

**NOTE: As provided in LFC policy, this report is intended for use by the standing finance committees of the legislature. The Legislative Finance Committee does not assume responsibility for the accuracy of the information in this report when used in any other situation.**

**Only the most recent FIR version, excluding attachments, is available on the Intranet. Previously issued FIRs and attachments may be obtained from the LFC office in Suite 101 of the State Capitol Building North.**

## FISCAL IMPACT REPORT

SPONSOR: Wright DATE TYPED: 02/05/01 HB 234  
 SHORT TITLE: Telemarketing Regulation Act SB \_\_\_\_\_  
 ANALYST: Wilson

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY01	FY02	FY01	FY02		
			\$380.0*	Recurring	General Fund
			\$130.0*	Non-Recurring	General Fund

\*See Narrative

(Parenthesis ( ) Indicate Expenditure Decreases)

### REVENUE

Estimated Revenue		Subsequent Years Impact	Recurring or Non-Rec	Fund Affected
FY01	FY02			
	See Narrative		Recurring	General Fund

(Parenthesis ( ) Indicate Revenue Decreases)

### SOURCES OF INFORMATION

Public Regulation Commission (PRC)  
 Attorney General's Office (AG)

### SUMMARY

#### Synopsis of Bill

HB123 creates the Telemarketing Regulation Act which would require the Public Regulation Commission to keep a "do not call" database of individuals who do not want telemarketers to call them. Telemarketers would then be subject to penalty for calling any person on the list.

Specifically, the PRC (or a contractor hired by the agency) is required to establish and provide for the operation of a database consisting of a list of telephone numbers of residential subscribers who object to telemarketing. By January 1, 2002, the PRC must promulgate rules addressing at least the following: (1) requiring telecommunications companies that provide local exchange service to inform residential subscribers of the opportunity to notify the commission of its objection to telemarketing; (2) methods by which objections

## House Bill 234 -- Page 2

and revocations are to be collected and added to the database, and the length of time the notice of objection would be effective; (3) methods by which telemarketers may obtain access to the database.

A residential subscriber wishing to place his/her objection in the data base will be charged a fee of five dollars by the Commission and persons desiring to engage in telemarketing who desire access to the database will be charged a fee of ten dollars. The information in the database is confidential and is not subject to public inspection or disclosure. Persons engaged in telemarketing are prohibited from blocking or circumventing a subscriber's use of caller ID. If the FCC establishes a national database, the PRC is required to include any part of the database that relates to New Mexico. In enforcing the provisions of the Act, the PRC may impose a penalty of up to \$2000 for each violation, and may seek additional relief in the district court for Santa Fe County. A person who has been subjected to more than one act of telemarketing by the same person in violation of the Act, may bring an action to enjoin the violation and bring an action to recover for actual monetary loss from the violation or receive up to \$2,000 in damages, whichever is greater. It is a defense to an action that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telemarketing violations. There is a two year statute of limitations for bringing actions pursuant to the Act; the remedies under the Act are not exclusive, but are cumulative

### Significant Issues

1. Telemarketing practices are currently regulated pursuant to the Unfair Practices Act (Sections 57-5A-1 to 57-5A-5 NMSA 1978), and Trade Practices and Regulations, specifically Section 57-12-22 NMSA 1978 which sets out procedures, times, required disclosures etc. regarding telephone solicitation sales. The Attorney General is charged with the duty of enforcing Trade Practices and Regulations and is given statutory authority to bring actions, seek injunctions, negotiate settlements and restitution, and seek civil penalties. The maintenance of the database and enforcement of actions under HB 234 might be more efficiently undertaken by the Attorney General because it is more consistent with the duties of the Attorney General than with the duties of the Public Regulation Commission. The Public Regulation Commission regulates the rates and quality of service of telecommunications companies; it does not regulate the use of the telephone as a marketing tool by telemarketers.
2. There is an internal conflict regarding the confidentiality of the database. On one hand, a telemarketer pays \$10.00 to gain access to the database (Section 8), but Section 9 states that the information in the database is confidential and is not subject to public inspection or disclosure. Does the payment of \$10.00 negate the confidentiality of the database? If the database is subject to disclosure to telemarketers, it will effectively be public.
3. Enforcement of this Act will be very difficult unless customers actually record calls to their homes and keep track of whether a blocking method was used by the telemarketer. Many, if not most telemarketers are calling from out of state, and enforcement may require actions to be brought in courts outside of New Mexico or in federal court. This increases the complexity and cost of enforcement actions. The Attorney General's office may be more equipped to handle such enforcement actions.

### **FISCAL IMPLICATIONS**

HB 234 has no appropriation. The Public Regulation Commission estimates that the cost to administer and enforce this bill would be \$380,000 annually and a one-time expense of \$130,000: 5 FTE's at a cost of \$180,000 for salaries and benefits, and \$200,000 for office space, recurring annually; setting up the database would cost approximately \$100,000 and the furniture and computer equipment would cost approximately \$30,000. The revenues from the bill cannot at this time be estimated, and would not go to the PRC. The costs of this bill can not be absorbed by the PRC.

There will be some revenues generated through fees but it is not possible for the PRC to estimate what they will be.

## **ADMINISTRATIVE IMPLICATIONS**

HB 234 will require that the Public Regulation Commission establish an entirely new program. A rulemaking will be required, a data base will have to be established and maintained, funds will need to be tracked, and an investigator and attorney will be needed for enforcement. The agency estimates that 5 FTE's will be required: 1 person to design and maintain the data base; 1 person to administer the program; 1 attorney for enforcement; 1 investigator for enforcement; 1 person in the administrative services division to handle fiscal issues.

## **CONFLICT**

SB 220, Telephone Consumer Privacy Act

## **OTHER SUBSTANTIVE ISSUES**

The concept of a Do Not Call law is well established. The Telephone Consumer Protection Act of 1991 and the Telemarketing and Consumer Fraud Abuse Prevention Act of 1994 are federal laws that require telemarketing firms to establish and maintain "Do Not Call" lists. These federal laws require the telemarketing firms to place residential telephone consumers on their "Do Not Call" list upon the consumers' request. The federal Do Not Call provisions have been ineffective, inconvenient for residential telephone consumers to use and largely unenforced. A residential telephone consumer must tell each telemarketing firm that has contacted the consumer about the consumer's desire to not receive additional telemarketing calls. The residential telephone consumer would need to maintain his or her own list in order to determine when a telemarketer has violated the Do Not Call provision.

Because of the inadequacies of the current federal Do Not Call provisions, seventeen states have enacted state versions of the Do Not Call law. These laws vary regarding which state agency is required to maintain the list, the imposition of fees to administer the program, the imposition of civil and/or criminal penalties and whether the statutes provides for a private cause of action and the recovery of reasonable attorneys' fees.

The Direct Marketing Association has established a private, voluntary self-regulation system that it calls the Telephone Preference Service. This private, voluntary, self-regulation system is inadequate as it only covers members of the Direct Marketing Association and lacks reasonable enforcement mechanisms.

The use of the telephone to market goods and services to the home and to other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques. Unrestricted telemarketing, however, can be an intrusive invasion of privacy. Many consumers are outraged over the proliferation of intrusive nuisance calls to their homes from telemarketers. The proliferation of unsolicited telemarketing calls, especially during the evening hours, creates a disturbance upon the home and family life of New Mexican consumers during a time of day used by many families for traditional family activities.

The public policy implicated by this legislation is how to balance an individuals' privacy rights and commercial freedom of speech in a way that protects the privacy of individuals and permits legitimate telemarketing practices. While many consumers enjoy and benefit from unsolicited telemarketing contacts from legitimate telemarketers, many other consumers object to these contacts as an invasion of privacy and have expressed an intention to refuse to respond to such telemarketing contacts.

Legitimate telemarketers have no further legitimate interest in continuing to invade the privacy of those consumers who have affirmatively expressed their objections to such contact. Moreover, legitimate telemarketers can make their telemarketing efforts even more cost-effective by avoiding calling those consumers who have affirmatively expressed an objection to any telemarketing contact.

This bill recognizes that the consumer can always invite a business to contact the consumer and does not limit calls from a business with whom a consumer has an existing business relationship. The ambit of the Act targets unsolicited telemarketing activity only.

## **House Bill 234 -- Page 4**

A regulatory framework that requires residential telephone consumers to pay a small fee to further their privacy interests is a reasonable approach to finance such a program. Telemarketers should also pay a reasonable fee but one that does not discriminate against smaller firms by charging excessively high fees. This financing mechanism requires those who benefit from the program and profit from the business activity to pay for the program.

Based on the experiences in other states, as many as 25% to 33% of residential telephone consumers may be interested in participating in this service. There will be thousands of telemarketing firms that would be impacted by this law.

### **POSSIBLE QUESTIONS**

Would it be more efficient to give Attorney General the responsibility of administering and enforcing the provisions of HB234 since HB234 expands the regulation of telemarketers as a Trade Practice and Regulation?

DW/njw