the Attorney General's Do-Not-Call list.

Callers must clearly state their identities at the start of calls including the caller's name, telephone number, city and state of location, and the business on whose behalf the telephone solicitation is made.

Callers may not use any method to block or otherwise deliberately circumvent the subscriber's use of caller identification service.

The Attorney General shall establish and maintain a Do-Not-Call list and shall provide to and receive from the Federal Trade Commission all North Dakota subscriber telephone numbers maintained on these lists so that subscribers will only have to sign up with either the federal agencies or the Attorney General.

The Attorney General may charge fees for the list not to exceed \$200 per quarter or \$800 per year.

The Attorney General may promulgate rules as necessary governing the establishment, operation and maintenance of the Do-Not-Call list.

Any person who receives a telephone solicitation in violation of the do not call law may bring an action for injunction, damages or both and may be awarded actual damages or damages up to \$2,000 for each violation, whichever is greater.

The legislation provides a one-year statute of limitations.

The Attorney General may enforce violations of the law using the powers and remedies provided to the Attorney General in chapter 51-15, commonly referred to as "the consumer fraud law."

The Attorney General may issue cease and desist orders for violations of the law. Aggrieved parties may request a hearing in an adjudicative procedure in accordance with chapter 28-32. The Attorney General may also impose civil penalties of up to \$2,000 in an adjudicative proceeding. The Attorney General may recover reasonable attorney's fees and hearing costs incurred in an adjudicative proceeding if the Attorney General prevails.

In a court action the Attorney General may seek civil penalties up to \$2,000 per violation. A violation of this law constitutes a violation of chapter 51-15 and the court may award civil penalties pursuant to chapter 51-15.

The Attorney General is entitled to an award of reasonable attorney's fees, investigation fees, costs and expenses in an action brought pursuant to this legislation. All fees, penalties and recoveries pursuant to violations of this law will be collected and retained by the Attorney General for enforcement of this legislation.

The civil penalties imposed for violations of this legislation are in line with the civil penalties imposed by other states for violations of their Do-Not-Call statutes.

California, Illinois, Louisiana, Minnesota, Texas, Wisconsin, and \$1,000 or less per violation of Do-Not-Call statutes. Illinois imposes \$2,500 for subsequent violations. Wyoming imposes \$2,500 for second violations and \$5,000 for third and subsequent violations.

Alabama, Colorado, Georgia, Kentucky, New York and Tennessee impose civil penalties of \$2,000 per violation. Colorado imposes an additional \$10,000 in civil penalties if the victim is elderly.

Alaska, Connecticut, Idaho, Massachusetts and Missouri impose civil penalties of \$5,000 per violation.

Arkansas, Florida, and Kansas impose civil penalties of \$10,000 per violation. Arkansas imposes an additional \$10,000 in civil penalties if the victim is elderly.

Oregon imposes civil penalties of \$25,000 per violation. Indiana imposes \$25,000 for repeat offenders.

The FTC may collect civil penalties of up to \$11,000 per violation for calls in violation of its Do Not Call registry. North Dakota, in an action brought pursuant to the FTC Amended Telemarketing Sales Rule cannot obtain any civil penalties for violation of the federal law.

The fees to purchase the list, as delineated in this legislation, are the maximum amounts. The actual amounts provided pursuant to rules adopted by the Attorney General could be less depending upon costs incurred in developing, establishing and maintaining the list. The Attorney General hopes to be able to provide certain accommodations for small businesses such as culling a list by local telephone pre-fix numbers, etc. and those capabilities may provide a less expensive alternative to such businesses.

This Committee in this hearing is considering what may be, if enacted by the 58th Legislative Assembly, one of the most popular and important pieces of legislation this legislative session.

When Pennsylvania enacted its Do-Not-Call legislation, 1.62 million telephone subscribers enrolled in Pennsylvania within the first six weeks of registration in that state. Minnesota's Do-Not-Call law went into effect January 1, 2003. Registration for the Do-Not-Call list in Minnesota began November 4, 2002. On January 1 almost one million twenty three thousand residential telephone subscribers were registered on the list, representing nearly half of Minnesota's 2.2 million residential phone lines.

I have been involved in numerous multi-state working groups throughout the country in regard to existing, contemplated or pending Do-Not-Call legislation in the many states and the federal government, with the Do-Not-Call Registry that has not been adopted as part of the Federal Trade Commission Telemarketing Sales Rule. Whether the Do-Not-Call legislation is within the authority of the Attorney General's office, Public Service Commission, or as in Minnesota, the Minnesota Department of Commerce, public officials in other states have stated this legislation is tremendously popular with their state's citizens.

Approximately 26 states currently have Do-Not-Call laws including Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Minnesota, Missouri, Montana, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Wisconsin, and Wyoming. Legislation is pending or being introduced in several states.

The prospect of avoiding irritating, bothersome and unwanted telemarketing calls tends to overshadow the more important role of Do-Not-Call legislation, which is protecting consumers and most often, vulnerable seniors.

Telemarketing fraud is a significant problem in this country. According to the American Association of Retired Persons (AARP), it is estimated that up to ten percent of the 140,000 telemarketing firms operating in the United States in 1996 were fraudulent. There are hundreds of variations of telemarketing fraud in which high-pressure sales persons solicit funds or sell products based on misleading, false or deceptive statements or claims. In North Dakota these scams might include sales of magazine subscriptions, bogus travel

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opportunities, bogus sweepstakes, worthless credit card protection plans and illegal lotteries. We have many elderly victims in North Dakota that have lost \$10,000 to \$100,000 or more to scams that started with small amounts of money sent in response to telemarketing purchases. Telemarketing leads are purchased by and shared among scam artists.

These telemarketers are very smooth and court their victims over time. When consumers' instincts cause them to question the pitches, these telemarketers quickly become very abusive and threatening. If you are an elderly person, often isolated, living in rural North Dakota, you will do exactly what these telemarketers tell you to do, including sending large sums of money.

This legislation will provide important consumer protection in our state. This Do-Not-Call legislation will significantly help to protect North Dakota consumers from telemarketing fraud.

The majority of blatant and ruthless crooks will not honor Do-Not-Call lists and this legislation will not stop that activity. However, many of the questionable or fraudulent sales are shrouded with some suggestion of legitimacy. Violations are often difficult to prove because of lack of evidence, unavailability of records, etc. Many of these telemarketers are actually more concerned about violating Do-Not-Call laws because of the penalties and ease of proving violations. In a recent raid by the Louisiana Attorney General's office in that state, the investigators seized records of blatantly illegal activity. These investigators discovered a Louisiana Do-Not-Call list on location. The defendants actually stated to investigators they did not want to be in violation of the Do-Not-Call law.

Many Do-Not-Call list subscribers will not want any exceptions. Some may not want to receive telephone solicitations for any purposes, including charitable purposes. However, the limitation of the exception for charities to only those charities using their own employees or volunteers is a reasonable compromise. Charitable organizations that employ professional fundraisers will be concerned that the Do-Not-Call law applies to those organizations. The Attorney General, however, firmly believes this is an important policy decision by this legislature because the broader exception will swallow the rule that attempts to prevent subscribers from receiving unwanted calls.

Missouri, Oregon and Tennessee are among other states that limit the Do-Not-Call exception for charitable organizations to only those charitable organizations that use their own employees and volunteers for charitable solicitation calls. Organizations employing professional fundraisers in solicitations in these states must comply with the Do-Not-Call list and law. Texas does not appear to provide any exception from its Do-Not-Call law for any charitable solicitations and calls.

The Attorney General recognizes there are many reputable charitable organizations in North Dakota and elsewhere that employ reputable professional fundraisers. This office does not regularly examine those relationships or the allocation of donations between the charity and the fundraiser because we have no reason to concern ourselves with reputable charities. Nonetheless, we occasionally receive a public inquiry expressing concern or

asking questions about a particular charitable fundraising activity in North Dakota. In reviewing some of the charitable solicitations we have discovered that, in some instances, the benefits to the local organization are nominal. The responses from the local organizations and charities indicate that the several thousand dollars the local organization received is money that organization otherwise would not have received. This is a decision within the purview of the charity that employs the professional fundraiser. However, when only a small portion of the proceeds are used for a legitimate charitable purpose, the concern is whether the donors would make such contributions in circumstances in which a majority of the donations do not actually go to the charity. In our experience and according to our investigations, donors indicate they would not have contributed if they were aware the majority of their donations go to the professional fundraiser.

During my years with the Attorney General's office, I have learned that some of the most abusive telemarketing practices include charitable solicitations by questionable professional fundraisers on behalf of questionable charities. Some charitable organizations often use names similar to bona fide charities or reputable organizations. The caller might represent "The Cancer Society of America" as opposed to the well-known "American Cancer Society." Donors often do not realize the subtle distinctions. My division investigated a case involving a professional fundraiser named Gecko Communications raising funds in North Dakota on behalf of "Fondest Wish Foundation" making wishes come true for seriously or terminally ill children. That name was similar to the "Make-A-Wish Foundation" with the same mission but a familiar and reputable organization that actually spends the majority of its contributions on terminally ill children. The fundraiser retained 90 percent or more of the money. The fundraiser was investigated or prosecuted by the federal government and we were unable to recover any of those donations. We, however, recovered approximately \$10,000, a small portion of the total donations, from the "Fondest Wish" charity.

Questionable professional fundraisers and charities, located primarily out-of-state, frequently take advantage of generous North Dakota citizens and consumers who open their checkbooks to give substantial money pursuant to many charitable pitches. These donors contribute hundreds of thousands of dollars to organizations they are not familiar with because they want to help when told, for example, the money will be used for disabled firefighters and law enforcement officers, etc. Unfortunately, in many instances, 95 percent of the money goes directly into the pockets of the professional fundraiser. The remaining amount of the donation may actually be used for charitable purposes, depending upon one's definition of "charitable purposes." The Attorney General's concerns are regarding the misrepresentations that often occur during the solicitations. According to the Attorney General's investigations and experience in the area of charitable solicitations, consumers would not contribute but for the misrepresentations or deception by the fundraisers and charities. In our experience hundreds of thousands of dollars each year are sent by North Dakota donors to these professional fundraisers.

In October 2002 the Attorney General initiated legal action against two out-of-state professional fundraisers, Public Awareness, Inc. and Duane Kolve, who were conducting charitable solicitations on behalf of four nonprofit organizations including the Association for Disabled Firefighters, Inc., Coalition of Police and Sheriffs, Inc., American Veteran

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Relief Foundation, Inc. and ADSA, Inc. (an acronym for American Deputy Sheriffs Association.) The lawsuit alleges that the professional fundraiser and the four associated charities engaged in misrepresentations during the solicitations including that the donations would be used to fund nonexistent burn camps in North Dakota and falsely stating that the consumers solicited previously had contributed to the organization. Pursuant to a court order, the Attorney General took possession of at least one thousand five hundred checks that were sent by North Dakota donors to local mail processing centers during the weeks following the initiation of the legal action. Those checks range from \$15 to \$30 or more and probably total between \$22,000 and \$40,000. These defendants would have cashed those checks, if the Attorney General had not intercepted these checks pursuant to a court order. The checks are sent in envelopes provided by the fundraisers to the local address of the mail-processing center, but do not include the name of the mail-processing center in order to create the false impression that the "charity" has a local address. Questionable charities routinely employ this practice. The donations involved in our pending legal action are a drop in the bucket in comparison to the total amount of charitable solicitations sent by consumers to other professional fundraisers in similar circumstances.

The Attorney General has joined in an amicus curiae brief in a case before the United States Supreme Court involving the states' interests in regulating of fraudulent charitable solicitations or fundraising. The case involves the State of Illinois versus Telemarketing Associates, Inc. It will result in a very important decision regarding states' authority in the regulation of charitable solicitations. The amicus curiae brief was joined by approximately 46 states and Puerto Rico. The amicus curiae brief provides an interesting and poignant discussion of questionable or fraudulent charitable solicitations. I have provided copies of the brief, as you will find the discussion enlightening in this area.

The Federal Trade Commission has adopted Do-Not-Call provisions as part of its Final Amended Telemarketing Sales Rule ("TSR") published in the Federal Register January 29, 2003. However, the FTC Amended Telemarketing Sales Rule, including the Do-Not-Call registry is not a solution for North Dakota. North Dakota requires state legislation for several reasons. First, financial institutions, insurance companies and long-distance carriers are not subject to the FTC TSR. North Dakota's legislation will include telephone solicitations by these companies. Next, two lawsuits were filed in federal court on January 29, 2003 challenging the Do-Not-Call requirements on constitutional concerns that it violates the first amendment on prior restraint and content based restrictions, protections for commercial speech, etc. and various other federal claims that certain provisions of the TSR unrelated to the Do-Not-Call registry exceed the FTC's authority. Although these legal challenges likely will not be successful the challenges may delay the implementation of the Do-Not-Call registry. Furthermore, the FTC rule violations in North Dakota must be enforced in federal court with the approval of the FTC. The state of North Dakota could not impose any penalties or collect any investigation costs or attorney's fees. The state can only obtain injunctive relief, a very costly option. Our North Dakota citizens have a right to expect swift, effective enforcement in our local courts.

The FTC TSR Do-Not-Call requirements are significantly consistent with the proposed North Dakota legislation, except as to charitable solicitations and the FTC's broader

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exemption for calls leading to a later face-to-face sales presentation. Under the FTC Rule, professional fundraisers soliciting on behalf of charitable organizations may contact subscribers on the Do-Not-Call registry, unless those telephone subscribers have separately notified the charitable organization or professional fundraiser not to call.

Opponents of Do-Not-Call legislation have raised or suggested possible First Amendment constitutional violations. The Attorney General has reviewed and rejected possible successful First Amendment constitutional challenges. The Federal Trade Commission clearly and articulately rejected First Amendment arguments in its adoption of the FTC Amended Telemarketing Sales Rule and Do-Not-Call Registry. In June 2002 the United State's District Court in Colorado denied the Plaintiffs' request for a Temporary Restraining Order, ruling from the bench and finding there was no likelihood of success on the merits of the Plaintiffs' First Amendment and Commerce Clause claims. In July 2002 the Indiana state court ruled that Indiana's Do-Not-Call legislation is constitutional. While the Attorney General cannot prevent legal challenges, he is not aware of any successful challenges to the many states' Do-Not-Call legislation.

The North Dakota Newspaper Association is proposing two minor amendments. These amendments provide clarification as opposed to substantive changes. The first proposed amendment includes a "free trial newspaper subscription" within the definition of an "established business relationship." The second proposed amendment clarifies that a subscriber can agree to a telephone solicitation by prior express written request, consent or invitation. The Attorney General does not object to these proposed amendments.

The Attorney General is proposing some amendments. The primary proposed amendment includes "political candidates, political committees and political parties" as an exception from telephone solicitations, when the calls are made by volunteers or employees. This exception was previously contemplated and inadvertently omitted from the legislation. Some minor amendments simply change the legislation's reference to "no-call" to the designation "do-not-call." Finally, there are numerous amendments included that will permit the Attorney General to use the Federal Trade Commission's national do-not-call registry, in the Attorney General's discretion, in lieu of establishing and maintaining a separate do-not-call list by the Attorney General.

For these reasons, the Attorney General respectfully urges this committee to give Senate Bill 2255, with the Attorney General's proposed amendments, a "do pass" recommendation.

Thank you for your time and consideration. I will be available to try and answer any questions.

A.G.

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2255
HOUSE JUDICIARY COMMITTEE
DUANE DEKREY, CHAIRMAN
MARCH 18, 2003

Page 2, line 14, after "Code" insert ", or by and behalf of a political candidate, political committee, or political party as defined in section 16.1-08.1-01 for a political purpose as defined in section 16.1-08.1-01"

Page 2, line 17, after "organization" insert "or political candidate, political committee, or political party"

Page 2, line 22, after "organization" insert "or political candidate, political committee, or political party"

Page 3, line 29, replace "no-call" with "do-not-call"

Page 4, line 5, after "who" insert ", for at least ninety days prior to the date the call is made, has been"

Page 4, line 5, remove "is"

Page 4, line 6, replace "no-call" with "do-not-call"

Page 4, line 6, after maintained insert " or used by the attorney general"

Page 4, line 6, after "51-26-09" insert "or the national "do-not-call" registry established and maintained by the federal trade commission pursuant to 16 C.F.R. § 310"

Page 4, line 14, replace "no-call" with "do-not-call"

Page 4, line 14, after "list" insert "-national federal trade commission do-not-call registry"

Page 4, line 14, after the period insert "1."

Page 4, line 17, ", or by using the national do-not-call registry established and maintained by the federal trade commission pursuant to 16 C.F.R. § 310.

Page 4, line 18, replace "no-call" with "do-not-call"

Page 4, line 21 replace "1" with "a"

Page 4, line 26 replace "2" with "b"

Page 4, line 30 replace "3" with "c"

Page 5, line 1, replace "4" with "d"

Page 5, line 5, replace "5" with "e"

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A.G.

- Page 5, line 5, after "5." remove "If, pursuant to federal law, the federal trade commission and the federal"
 - Page 5, remove line 6
 - Page 5, line 7, remove "subscribers who object to receiving telephone solicitations,"
 - Page 5, line 7, replace "the" with "The"
 - Page 5, line 8, after "Include" insert "In the list established under this section"
 - Page 5, line 8, after "national" insert "do-not-call registry established and maintained by the federal trade commission, pursuant to 16 C.F.R. § 310."
 - Page 5, line 9, after "may" insert "provide to the federal trade commission, for inclusion in the national do-not-call registry, the telephone numbers of North Dakota subscribers who are in the attorney general's do-not-call list or who have otherwise notified the attorney general of the subscriber's objection to receiving telephone solicitations"
 - Page 5, line 9, remove "also"
 - Page 5, remove lines 10 through 12
 - Page 5, line 13, replace "6" with "r"
 - Page 5, remove lines 17 through 22
 - Page 5, after line 22 insert "2. Notwithstanding any other provision of this chapter, a national do-not-call registry established and maintained by the federal trade commission, pursuant to 16 C.F.R. § 310., may serve as the state do-not-call list provided by this chapter, in the attorney general's discretion."
- Renumber accordingly

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Deanna D. Smith 10/21/03
Operator's Signature Date



House Judiciary Committee
March 10, 2003
REGARDING SENATE BILL 2255

Chair DeKrey and members of the House Judiciary Committee. My name is Dick Weber. I am a member of the AARP North Dakota, Executive Council. I appreciate this opportunity to testify on Senate Bill 2255 regarding the establishment of a telemarketing do-not-call list for North Dakota. AARP has been active across the country in working on telemarketing issues. We believe that establishment of a do-not-call list is an appropriate and important step toward protecting consumers against unsolicited calls into their homes.

When Congress passed the Telemarketing and Consumer Fraud and Abuse Prevention Act in 1994, the legislative history cited privacy as one of the protections Congress sought to establish under the Act. However, the Telemarketing Sales Rule promulgated by the Federal Trade Commission in 1995 only gave consumers the right to give a do-not-call message to telemarketers on an individual basis. In response to the ineffectiveness of this provision, and the enormous public outcry against unwanted telemarketing, the FTC recently announced it was creating a national do not call registry. Consumers will have the opportunity to register their names with the Commission, and telemarketers will have to purchase this list, striking any of the names on the list from their directories.

If they do call anyone on the list, the FTC has the authority to prosecute the telemarketer for violating the law. A national registry is helpful, but it is important to note the FTC has *no* jurisdiction over certain industries, such as common carriers (e.g., telephone companies,) banks, or insurance companies. State law, such as SB 2255, is crucial to fill in this gap in protection. Further, only state law can control intrastate telemarketing calls, making state action in this area essential. It is anticipated telemarketers will open call centers in states with no do not call regulation to avoid the FTC's new rule. In this case, only state law can stop unwanted calls.

A statewide list is a far more effective method of preventing unwanted sales calls than requiring consumers to give an individual message to each telemarketer *after* they have already called.

107 West Main Avenue, Suite 125 | Bismarck, ND 58501 | 701-221-2274 | 701-255-2242 fax | 1-877-434-7598 TTY
James G. Parkel, President | William D. Novell, Executive Director and CEO | www.aarp.org

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Operator's Signature

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The telemarketing industry often makes the argument that consumers could screen calls through use of a caller ID system or an answering machine. We believe this is an unacceptable argument. Why should consumers be compelled to incur the inconvenience and expense of screening calls that are unsolicited and unwanted? Another argument made by the industry is that do-not-call lists are an infringement on first amendment rights. This is clearly not the case. Commercial speech is regulated in myriad ways; otherwise, there could be no laws restricting false advertising or inadequate warning labels. Do-not-call lists are a necessary privacy protection for consumers who do not want unsolicited intrusions into their homes.

AARP commends the Attorney General and the legislative sponsors for introducing SB 2255 to protect residents of North Dakota from unwanted telemarketing calls. These laws are very popular in the states that have enacted them. They protect consumers from unwanted calls, and also save businesses the time and expense of calling consumers who do not want to hear from them. As of December 2002, twenty-six states have Do Not Call laws (Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Minnesota, Missouri, Montana, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Wisconsin, and Wyoming.) In Michigan and New Jersey, bills have passed the legislature and are awaiting the Governors' signatures. AARP is currently working actively in several states to improve or defend Do Not Call laws (Alaska, Idaho, Kansas, Maine, Michigan, Missouri, Montana, Nevada, New Jersey, North Dakota, Oklahoma, South Carolina, and South Dakota.)

When 1,000 Minnesota adults were questioned, researchers found that 95% of state residents strongly (89%) or somewhat (6%) supported a new state law that gives people the option of placing their name and phone number on a Do Not Call list. AARP members in South Dakota strongly (81%) support legislation that would create a "Do Not Call" list to keep telemarketers from calling them. Another 13% somewhat support this legislation.

AARP recognizes the need to balance the interests of business and consumers. It is important to note, however, that do-not-call lists are only effective if they actually prevent unwanted telemarketing calls. Therefore, exemptions must be kept to a minimum. Minnesota found the exemption regarding calls to make face-to-face appointments to significantly weaken their law.

We believe the language in SB 2255 provides a reasonable accommodation in this area for business and consumers.

We support the exemption for North Dakota charitable organizations using their own employees or volunteers to make calls to North Dakota citizens. However, North Dakota citizens have legitimate concerns about charitable organizations using paid professional fundraisers for charitable fundraising in which the majority (often ninety-five percent or more) of the funds donated may go to the paid professional fundraiser and not to the charity. When charities use telemarketing firms to make fundraising calls we believe those firms should be required to comply with the law and purchase the do not call list.

We believe Senate Bill 2255 provides important protections for consumers and we do not favor further exemptions that would compromise the integrity of this bill.

I appreciate the opportunity to testify on behalf of AARP and would be happy to answer any questions you may have about our position.

AARP is a nonprofit, nonpartisan membership organization dedicated to making life better for people 50 and over. We provide information and resources; engage in legislative, regulatory and legal advocacy; assist members in serving their communities; and offer a wide range of unique benefits, special products, and services for our members. These include *AARP The Magazine*, published bimonthly; *AARP Bulletin*, our monthly newspaper; *Segunda Juventud*, our quarterly newspaper in Spanish; *Live and Learn*, our quarterly newsletter for National Retired Teachers Association members; and our Web site, www.aarp.org. We have staffed offices in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.

Exhibit 2

Testimony submitted on behalf of the

**North Dakota State Lodge
Fraternal Order of Police**

Regarding Senate Bill 2255

Submitted by:

**Michael Geiermann
Attorney at Law
Lobbyist for: North Dakota State Lodge
Fraternal Order of Police**

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Senate Bill No. 2255

SB2255 (the "Act") would extend the coverage of the proposed do-not-call list requirements to calls made by professional fundraisers on behalf of nonprofit and charitable organizations. Specifically excluded from the bill's coverage are calls made by employees or volunteers of charitable organizations as well as certain calls of a commercial nature under specified circumstances.

This regulatory framework is facially unconstitutional and infringes on the fully protected speech rights of nonprofit and charitable organizations which utilize professional representatives to communicate their message and seek financial support.

Discussion

The advocacy of nonprofit and charitable messages and concomitant appeal for public support is fully-protected speech at the "core" of the First Amendment. The First Amendment guarantees the right to engage in lawful speech with the goal of protecting our system of government and promoting the free exchange of ideas. Reno v. ACLU, 521 U.S. 844, 885 (1997). The Supreme Court has held that the appeal for public support by a charity is fully-protected speech, regardless of the medium of communication. Riley, 487 U.S. at 789; Secretary of State of Md v. Joseph H. Munson, Co., 467 U.S. 947; Schaumburg, 444 U.S. at 833-34; see also Ind. Vol. Firemen's Ass'n, 700 F. Supp. at 421. Thus, the First Amendment protects the message without reference to the messenger, in this case professional representatives of the nonprofit organization

The Supreme Court has stated that "[regulation of a solicitation 'must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech. . . , and for the reality that without solicitation the flow of such information and advocacy would likely cease.'" Riley, 487 U.S. at 796 (citations omitted). The strict scrutiny standard for fully-protected speech applies to such regulations. This Court also has ruled that the advocacy of nonprofit and charitable messages and appeal for public support is

fully-protected speech. Ind. Vol. Firemen's Ass'n, 700 F. Supp. at 436-37.

A charity's use of a professional representative to advocate ideas and appeal for public support does not diminish the fully-protected nature of the speech. As set forth above, the professional representative's appeal for support on behalf of the charity or nonprofit is "inextricably intertwined" with the fully-protected advocacy and educational speech of the nonprofit message. Riley, 487 U.S. at 796; Ind. Vol. Firemen's Ass'n, 700 F. Supp. at 438. Under strict scrutiny, the regulation infringing upon protected speech cannot stand if it is not narrowly tailored to further a compelling interest which the government is entitled to protect using the least restrictive means available. Munson, 467 U.S. at 959-60; Schaumburg, 444 U.S. at 636. Further, a government scheme that permits the advocacy of ideas and appeal for support by volunteers and employees of nonprofit and charitable organizations and withholds that right from the very same organizations when they utilize professional representatives facially is unconstitutional. The Supreme Court has held that a paternalistic regulatory scheme of this kind is prohibited because it necessarily discriminates against small or unpopular charities which may be forced to rely on professionals for economic reasons. Riley, 487 U.S. at 799; Ind. Vol. Firemen's Ass'n, 700 F. Supp. at 438.

To meet this test, the Act must use "sensitive tools" to affect legitimate government interests while avoiding unconstitutional infringements upon protected speech. Spieser v. Randall, 357 U.S. 13, 525 (1958). The Supreme Court has held that it is the burden of the state to demonstrate that the Act is narrowly drawn and uses the least intrusive means available to further a compelling government interest. This is true even if the purported goal of the Act is residential privacy. The Supreme Court recently has affirmed that privacy can only infringe upon speech using the least restrictive means available: "[w]e continue to believe that the sensitivity and significance of the interests presented in clashes between [the] First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." Bartnicki v. Vopper, 532 U.S. 514, 529 (2000) (quoting Florida Star v. B.J.F., 491 U.S. 524, 532-533 (1989)); see Watchtower Bible & Tract Soc. of New York, Inc. v. Vill. of Stratton, Ohio, Co., 122 S.Ct. 2080 (June 17, 2002).

It is further a settled rule of constitutional jurisprudence that government may not do

indirectly what it is forbidden from doing directly:

As we have often noted, "[c]onstitutional rights would be of little value if they could be . . . indirectly denied." Harman v. Forssenius, 380 U.S. 528, 540 (1965), quoting Smith v. Allwright, 321 U.S. 649, 664 (1944). The Constitution "nullifies sophisticated as well as simple-minded modes" of infringing on Constitutional protections. Lane v. Wilson, 307 U.S. 268, 275 (1939); Harman v. Forssenius, 380 U.S. at 540-541.

U.S. Term Limits v. Thornton, 115 S.Ct. 1842, 1867 (1995). Thus a law which discriminates against small or unpopular charities not by banning them, but by hindering the advancement of their goals indirectly, is subject to the same review as a blunt ban on speech.

Consequently, to survive strict scrutiny, it must be demonstrated that the Act (1) is narrowly tailored (2) to further a compelling government interest (3) by the least restrictive means available. The State bears the burden to establish the necessity of depriving nonprofits and charities of this valuable free speech interest. Shapiro v. Thompson, 494 U.S. 618, 634 (1969); Dunn v. Blumstein, 405 U.S. 330, 335 (1971). It cannot make such a showing. There are numerous reasons the Act violates federal and state free speech guarantees and extends beyond the permissible scope of any governmental interest in residential privacy such that it is unconstitutional:

1. The Act Is Not Narrowly Tailored

The Act must be narrowly tailored to further a compelling government interest. It cannot meet this threshold requirement of strict scrutiny analysis because the Act's exemptions render it underinclusive. That is, the speech prohibitions advanced by the Act apply to some speakers and not others, yet the exemption of certain speakers (for example, charities using their own

employees or volunteers) not only fails to further the alleged residential privacy interest, but it is inconsistent with such an interest.

An underinclusive statute inherently is suspect where its exemptions are unrelated to or do not further the government's articulated interest. City of Cincinnati v. Discovery Network, 507 U.S. 410, 428 (1993). See also Good News Club v. Milford Cent. Sch., 533 U.S. 98, 120 (2001). Applied here, the exemptions from the Act clearly undermine any assertion that the Act is narrowly tailored to accomplish a legitimate governmental interest. For example, the Act offers no justification for regulating nonprofit and charitable messages and appeals for support when communicated by professional representatives, but exempting the same communication when conveyed by compensated employees of charitable organizations. The Supreme Court and this Court previously have held no such legitimate justification exists. See also Riley, supra, at 794, 799-800, 801 n.13.

Nor is the Act narrowly tailored where it favors commercial speech over the noncommercial speech of nonprofits, thereby rendering it further underinclusive. Government is forbidden from favoring commercial speech over fully-protected speech. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 513 (1981). By banning communications to prospective donors when made by professional representatives, while permitting in certain circumstances calls for purely commercial purposes, the Act unconstitutionally favors commercial speech over fully-protected speech.

Ultimately, the Act's exemptions reveal it is not a narrowly tailored endeavor to protect residential privacy, but rather a discriminatory and unconstitutional effort by a government engaging in impermissible and paternalistic value decisions designed to affect "undeniably the

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encouragement of some forms of solicitation and the discouragement of others. . . ." Ind. Vol. Firemen's Ass'n, 700 F. Supp. at 446.

2. The Act Does not Employ the Least Restrictive Means Available to Further any Legitimate Interest

The Act creates a "do-not-call" list that regulates communications to North Dakota residential telephone numbers by prohibiting calls made to telephone numbers on the list, including noncommercial fully-protected calls made by professional representatives on behalf of nonprofit and charitable organizations. For such nonprofits or charities, the Act effectively presents only one option to exercise their First Amendment rights, that is, they must communicate with prospective donors on the "do-not-call" list using volunteers and employees. The alternative is to suppress the communication or to suffer the drastic civil penalties and injunctive remedies permitted under the Act if they use professional representatives. The Act's permitted use of volunteers and employees is illusory.

By necessity, the nonprofit and charitable organizations rely on professional representatives to convey their messages and appeal for public support on their behalf. Most simply do not have the infrastructure, personnel, operational efficiencies, and expertise to impart the fundraising message currently imparted by professional representatives. In Riley, the Court found certain provisions in the North Carolina statute unconstitutional in part because they favored larger more established charities that could afford to hire a telemarketing force or obtain volunteers while smaller newer or controversial charities had neither the resources to hire or the ability to attract volunteers. Riley, 487 U.S. 781.

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It is the State's burden of persuasion that it has employed the least restrictive means to further the alleged protection of residential privacy. This burden cannot be met. Because communications by nonprofit and charitable organizations and professional representatives acting on their behalf are fully-protected speech subject to the greatest protection of the First Amendment, no iteration of the Act would be constitutional to the extent that it regulates and prohibits nonprofit and charitable communications. Fundamentally a "do-not-call" list is a state sanctioned regulatory scheme that eliminates protected speech. A constitutional balance of fully-protected speech guarantees for charities and residential privacy interests cannot be achieved by a statutory scheme that results in government limiting otherwise lawful speech of some but not others based upon the content of the message and, or the identity of the speaker. The State must rely on other alternatives to reconcile the competing protected speech and residential privacy interest without silencing the nonprofits' guaranteed right of free speech.

3. The Act is a Prior Restraint on Fully-Protected Speech

Prior restraints of protected speech are abhorrent to the Constitution. A prior restraint cannot stand in all but the most extreme circumstances; for example, times of war or "fighting" words. Near v. Minnesota, 283 U.S. 697, 716 (1931). The First Amendment jurisprudence almost uniformly prohibits government from suppressing speech prior to utterance. Near, 283 U.S. at 714. A governmental scheme interposing a system "of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity." Freedman v. State of Maryland, 380 U.S. 51, 57 (1965) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)); FW/PBS, Inc. v. Dallas, 493 U.S. 215, 225 (1989); see Zook v. Brown, 865 F.2d 887, 890 (7th Cir. 1989). The Supreme Court also has held that "prior restraints on speech and

publication are the most serious and the least tolerable infringement on First Amendment rights.”

Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

It is clear that the Act is a prohibited prior restraint on fully-protected speech. The Act bars nonprofits and charities from communicating nonprofit and charitable messages and appealing for public support via professional representatives. As such, because the Act suppresses this speech prior to utterance, it is a prior restraint. Moreover, the Act also functions as a prior restraint because it bars nonprofits from directing communication to residential telephone numbers on the “do-not-call” list which subsequently have been reassigned to a resident other than the resident responsible for initially placing the number on the list. As set forth above, the Constitution prohibits direct and indirect infringements upon speech. U.S. Term Limits v. Thornton, 115 S.Ct. at 1867. A prior restraint can take the form of a direct ban, or a burden which is impossible to meet (i.e. forcing a charity to use volunteers when it is incapable of doing so or to remain silent). The Act is therefore a prior restraint of protected speech.

4. The Act is a Content-Based Restriction on Speech

The Act is subject to strict scrutiny because it is a content-based regulation of speech. The Act applies its restrictions based on the content of the banned calls and the identity of the caller. A statute that defines the speech it regulates by content, or particular speakers, is evaluated as a content-based restriction on speech. Playboy, 529 U.S. at 811-12. Content-based restrictions on speech are presumptively invalid and subject to strict scrutiny. Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989); R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992); Ind. Vol. Firemen's Ass'n, 700 F. Supp. at 438; Riley, *supra*.

Under the Act, the “do-not-call” list provisions are triggered by the content of the

telephone communication. The content of the conversation, and not the time of the call or location of the recipient – triggers the Act's ban. For example, a call by a charity using professional representatives that simply advocates or educates absent an appeal for support is not prohibited while one with an appeal (by adding just three words, to-wit: "Can you help?") is prohibited. Only an illusory distinction can be made regarding the effect of these two types of calls on the residential privacy of North Dakota residents. The Act also is content-based because it is triggered when certain speakers engage in the communication. For example, a call to a North Dakota resident on the "do-not-call" list when made by a volunteer or employee of a nonprofit or charitable organization to appeal for support is exempt, but an identical call with the identical content made to the same resident is illegal when made by a professional fundraiser.

Nor is the Act content neutral because, as noted, its application is triggered by the content or identity of the caller. The Supreme Court repeatedly has ruled that such a statute is defective because it cannot be "justified without reference to the content of the regulated speech." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Comty. for Creative Non-Violence, 468 U.S. 288, 295 (1984)).

To survive the strict scrutiny, standard established by the Supreme Court, the content-based attributes of the Act must be narrowly tailored to further a strong interest which North Dakota is entitled to protect. Munson, 467 U.S. at 959-60; Schaumburg, 444 U.S. at 636. The Act is not so narrowly tailored. It is insignificant from a constitutional perspective that the nonprofits utilize professional representatives to deliver their message to current and prospective supporters.

5. The Act is Overbroad.

The Act is overbroad because it brings protected speech within its prohibitions and creates a chilling effect on persons who refrain from the conduct fearing potential prosecution. Cantwell, 310 U.S. at 308. Under this principle, a law is unconstitutional on its face if it prohibits a substantial amount of protected expression. Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1399 (2002). Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). The Court has held that "facial challenges to overly-broad statutes are allowed not primarily for the benefit of the litigant, *but for the benefit of society* – to prevent the statute from chilling the First Amendment rights of others not before the Court." Munson, 467 U.S. at 958 (emphasis added).

As noted by Monaghan, "[o]verbreadth may be conceptualized as legislative failure to focus explicitly and narrowly on social harms which are a valid concern of government and are the justification for interfering with expressive activities." Note, "The First Amendment Overbreadth Doctrine," 83 Harv. L. Rev. 844, 860 (1970).

Where, as here, a statute " unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify and overbreadth attack." City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984). Indeed, as applied to appeals to the public for support of nonprofit and charitable organizations, the Court has underscored the imperiling nature of overbroad statutes:

[e]ven where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity. Society as a whole then would be the loser.

Munson, 467 U.S. at 956.

Appeals for support directed at North Dakota residents is fully-protected speech even

when conveyed by professional representatives. The Act regulates this speech. It chills legitimate speakers by threatening substantial civil penalties which vastly exceed the scope of any perceived infringement on residential privacy. In substance, nonprofit and charitable organizations are coerced to silence rather than face penalties and injunctive relief. The "chilling" effect of any such statutory scheme is obvious.

Still other factors contribute to the overbreadth of the Act. It does not provide safeguards to ensure that a North Dakota resident registering with the "do-not-call" list is authorized to do so. Further, the Act cannot stand where it fails to provide for a regular verification (by a renewal or otherwise) of the register numbers on the "do-not-call" list, if only to account for changes in telephone numbers, deaths, or moves. Without a timely and effective process for updating this information, new telephone subscribers inevitably will be assigned a number previously registered on the "do-not-call" list by someone other than the current subscriber.

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10/21/03
Date

NORTH DAKOTA REPUBLICAN PARTY

Monday, March 10, 2003

TESTIMONY IN NEUTRAL POSITION TO SB 2255

1 CHAIRMAN DEKREY AND MEMBERS OF THE COMMITTEE:

2 I wish to thank this committee for allowing me to present testimony regarding
3 Senate Bill 2255. The North Dakota Republican Party is concerned that this legislation
4 presents a very troubling infringement on the Free Expression and Free Association
5 guarantees of the First Amendment. SB 2255 seeks to place lawful time, place and
6 manner restrictions on various telemarketing activities. However, unlike the federal law
7 and the "do not call" registries in a majority of other states, SB 2255 does make a
8 distinction between telephone solicitations of a commercial nature and the exercise of
9 political expression. As such, SB 2255 represents a very troubling infringement on the
10 rights of political candidates, political parties and third party groups.

11 We begin with the assumption that SB 2255 will result in a successful program.
12 When made available, "do not call" registries have been hugely popular, with a large
13 percentage of residential subscribers enrolling during the first year. (Mitch Lipka, "New
14 Jersey Set to Pull the Plug on Telemarketers," Philadelphia Enquirer, November 1,
15 2002). Like citizens in 26 other states, North Dakotans will undoubtedly subscribe to the
16 list made available in SB 2255.

17 Political parties and candidates utilize paid telemarketing services in the following
18 areas: polling; voter identification; fundraising to known donors; prospecting to potential
19 donors or lapsed donors; advocacy calling; and prerecorded messages to announce
20 events and to encourage participation in the voting franchise. SB 2255 may contain an
21 exemption for polling, advocacy calling and voter identification. However, all other
22 areas are substantially affected by SB 2255.

23 Please realize that political parties and candidates are not selling soap; we're not
24 trying to get you to sign up for long distance service or a new credit card. Whether a
25 political party or candidate is raising money or spending money, we are only trying to

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1 encourage citizens to become involved in the political process and, ultimately, to vote.
2 In doing so, political parties and candidates are serving a vital public interest. While the
3 Secretary of State and County Auditors do an efficient job of administering elections,
4 these officials are not primarily responsible for encouraging participation in the voting
5 franchise. There is no "Department to Encourage People to Vote" at the state or federal
6 level. However, each year political parties and candidates spend hundreds-of-
7 thousands of dollars on programs designed to encourage people to vote.
8 Telemarketing is an essential component of these programs.

9 For instance, political parties and candidates will often utilize prerecorded
10 messages to announce events and encourage voting. These messages may also be
11 used to advocate for a candidate. SB 2255 prohibits the use of these prerecorded
12 messages by prohibiting the use of automatic dialing-announcing devices. During the
13 2000 and 2002 election cycles, both the Republican Party and Democratic-NPL Party
14 used these prerecorded messages extensively. Prerecorded messages are used by
15 both parties because they are inexpensive, allow us to utilize our most popular elected
16 officials, and may be made during the day so that the calls are largely recorded on
17 answering machines. If these prerecorded calls are prohibited, the calls will continue
18 with live announcers preceding the recorded message or with only a live announcer.
19 The calling times will then be moved from the day to the evening hours, when people
20 are home. By prohibiting prerecorded calls, SB 2255 will result in more disruptions in
21 the evening, not less.

22 The Republican Party asks this committee to consider the attached amendment
23 that would exempt the political activities of parties, candidates and third party groups
24 from the provisions of SB 2255.

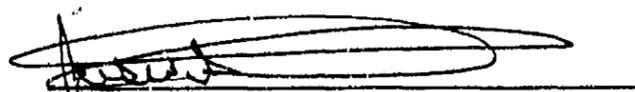
25 Our request is not uncommon or unique; in fact "do not call" registries enacted by
26 most other states and the pending Federal Trade Commission rule, exempt political
27 activity. Political activity is exempted under the national "do not call" registry because
28 the Federal Trade Commission because the Congress did not even grant the

1 commission jurisdiction over the calls of certain entities, including political campaigns
2 and political parties. (Release, "FTC Announces Final Amendments to Telemarketing
3 Sales Rule, Including National 'Do Not Call' Registry," Federal Trade Commission,
4 December 18, 2002). Additionally, a majority of states that have enacted no-call
5 legislation have granted a partial or full exemption for political activity. For instance,
6 Minnesota exempts political activity by making their law inapplicable to communications
7 "by or on behalf of an organization that is identified as a nonprofit organization under
8 state or federal law." Minn. Stat. § 325E.311(6)(3). Illinois prohibits calls placed by an
9 autodialer, unless the call is "made by an autodialer . . . on behalf of any political . . .
10 organization." 815 Ill. Comp. Stat. 305/20-a(3), b. And Pennsylvania's "hugely popular"
11 no-call list indicates that "telephone solicitation" does not include a call made "[o]n
12 behalf of a political candidate or a political party." 73 Pa. Cons. Stat. § 2242(5).

13 Unlike the commercial solicitors targeted by most "do not call" lists, political
14 parties and candidates enjoy the broadest protection for freedom of speech and
15 association. In enacting similar "do not call" registries, **the federal government and a**
16 **majority of states** have recognized these fundamental rights by exempting political
17 activity. The Republican Party believes it is essential that these rights are fully
18 protected by making application SB 2255 inapplicable to political parties, candidates
19 and other groups with a political purpose.

20 I would like to thank the committee for allowing me to testify this morning and I
21 hope you will look favorably on our amendment to SB 2255.

22 DATED March 10, 2003.


Jason W. Stverak
Executive Director
North Dakota Republican Party

Page No. 3

Jason Hweck

Fifty-eighth
Legislative Assembly

House Judiciary Committee

PROPOSED AMENDMENT TO SENATE BILL NO. 2255

Page 7, after line 31, insert:

"51-26-23. Application to Political Activity. The provisions of this chapter do not apply to the activities of a political party, candidate or other group with a political purpose as defined in chapter 16.1-08.1."

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TESTIMONY OF MARILYN FOSS ON ENGROSSED SENATE BILL NO. 2255

Mr. Chairman, members of the judiciary committee, my name is Marilyn Foss. I am appearing before you this morning on behalf of MCI WorldCom. MCI WorldCom is a telecommunication company which does business in North Dakota and throughout the US. It uses telemarketing to promote its product lines in North Dakota. Those include local telephone service in limited markets and long distance services.

I am here this morning to propose two amendments to SB 2255. The first, which relates to the information which a caller must provide under proposed section 51-26-07, would require the caller to disclose a true name and business for which the solicitation is being made, but would require the caller to disclose the address and location only as requested. MCI WorldCom suggests this change in order to shorten the introductory statement which is given by the caller. However, as we feel persons who desire to know the business address and location should be provided with that upon request we have made provision for that in the amendments.

The second amendment simply gives the attorney general the option of using the FTC do not call program and list as the state program and list if the attorney general concludes it is desirable to do so. If the FTC program proves effective it may prove to be more cost effective for the state and users of the list to participate in the national program, rather than having to set up and administer separate programs in the individual states.

Thank you.

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Diana D. Wall
Operator's Signature

10/21/03
Date

Foss Amend.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2255

Page 4, line 9, remove ", the caller's telephone number, the caller's city and state of"

Page 4, line 10, remove "location,"

Page 4, line 10, after the period, insert "The caller's telephone number, the caller's city and state of location must be provided upon request from a subscriber in this state."

Page 5, line 12, after the period, insert " Any other provision of this section notwithstanding, the attorney general may use the national "do-not-call" registry established and maintained by the Federal Trade Commission as the no call list."

Renumber accordingly

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Deanna Waller
Operator's Signature

12/21/03
Date

My name is Brenda Dissette, Executive Director of the ND Association of Nonprofit Organizations. Our organization represents over 270 charitable nonprofit organizations throughout the state. Charitable nonprofit organizations in North Dakota provide essential services to people and communities; they give citizens opportunity to volunteer, educate the public on important issues; they can leverage government funds with private donations.

SB 2255 is a bill that will protect consumers from fraudulent individuals and or businesses and exempts charitable nonprofit organizations from the "do not call list." However, you will be hearing from some North Dakota "good" credible charitable nonprofit organizations that do not have the staff or the volunteers to solicit donations over the telephone and rely on professional fundraisers to assist them with their fundraising. There are many legitimate charitable nonprofit organizations that rely on the expertise and operational efficiencies of professional telemarketers for fundraising because they can be cost effective and practical. Many nonprofits cannot duplicate the efficiencies gained by using professional fundraisers, allowing nonprofit organizations to focus on their mission rather than spending time and money purchasing and maintaining expensive equipment, training personnel and acquiring an extensive knowledge of state regulations.

The Federal Trade Commission is working on a national "do not call" list that is prompting numerous comments from commercial and non-commercial entities suggesting that the proposed rules would violate the First Amendment. And the national "do not call" list will keep the name of the consumer's name on the list for ten years and in North Dakota only for four years.

SB2255 does exempt charitable nonprofit organizations that utilize staff and volunteers to solicit funds over the phone and those nonprofit organizations in our state that also have a national presence and utilize professional fundraising would not be exempt. Charitable nonprofit organizations and professional fundraisers are already required by state law to report their revenues, expenses and contracts when it involves charitable solicitation that is monitored by the ND Attorney General's office and the Secretary of States office. And those reporting requirements have been made stronger

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in SB2341 that is up for vote today in the House of Representatives. The state association would like to suggest an amendment to include those charitable nonprofit organizations that do use professional fundraisers to be included as exempt. Then commercial and non-commercial would both have the same rules to live by.

Brenda Dissette, Executive Director

North Dakota Association of Nonprofit Organizations

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