

1-15-1994

"You May Have Already Won. . .": Telemarketing Fraud and the Need for a Federal Legislative Solution

Patrick E. Michela

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Administrative Law Commons](#), [Communications Law Commons](#), [Consumer Protection Law Commons](#), [Criminal Law Commons](#), [Legislation Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Patrick E. Michela *"You May Have Already Won. . .": Telemarketing Fraud and the Need for a Federal Legislative Solution*, 21 Pepp. L. Rev. Iss. 2 (1994)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol21/iss2/5>

This Comment is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

“You May Have Already Won . . .”: Telemarketing Fraud and the Need for a Federal Legislative Solution

“There’s a sucker born every minute.”

—P.T. Barnum

I. INTRODUCTION

Teresa M. Angle, a ninety-year-old widow, lived in a one bedroom apartment in Rochester, New York.¹ She had been married three times and had survived all three husbands. Mrs. Angle’s third husband had invested their money wisely in blue-chip stocks and had left Mrs. Angle financially secure and comfortable.²

On June 1, 1989, Jim Coburn telephoned Mrs. Angle and identified himself as an investment broker for a company called Group America.³ Mr. Coburn told Mrs. Angle about the excellent investment potential of foreign currencies, especially the Japanese yen. Mrs. Angle, who had travelled extensively and had visited the Far East, was intrigued by Mr. Coburn’s sales presentation and his promises of financial security. She told Mr. Coburn she would “think it over.”⁴

The following week, Mr. Coburn telephoned Mrs. Angle again and told her that she should take advantage of the investment opportunity immediately because the yen was “doing good.”⁵ These discussions persuaded Mrs. Angle and she forwarded a check to Group America for \$5,152.80. A week later, Mrs. Angle sent Group America an additional \$6,097.01.⁶

1. *The Nature and Extent of Telemarketing Fraud and Federal and State Law Enforcement Efforts to Combat It: Hearings Before the Commerce, Consumer and Monetary Affairs Subcomm. of the House Comm. on Government Operations*, 101st Cong., 2d Sess. 16 (1990) [hereinafter *The Nature and Extent of Telemarketing Fraud*].

2. *Id.* at 16-18.

3. *Id.* at 17.

4. *Id.*

5. *Id.*

6. *Id.*

Over the next nine months, Mr. Coburn and other representatives of Group America called Mrs. Angle and convinced her to convert all of her assets to the investments they suggested. On Group America's recommendations, she invested in the yen, British pound notes, Deutsche marks, platinum, copper, gold, and other currencies and metals.⁷ She paid for her investments either by check or by directly sending her stock certificates, which Group America sold and converted to currencies and metals.⁸

Mrs. Angle's purchases ranged in amount from \$5,000 to well over \$100,000 per order.⁹ Although salesmen from Group America told Mrs. Angle that "the sky was the limit" and promised her profits up to \$1,000,000 on her investments, Mrs. Angle lost nearly every dollar she "invested" through Group America.¹⁰ Mrs. Angle testified before a congressional subcommittee that, acting on Group America's investment advice, she had lost over \$800,000, including the loss of dividend earnings she would have realized if she had not sold her stock.¹¹ During her relationship with Group America, her considerable assets plummeted to about \$40,000.¹² She testified that her financial ruin had caused her many sleepless nights and constant anxiety over the state of her finances and the likelihood that she could not afford the rent on her apartment. She said:

I cannot really explain why I let these total strangers sweet talk and badger me into sending my life savings to them, except to say that they must have taken advantage of my loneliness by constantly calling me on the telephone and talking to me and my need for financial security which they promised they could achieve for me by these 'hot investments.'¹³

Unfortunately, Mrs. Angle's experience is not uncommon. Over the past decade, telemarketing has expanded into an industry worth over \$400 billion per year.¹⁴ Unscrupulous swindlers, seeing the telephone as a useful tool to conduct their deceit, have taken advantage of the telemarketing industry to bilk consumers out of billions of dollars annu-

7. *Id.* at 18.

8. *Id.* Mrs. Angle owned stock in such companies as Eastman Kodak, Chase Manhattan, and General Motors. She also had money in several mutual funds. All of these assets were converted to the investments suggested by Group America. Mrs. Angle did not know how much Group America sold her stocks for. *Id.* at 17-18.

9. *Id.* at 16-18.

10. *Id.* at 18.

11. *Id.* at 24.

12. *Id.* at 16.

13. *Id.* at 16-17.

14. Nadji Tehrani, *Publisher's Outlook: We Agree With the U.S. Department of Commerce . . . HR 1304, as Proposed, Is Too Restrictive on Business and Unnecessary!*, *TELEMARKETING*, Sept. 1991, at 1 (reporting that in 1991, telemarketing accounted for \$435 billion in sales).

ally.¹⁵ Fraudulent telemarketers win the confidence of consumers through slick sales presentations and prey upon their weaknesses. The number and complexity of fraudulent telemarketing scams have continued to increase and have touched literally every geographical region of the country and every segment of society.¹⁶

This Comment will examine the nature and extent of telemarketing fraud and attempts by local, state, and the federal government to combat it. Section II will detail the operation of a typical telemarketing business, the types of scams most often used by fraudulent telemarketers, and the groups most often victimized by telemarketing fraud.¹⁷ Section III will address various approaches by state and local government agencies to eliminate fraudulent telemarketing, and the difficulties these efforts have faced.¹⁸ Section IV will examine federal legislation currently pending in Congress designed to give the Federal Trade Commission (FTC) authority to make rules regulating the telemarketing industry and state attorneys general the power to prosecute fraudulent telemarketers in federal court.¹⁹ Finally, Section V will focus on the federal bills and offers suggestions for FTC rules, further legislation, and other programs.²⁰

II. TELEMARKETING FRAUD: AN OVERVIEW OF THE PROBLEM

The telephone, virtually since its invention, has exhibited its potential as a powerful business machine.²¹ Although the phone has been used for

15. *Telemarketing Fraud: Hearing on S. 2213, H.R. 4101, and S. 2326 Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science, and Transportation, 100th Cong., 2d Sess. 1-2 (1988)* [hereinafter *Hearing on S. 2213, H.R. 4101, and S. 2326*]. Senator Albert Gore stated:

Some have suggested that telemarketing fraud ought to go by the slogan "Reach out and cheat someone," for that is exactly what is now happening. There is no mistaking it, telemarketing fraud is a billion dollar a year illicit industry that most often involves . . . offers that are simply too good to be true.

Id.

16. Denise Gellene, *FBI Launches 12-State Telemarketing Sweep; Fraud: Authorities Arrest Dozens and Impound Property Worth More Than \$1 Million in a Nationwide Crackdown*, L.A. TIMES, Mar. 5, 1993, at D1 (estimating that 9 out of 10 Americans had been targets of "suspicious solicitations").

17. See *supra* notes 21-172 and accompanying text.

18. See *supra* notes 173-290 and accompanying text.

19. See *supra* notes 291-334 and accompanying text.

20. See *supra* notes 335-99 and accompanying text.

21. MURRAY ROMAN, TELEPHONE MARKETING TECHNIQUES 7 (1979). Roman, a noted

over one hundred years in all facets of the business world, the widespread use of the phone as a marketing tool and a vehicle for initial customer contact is a fairly recent development.²² Businesses have begun to understand the potential uses for telemarketing²³ and, with the advances in telecommunications technology, are beginning to tap that potential.²⁴

The applications of telemarketing are continually increasing in both number and complexity. Organizations use telemarketing to raise funds for charity,²⁵ to make service calls to pre-existing customers,²⁶ to follow up with direct mail solicitations,²⁷ to remind magazine subscribers to re-

telemarketing expert, states that the phone "was used as a business adjunct long before it became the socially oriented instrument it is now considered." *Id.* He points out that a list produced by the Bell Telephone Company in 1878 named 272 different businesses with phones. *Id.*

22. Felix M. Kent, *Regulation of Telemarketing*, N.Y.L.J., Sept. 23, 1988, at 3. Although "telephones have been used to market products . . . since the invention of the telephone," sophisticated and widespread telemarketing has emerged only over the past two decades. *Id.* In fact, "[s]ome economic forecasters [predict] . . . that, except for perishables and certain other items, a large part of the American family's shopping budget [in the 21st Century] will be expended for purchases made from the home." *Id.* This growth in the telemarketing industry has been traced to both technological advances, such as computers and credit cards, and sociological changes, such as the growth of the two income family and the resultant decrease in time available for families to shop. *Id.*

23. "Telemarketing" is defined as "a new marketing discipline that uses telecommunications technology as part of a well-planned, organized, and managed marketing program that prominently features the use of personal selling, using non-face-to-face contacts." BOB STONE & JOHN WYMAN, *SUCCESSFUL TELEMARKETING: OPPORTUNITIES AND TECHNIQUES FOR INCREASING SALES AND PROFITS* 210 (2d ed. 1992).

24. Tehrani, *supra* note 14, at 88. Telemarketing has become, "by far, the most effective tool in sales, customer service, credit collection, market research and business negotiation, which are the lifeblood of every business, small or large." *Id.*

25. STONE & WYMAN, *supra* note 23, at 114-15. The Jerry Lewis Muscular Dystrophy Telethon is the best known example of fundraising through telemarketing. However, telemarketing is also used by many other charities and organizations. It has been estimated that over \$40 billion per year is raised for charitable organizations, with a large percentage of that money raised through phone solicitations. *Id.*

26. EDWARD L. NASH, *DIRECT MARKETING: STRATEGY, PLANNING, EXECUTION* 158 (2d ed. 1986). Companies can contact existing customers to advise them that an order has been delayed or that an item is out of stock in a certain color or size. *Id.* Another example of the use of telemarketing with existing customers is the "GE Answer Center." General Electric operates a large telemarketing center that consumers can call toll-free for information on the operation and maintenance of GE products. STONE & WYMAN, *supra* note 23, at 214.

27. NASH, *supra* note 26, at 159. Telemarketers may send out promotional materials to consumers with a number to call. One example is a promotion run by Johnnie Walker Scotch. Consumers were given an opportunity to win \$25,000 by calling a toll-free 800 number. The recorded message asked the caller to answer a simple question: name the city where Johnnie Walker is bottled. Of course, the answer was available

new,²⁸ to prospect for future customers,²⁹ and to conduct market research and political polling.³⁰ In addition, businesses use telemarketing for a wide array of tasks. Many small businesses use telemarketing as a cost-effective way to advertise and develop new clients.³¹

on the label from any bottle of Johnnie Walker. STONE & WYMAN, *supra* note 23, at 82.

28. NASH, *supra* note 26, at 159 (after a series of letters reminding a subscriber to renew, the publisher may call the subscriber directly).

29. *Id.* at 160. "Cold calling" can be expensive, but it can also be an effective way to develop future clients. Generally a less experienced salesperson will make calls attempting to "bird dog," or set up appointments with, potential clients. When the novice salesperson identifies a solid lead, he turns it over to a more experienced solicitor who attempts to make the sale. *Id.*

30. *Id.* at 157 ("The most aggressive users of [telemarketing] have been politicians, whose paid and volunteer workers canvass voters, raise funds, and get supporters to the polls on election day.").

31. Ann M. Arcadi, Note, *What About the Lucky Leprechaun?: An Argument Against "The Telephone Consumer Protection Act of 1991,"* 1991 COLUM. BUS. L. REV. 417, 427. The owners of the Lucky Leprechaun, a chimney-sweep service in Salem, Oregon, discovered telemarketing and found that it gave them "10 or 15 solid leads" for new customers each day at a much lower price than the advertisements they used to run. The Lucky Leprechaun used an "automatic dialer announcing device" (ADAD), a computer that automatically dials random telephone numbers and plays a pre-recorded advertisement. *Id.*

Many states have banned the use of ADADs or have enacted statutes requiring that a live operator make initial contact with the recipient of the call and ask permission to play the pre-recorded message. *See, e.g.,* CAL. BUS. & PROF. CODE § 2874(a) (West Supp. 1993). However, these laws defeat the purpose of ADADs. Small businesses use the machines to save money on advertising because the requirement of live operators drives up the cost of advertising. The Oregon Supreme Court unanimously overturned an Oregon state law prohibiting ADADs, holding that the law is a violation of free-speech rights guaranteed by the Oregon Constitution. Charles E. Beggs, *Oregon Top Court Cuts Off Phone-Solicitor Law*, THE OREGONIAN, Feb. 20, 1993, at B6. However, the United States Supreme Court recently upheld the states' right to restrict the use of ADADs. In April 1993, the Supreme Court refused, without comment, to hear a challenge to Minnesota's ADAD law. Paula M. Alberta, *High Court Backs Rights of States to Restrict Automatic Dialing*, DM NEWS, Apr. 5, 1993, at 1.

The Federal government, following the lead of state ADAD statutes, and reacting to public outcry that denounced ADADs as an invasion of privacy, passed the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227(b)(1)(B) (Supp. 1991), which bans the use of ADADs for commercial purposes. The owners of the Lucky Leprechaun filed a motion for a preliminary injunction against the federal law, and, in December 1992, an Oregon district court judge granted the motion, finding that the Lucky Leprechaun had raised a serious constitutional question as to the validity of the TCPA under the First and Fifth Amendments. *Moser v. FCC*, 811 F.

The use of the phone for marketing purposes is advantageous to businesses for several reasons. First, telemarketing is highly selective, reaching only the individuals the telemarketer chooses to solicit.³² Second, telemarketing "reaches out to its customer with ultimate immediacy;" it puts the seller and customer in direct personal contact.³³ Third, the direct contact between the potential buyer and seller forces the potential buyer to respond in some way, thus giving the seller immediate feedback regarding the product and the sales technique. In fact, "most people feel an obligation to be courteous. Few people just hang up."³⁴

Most telemarketing firms, whether legitimate or fraudulent, are set up in a similar manner and employ many of the same methods. The following section will detail the organization of a typical telemarketing operation. The operation described is a legally run business designed to locate potential customers and make sales over the phone; the use of this basic organizational framework in illegally run telemarketing operations will be discussed in later sections.

A. *A Typical Telemarketing Operation*

1. The "Front End"

The first and most important task every telemarketing operation must perform is to locate potential customers. Telemarketers seek to develop potential customers or "leads" who have attributes very similar to existing customers or fit into the specific target group for the particular product.³⁵ Telemarketers acquire names and addresses of prospects from a

Supp. 541 (D. Or. 1992). Subsequently, Moser was granted summary judgment by the court, which held that the TCPA placed unconstitutional restrictions on protected commercial speech. *Moser v. FCC*, 826 F. Supp. 360 (D. Or. 1993).

Although ADAD telemarketing comprises a significant portion of telemarketing activity, a detailed analysis of the use of such machines is beyond the scope of this Comment.

32. NASH, *supra* note 26, at 157.

33. *Id.* at 157-58.

34. *Id.* at 158. The author also recognizes that the immediacy and direct contact between potential buyer and seller can have negative aspects: "Nothing will irritate a consumer quite as much as a poorly timed, poorly conceived, or poorly executed telephone call." *Id.*

35. STONE & WYMAN, *supra* note 23, at 108-10. An analysis of a company's current client list can indicate the precise demographic group or specific attributes upon which the company should concentrate. ROMAN, *supra* note 21, at 17.

number of different sources including phone books, magazine subscriber lists, list brokers,³⁶ and club rosters.³⁷

Once the telemarketer has compiled a contact list, front-end salespeople, or "fronters," make the initial contact with the customers either by placing calls to the potential customers, known as an "outbound program,"³⁸ or by receiving calls from customers who respond to advertisements placed by the telemarketer, known as an "inbound program."³⁹ Fronters, the least experienced salespeople in any telemarketing operation, work out of large phone rooms, sometimes pejoratively called "boiler rooms,"⁴⁰ containing many salespeople and many phones.⁴¹ The front end, in both outbound and inbound programs, is the most expensive and time-consuming component of any telemarketing operation.⁴²

36. A list broker compiles client lists from various sources, such as credit card companies, and then sells them to telemarketers and other direct marketers. NASH, *supra* note 26, at 80-83.

37. ROMAN, *supra* note 21, at 17.

38. In an outbound program, the telemarketer makes calls, attempting to locate customers interested in buying its products. STONE & WYMAN, *supra* note 23, at 3, 208. Outbound programs are more expensive to run because, since the telemarketer is making the initial contact, the consumer may be contacted at an inconvenient time and, thus, is unreceptive to a sales presentation. *Id.* at 155-57.

39. In an inbound program, the telemarketer induces the customer to call the company either by mailing out promotional pamphlets or by print, radio, or television advertising. *Id.* at 164. Inbound programs usually generate more sales than outbound programs because the customer, by calling in, has already demonstrated an interest in the product or service and calls at his convenience. *Id.*

40. HOUSE COMM. ON GOVERNMENT OPERATIONS, THE SCOURGE OF TELEMARKEETING FRAUD: WHAT CAN BE DONE ABOUT IT?, H.R. REP. NO. 421, 102d Cong., 1st Sess. 3 n.3 (1991) [hereinafter THE SCOURGE OF TELEMARKEETING FRAUD]:

The term boiler room comes from the past when telemarketers would rent space for a short time in old buildings, often in the basement near or in the boiler rooms Boiler rooms [today] can be set up anywhere but usually involve a short lease, a quick set up, a large room . . . with many salesmen and telephones, and then a quick departure when the scam is detected.

Id. This Comment will differentiate between illegal boiler room operators and legitimate telemarketers. The term "boiler room" will only be used to denote illegal telemarketing operations.

41. *Id.* See also Richard L. Bencin & Donald J. Jonovic, *Anatomy of a Boiler Room*, in ENCYCLOPEDIA OF TELEMARKEETING 517 (Richard L. Bencin & Donald J. Jonovic eds. 1989) [hereinafter ENCYCLOPEDIA OF TELEMARKEETING] (describing the "rundown, sub-human, inadequate facilities" inside a boiler room).

42. THE SCOURGE OF TELEMARKEETING FRAUD, *supra* note 40, at 17. Although front end sales are low, the back end is so profitable that a telemarketer can profit greatly even if only 4 out of 150 people contacted on the front end actually buy the product

Due to the inexperience of front-end salespeople, telemarketers encourage, or sometimes require, frontiers to read verbatim from a script provided by the telemarketer that is designed to induce the customer to buy the product or service being offered.⁴³ A typical script allows the recipient of the phone call to ask questions and provide certain information to the salesperson. The script provides the frontier with different messages to read depending on the customer's responses to the questions posed by the frontier.⁴⁴

The questions and responses in the script are designed so that the frontier can easily overcome any objections to the product or reluctance to buy.⁴⁵ In some cases, telemarketers overcome objections to the sales presentation and reluctance to buy on the front end through the use of "closers."⁴⁶ Closers are more experienced salespeople, often the managers of the telemarketing operation, who break into the front-end sales presentation to make a stronger sales pitch when a frontier is unable to "close the deal."⁴⁷

Telemarketers also often employ "chance promotions" or sweepstakes giveaways to induce customers to buy their products.⁴⁸ In a chance pro-

or service being offered. *Id.*

43. ROMAN, *supra* note 21, at 18-19. Like the copy in a print or broadcast advertisement, scripts are designed to convince a potential customer to buy the product. However, unlike advertising copy, scripts are read directly to the customer and, therefore, they must take into account the fact that the recipient of the call can raise objections and ask questions. *Id.* See also Thomas A DePrizio, *Step-by-Step for Startups: A Review*, in *ENCYCLOPEDIA OF TELEMARKETING*, *supra* note 41, at 532, 538 (discussing different types of scripts).

44. NASH, *supra* note 26, at 162 ("In some cases [the conversation] moves to 'Thanks anyway. Goodbye.' In other situations, it asks other questions or provides more information.").

45. *Id.* For an example of a typical telephone script, see *id.* at 162-68. For information regarding the development and use of scripts, see generally *ENCYCLOPEDIA OF TELEMARKETING*, *supra* note 41, at 163. See also *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 567 n.2, 568 (7th Cir. 1989) (sales script for a fraudulent telemarketing scam involving the sale of "discount travel passports"), *cert. denied*, 493 U.S. 954 (1989).

46. *Innovation in Telemarketing Frauds and Scams: Joint Hearing Before the Subcomm. on Regulation, Business Opportunities, and Energy of the House Comm. on Small Business and the Subcomm. on Health and Long-Term Care of the House Select Comm. on Aging*, 102d Cong., 1st Sess. 202 (1991) [hereinafter *Joint Hearing*].

47. *Id.* at 203. Managers can also communicate with frontiers over a circuit closed to the customer to advise the frontier what to say during the conversation. *Id.*

48. See generally *PROMOTION MARKETING ASSOCIATION OF AMERICA, INC., PROMOTION MARKETING LAW* (Frank T. Dierson, ed. 1991) [hereinafter *PROMOTION MARKETING LAW*]. Chance promotions are not an essential element of all telemarketing sales presentations. However, the practice is prevalent throughout the industry and is used heavily in fraudulent telemarketing scams. Chance promotions are closely regulated by both federal and state criminal statutes. *Id.*

motion, customers are given the opportunity to win substantial prizes in exchange for listening to the telemarketer's sales presentation.⁴⁹ In inbound programs, the telemarketer uses the chance promotion as part of a direct mail campaign to induce people to call; in outbound programs, the telemarketer uses the promotion to keep the person on the phone.⁵⁰ However, because these promotions closely parallel lotteries, telemarketers must operate them very carefully to avoid violating state and federal laws that regulate chance promotions and prohibit lotteries.⁵¹

The vast majority of customers contacted by the front-end salespeople do not buy the telemarketer's products. One study concluded that a 20% sales rate is the highest rate a telemarketer can expect to realize on front-end sales efforts, and in many cases the sales rate is much lower.⁵² Because of the high cost of the calls, the typical telemarketer loses money on the front end.⁵³ However, by concentrating on customers that purchase the products and attempting to sell more of the product to those customers, a telemarketer can recoup front-end losses. Telemarketing is profitable, therefore, through the telemarketer's use of this process, which is called "reloading."

2. The "Reload"

Once the fronters make a sale, they give the name of the customer to the more aggressive and experienced back-end salespeople, or "reloaders."⁵⁴ Reloaders generally work without scripts and rely instead on their persuasive powers to overcome the customer's objections.⁵⁵

49. See generally LOUIS W. STERN & THOMAS L. EOVALDI, LEGAL ASPECTS OF MARKETING STRATEGY: ANTITRUST AND CONSUMER PROTECTION ISSUES 446-47 (1984) [hereinafter LEGAL ASPECTS OF MARKETING STRATEGY] (discussing legal aspects of sales promotion and personal selling practices).

50. *Id.*

51. For a discussion of lottery laws, see *infra*, notes 88-99 and accompanying text.

52. STONE & WYMAN, *supra* note 23, at 12-16. But see NASH, *supra* note 26, at 161 (a successful telemarketing campaign might achieve results of 25 to 35 percent responsiveness).

53. Inbound calls can cost as much as \$7.00 each and outbound calls can cost as much as \$16.00. See STONE & WYMAN, *supra* note 23, at 152.

54. Interview with Alan B. Pick, Los Angeles, November 18, 1992. Mr. Pick is a Los Angeles attorney with expertise in telemarketing law.

55. THE SCOURGE OF TELEMARKETING FRAUD, *supra* note 40, at 18 n.40. One telemarketer described the method he used to overcome a potential client's request to discuss the investment with his wife: The telemarketer would attack the client's "manhood" by asking, "Look down between your legs; do you have any [testicles]"

They concentrate on customers who have demonstrated a responsiveness to phone solicitations and a willingness to buy products over the phone.⁵⁶ The reloaders make repeated calls to the customers to sell more of the product.⁵⁷ They often re-enter the customer in chance promotions offered by the telemarketing firm and use the chance promotion as a carrot to induce more sales at increasing prices to the consumer.⁵⁸

As the discussion of Teresa Angle's⁵⁹ experience demonstrates, many fraudulent telemarketers will continue to reload the customers until the customer has no money left to spend.⁶⁰ Fraudulent telemarketers reload the victims of the fraud repeatedly until complaints begin to mount and the authorities begin to close in. At that point, the fraudulent telemarketers will make "drop" calls offering larger discounts and more substantial prizes.⁶¹ Shortly thereafter, the telemarketers "bust out." They close down the operation, move to a different area, and set up the same or a similar scam again.⁶²

The qualities that have made telemarketing appealing to legitimate businesses have also drawn scam artists willing to use the technology to swindle unsuspecting consumers out of billions of dollars per year.⁶³ The illicit use of telemarketing has sullied the image of telemarketing for

down there? Who wears the pants in your family?" *Id.* This same telemarketer demonstrated to House staffers that he could sell "goat manure" by overcoming any questions or concerns raised by the staffers. *Id.* The House committee concluded that the telemarketer "proved his point: You can sell almost anything with the right pitch and the right manner." *Id.*

56. Interview with Alan B. Pick, *supra* note 54.

57. THE SCOURGE OF TELEMARKEETING FRAUD, *supra* note 40, at 19. One fraudulent telemarketer said: "Once a first sale was completed, [we] immediately reapproached the client within the week to effect further sales. The objective was to steal as much money from the victim as possible within a 2-month period." *Id.* (emphasis omitted).

58. See *Joint Hearing*, *supra* note 46, at 203-04 (testimony of Kenneth M. Hearst, Assistant Chief Postal Inspector for Criminal Investigations).

59. See *supra* notes 1-13 and accompanying text.

60. THE SCOURGE OF TELEMARKEETING FRAUD, *supra* note 40, at 18-19. One fraudulent telemarketer described the role of the reloaders in an illegal telemarketing scheme: "The reloaders . . . would ascertain how much [money] the customer had, where they had their investments, and through very elaborate prepared pitches, set about to bilk the customer out of as much money as they could." *Id.*

61. See *Joint Hearing*, *supra* note 46, at 204.

62. *Id.* "One of the most insidious aspects of boiler room fraud is the ease with which the owners and sales people move among the boiler rooms. After a 'Bust Out,' . . . operators easily go back into business at other boiler rooms or under other names." *Id.*

63. 138 CONG. REC. H9, 693 (daily ed. Sept. 29, 1992) (statement of Rep. Swift). Estimates of the annual losses to Americans resulting from telemarketing fraud vary widely. The National Consumer's League estimates the losses at \$15 billion per year. *Id.* The Federal Trade Commission estimates that telemarketing fraud may cause losses of as much as \$40 billion annually. *Id.*

honest businesses⁶⁴ and has made consumers, who could benefit from legitimate telemarketing, leery of buying goods or services over the phone.⁶⁵ The following section will detail some of the more common scams employed by fraudulent telemarketers.

B. *Fraudulent Schemes Employed by Telemarketers*

State and federal authorities broadly define telemarketing fraud to encompass any scheme in which a telephone or other form of wire communication is used to defraud the public.⁶⁶ While fraudulent telemarketing schemes employ many of the same techniques used by scams not employing a phone,⁶⁷ the telephone adds a significant element of deception. A sophisticated telemarketer can use his powers of persuasion to paint a "word picture" in the mind of his client.⁶⁸ A telemarketer's skill in using these "word pictures" greatly increases the salesperson's ability to convince a purchaser to spend money on the

64. Telemarketing fraud has become so prevalent, well publicized, and entrenched, most articles and legislative reports focus only on fraudulent telemarketers and grudgingly admit that many legitimate telemarketers provide an invaluable service to consumers. *See, e.g.*, H.R. REP. NO. 688, 102d Cong., 2d Sess. 5 (1992) ("The Committee recognizes that legitimate telemarketing activities are ongoing in everyday business and *may provide a useful service* to both business operations and their customers." [emphasis added]).

65. *See Hearing on S. 2213, H.R. 4104, S. 2326, supra* note 15, at 62.

66. *See THE SCOURGE OF TELEMARKETING FRAUD, supra* note 40, at 3. The House Report points out that telemarketing fraud always contains unfair or deceptive business practices, but defines it more broadly than common-law fraud. Common-law fraud contains the following six elements: (1) misrepresentation, (2) scienter, (3) an intent to induce the victim's reliance on the misrepresentation, (4) actual reliance, (5) justifiable reliance, and (6) damages. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 105, at 685-86 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS §§ 525-26 (1981).

Fraudulent telemarketing scams usually do not contain all six of the elements because authorities often cannot prove that the salesman had the requisite intent. *THE SCOURGE OF TELEMARKETING FRAUD, supra* note 40, at 3 n.4. This is especially true with front-end sales presentations because the salespeople read directly from scripts. Nevertheless, even though all the elements cannot be proven, the House Report concludes that "fraudulent" is the most appropriate word." *Id.* This Comment will follow the House Report's broad definition of "telemarketing fraud," which includes unfair and deceptive, although possibly not fraudulent, practices.

67. *Id.* at 3.

68. *See* H.R. REP. NO. 688, 102d Cong., 2d Sess. 7 (1992) ("[T]elemarketers may attempt to deceive by painting 'word pictures' over the telephone that deliberately obscure or create mistaken assumptions in the minds of consumers . . .").

fraudulent scam.⁶⁹ Fraudulent telemarketers play upon the client's fears and emotions in ways that would be difficult or impossible in a face-to-face meeting.⁷⁰ In addition, they can tailor their sales presentations to appeal to the consumer, using different techniques for different types of people.⁷¹ The fraudulent telemarketers' expertise in the use of these powerful tools of deception continues to increase as new scams are developed every day.

The variety of scams involving the phone constantly increases because "boiler room operators are ingenious at coming up with schemes to sell almost anything, depending on what is a 'hot' item at that point in time."⁷² Boiler room operators are especially adept at determining the fears shared by many people and capitalizing on those fears. For example, during the U.S. military build-up in the Persian Gulf region preceding the war with Iraq, many boiler room operators, detecting fears of higher fuel prices, began selling partnerships in oil and gas leases and gasoline treatment products that they claimed would boost the octane of the gas and increase fuel efficiency.⁷³

69. Because a great number of boiler rooms are located in Southern California, many firms employ out-of-work actors as salespeople. Carol Angel, *Prosecutors Focus on Boiler Rooms and Other Scams*, L.A. DAILY J., Apr. 12, 1988, at 1. Former Assistant U.S. Attorney David A. Katz, coordinator of the Southern California Fraud Task Force, said that for these salespeople, working in a boiler room is "[e]ssentially . . . an acting job. Many of them are aware of the illegal nature of what they are doing . . . [b]ut they don't have trouble with the idea of giving a pitch, being charming." *Id.* at 26.

70. THE SCOURGE OF TELEMARKEETING FRAUD, *supra* note 40, at 3-4. Telemarketers are able to design their sales presentations to appeal to customers in various ways. One telemarketer convinced an 81-year-old widow to mortgage her house and invest in fraudulent oil and gas partnerships by calling once a week to read the Bible with her. *Id.* at 6.

71. *Id.* at 21-22. One fraudulent telemarketer said that there are "two ways to sell: fear or greed . . . [A] good pitch would hit both areas." *Id.* at 18. When discussing the sales of oil and gas leases, the telemarketer said that if he were talking to a "mooch," or a greedy investor, he would "design the pitch as if we were dealing with a sophisticated investor." *Id.* at 17. He would not go into the details of the investment, instead discussing the oil industry in general. *Id.*

72. *Id.* at 15.

73. Elyse Tanouye, "Operation Desert Scams" Nab Investors, WALL ST. J., Feb. 14, 1991, at C1. Boiler room operators routinely told "investors" that oil prices were certain to go "sky-high" and that investments would yield returns of 85% or more. *Id.* Although fraudulent telemarketers predicted prices of \$60 per barrel, crude oil actually dropped to \$21 after allied bombing began. *Id.*

Other boiler room operators have been able to use the current economic recession to their advantage. "Foreclosure counselors" often "disappear after extracting \$500 to help mortgage holders about to be booted from their homes." *Get Smart About Scams*, USA TODAY, July 15, 1992, at 10A. Also, some telemarketers scammed consumers by offering "advance fee loans" to consumers "regardless of credit history." David Holmstrom, *Scams Infiltrate Phone Lines*, THE CHRISTIAN SCI. MONITOR,

Due to the wide variety of scams and the ingenuity of fraudulent telemarketers in devising new ones, fraudulent telemarketing scams defy easy categorization.⁷⁴ However, there are several common scams that can be grouped into the following categories, discussed in greater detail below: (1) investment scams; (2) illegal lotteries; (3) 900-number scams; (4) credit card factoring/merchant credit card accounts; and (5) bank drafts. This list is illustrative of common telemarketing scams but is certainly not exhaustive.

1. Investment Scams

In investment scams, fraudulent telemarketers mislead the consumers into believing that they have invested their money in legitimate, stable ventures that will provide them with a generous return.⁷⁵ These scams often involve the sale of coins and precious metals,⁷⁶ gems,⁷⁷ real estate,⁷⁸ and oil and gas leases.⁷⁹

Mar. 2, 1992, at 8. After the consumer pays a \$200 to \$300 processing fee, the boiler room operator tells him that he did not qualify for the loan or merely mails him standard loan applications. *Id.*

74. See THE SCOURGE OF TELEMARKETING FRAUD, *supra* note 40, at 14-16.

75. *The Nature and Extent of Telemarketing Fraud, supra* note 1, at 8. For example, Grace Singletary, an 84 year old widow, testified before a House subcommittee that she had been duped into investing \$20,000 in a movie-production scam. At first, the salesman promised Mrs. Singletary that she would receive 2½ times her investment. Later, when it appeared that she was leery of investing in the scam, the salesman promised Mrs. Singletary that the investment was a "23-to-1 deal." *Id.* at 7-10.

76. See *infra* notes 1-13 and accompanying text. See also *FTC v. Security Rare Coins, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 22, 801 (E.D.N.Y. 1990) (defendants agreed to sign consent decree settling charges that they had misrepresented investment potential of coins); David Zigas & Gail DeGeorge, *Trade Metals! Little Money Down! Lose a Bundle Quick!*, BUSINESS WEEK, Jan. 29, 1990, at 87.

77. See, e.g., *FTC v. Kimberly Int'l Gem Corp.* [1983-87 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22, 282 (August 19, 1985) (defendants stipulated to permanent injunctions and default judgments and agreed to pay \$280,000 in redress for misrepresenting the investment potential of colored gemstones).

78. See generally Ralph E. Stone, *The Federal Trade Commission and Timeshare Resale Companies*, 24 SUFFOLK U. L. REV. 49 (1990). Real estate scams often involve the resale of timeshare condominiums, where the purchaser buys the right to use the property for a certain number of days per year. See also *FTC v. PM Marketing Masters, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 22, 760 (M.D. Fla. 1989) (court issued temporary restraining orders restraining defendants from engaging in deceptive practices in the sale of timeshare interests).

79. Tanouye, *supra* note 73, at C1.

As an illustration of how an investment scam works, consider the following. Kilgore Mining Company (KMC) solicited customers by phone, offering land for sale containing "guaranteed" coal deposits.⁸⁰ Salesmen sent brochures to people who expressed interest; the brochures contained falsified geology reports and Dun and Bradstreet reports on KMC's financial condition.⁸¹ Salesmen gave potential customers the names and phone numbers of "previously satisfied investors" who gave glowing reports of profitable investments through KMC.⁸² The "satisfied investors" were actually "shills" paid by KMC for their fraudulent misrepresentations.⁸³

Customers who bought the land from KMC received a letter stating that they had purchased the entire property, including subsurface coal rights. However, KMC owned only an option on the surface rights of the land it was selling⁸⁴ and never owned any mineral rights in the land. In fact, even if KMC had owned mineral rights, they would have been worthless: the coal that had once lay beneath the track had been previously mined.⁸⁵ Investors later learned that the land they had bought was worthless.⁸⁶ An FBI investigation of KMC resulted in the conviction of KMC's president, vice president, and two salesmen for mail and wire fraud and various other fraud counts.⁸⁷

2. Illegal Lotteries

Fraudulent telemarketers often operate illegal lotteries. As discussed above, many legitimate telemarketers use chance promotions or sweepstakes giveaways to induce consumers to buy their products. However, fraudulent telemarketers operate such promotions in violation of federal and state laws. Boiler room operators consider the products they sell to be of little or no importance, and usually the products are of inferior quality and grossly overpriced.⁸⁸ To sell these products, the salespeople

80. *United States v. Judd*, 889 F.2d 1410 (5th Cir. 1989), *cert. denied*, 494 U.S. 1036 (1990).

81. *Id.* at 1411-12. A letter sent to potential investors also guaranteed investors "a minimum of 3000 tons of recoverable coal on each parcel." *Id.* at 1415.

82. *Id.* at 1412.

83. *Id.* The shills received \$300 for each potential consumer with whom they spoke. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 1415. The letter stated: "[Y]ou are not purchasing just the coal reserves, you will receive a full deed on the property. It's actually your land." *Id.*

87. *Id.* at 1412. The four men, along with others, were indicted by a grand jury on 154 counts. The court sentenced the president to 20 years in prison, the vice president to 16 years, and the salesmen to 5 years. *Id.*

88. Boiler room salespeople often mislead consumers about the price or quality of

entice consumers with promises of prizes that are non-existent or of exaggerated value.⁸⁹

Legitimate telemarketers who sell their products by using chance promotions must be extremely careful not to run afoul of state and federal lottery laws.⁹⁰ While the definition of "lottery" varies among jurisdictions,⁹¹ the laws generally state that a promotion is a lottery if a prize is offered for the winner, the awarding of the prize is based on chance and not skill, and participants in the promotion are required to give up something of value, or "consideration," to enter.⁹² To comply with state and local laws, legitimate telemarketers who wish to run a chance promotion must eliminate the consideration element from the promotion.⁹³

The question of whether a particular chance promotion requires entrants to provide consideration is difficult to resolve, and the determination varies among jurisdictions.⁹⁴ In most jurisdictions, a chance promotion will not be an illegal lottery unless it requires the participant to

the items. One scam advertised, "Enough vitamins to last a whole year—for just 'three ninety-five.'" Six hundred consumers in Connecticut signed up, believing that they were obligated to pay \$3.95. However, when the bill came, the consumers realized that they each owed \$395.00. Mark Pazniokas, *Telemarketing Fraud Becomes Target of State Legislation*, THE HARTFORD COURANT, Feb. 28, 1992, at D1.

89. Holmstrom, *supra* note 73, at 8 ("A woman in Oklahoma responded to a post-card indicating that she had won a prize. She was persuaded to buy about \$600 worth of vitamins with her credit card. She never received a prize.")

90. LEGAL ASPECTS OF MARKETING STRATEGY, *supra* note 49, at 446. Most states proscribe all gambling, including lotteries. In addition, "[t]he Federal Trade Commission considers all lotteries to be unfair or deceptive (unless permitted under state law), and the Federal Communications Act prohibits broadcasters from transmitting information about lotteries." *Id.*

91. *See, e.g.*, 18 U.S.C. § 1307(d) (1982) (defining lottery as "the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers"); CAL. PENAL CODE § 319 (West 1988) ("[A] lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it."); N.Y. PENAL CODE § 225.00(10) (McKinney 1989) (defining lottery as "an unlawful gambling scheme in which (a) the players pay or agree to pay something of value . . . ; (b) the winn[ers] are to be determined by . . . some . . . method based upon the element of chance; and (c) the holders of the winning chances are to receive something of value.")

92. PROMOTION MARKETING LAW, *supra* note 48, at 03.3. *See also* LEGAL ASPECTS OF MARKETING STRATEGY, *supra* note 49, at 446.

93. LEGAL ASPECTS OF MARKETING STRATEGY, *supra* note 49, at 446.

94. *Id.*

purchase goods or services to be eligible to receive a prize.⁹⁵ Merely making a phone call, visiting a retail establishment, or mailing in an entry form will not suffice to make a chance promotion an illegal lottery.⁹⁶

To comply with state and federal law, most telemarketers operating chance promotions require that all fronters clearly state that no consideration is necessary for the potential customer to win a prize.⁹⁷ In illegal sweepstakes, however, the salesperson misrepresents to the consumer that the consumer must purchase the product or that the consumer will have a greater chance of winning the top prize in the giveaway if he purchases the telemarketer's product.⁹⁸ This, of course, converts the chance promotion into an illegal lottery and subjects the salesperson and the telemarketing firm to criminal as well as civil penalties.⁹⁹

95. *Id.*

96. *Id.* California recently enacted a statute allowing the use of 900-numbers in chance promotions when specified disclosures are made in all advertising for the 900 number. CAL. BUS. & PROF. CODE § 17539.5(d) (West Supp. 1993). Thus, California has made it clear that it does not consider the 900-number charges to be consideration. *But see* WIS. STAT. ANN. § 945.01(5)(b)(1) (West Supp. 1992). Wisconsin defines consideration as "anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant." *Id.* (emphasis added). Therefore, under Wisconsin law, any burden, including phone calls, could be construed as consideration. LEGAL ASPECTS OF MARKETING STRATEGY, *supra* note 49, at 446.

97. PROMOTION MARKETING LAW, *supra* note 48, at 01.3. This is a major factor in most legitimate telemarketers' decisions to develop scripts. The Promotion Marketing Association of America, a leading promotion and marketing trade organization, states: "The 'No Purchase Required' legend is a common and useful addition to the rules of a chance promotion for it signals the absence of the element of chance." *Id.* Further, a telemarketer should not suggest that a potential customer's chances of winning a more valuable prize will increase if the customer buys the telemarketer's product. "Such qualification converts the promotion into an illegal lottery. Purchasers and non-purchasers must be dealt with on equal terms without discrimination." *Id.*

98. *See, e.g., Federal Indictments Charge 32 in Telemarketing Scheme*, UPI, July 7, 1992, available in LEXIS, Nexis Library, UPI File. Consumers received postcards informing them that they had been chosen to receive a valuable prize. When they called the number, they were told that they had to either purchase a water purifier or a home security system for nearly \$500 or pay a \$12.95 entry fee to be eligible to receive the award. Consumers were also falsely told that the Environmental Protection Agency was going to make water purifiers mandatory and that the security system would lower their insurance premiums. *Id.*

99. Scripts help to reduce the chances that front-end salespeople working for legitimate telemarketers will misrepresent the nature of the promotion to customers. However, salespeople will sometimes go beyond the script in an attempt to induce a sale. For this reason, many telemarketing attorneys recommend that managers of telemarketing firms closely monitor their front-end salespeople by randomly listening in on sales presentations. Interview with Alan B. Pick, *supra* note 54.

3. 900-Number Scams

Boiler room operators keep abreast of technological advances in telecommunications and capitalize quickly on new technologies.¹⁰⁰ One such technology that fraudulent telemarketers exploit is the 900 number.¹⁰¹ The public benefits substantially from 900 numbers, which offer useful information such as weather, sports scores, time, and road conditions in an efficient and inexpensive manner.¹⁰² However, fraudulent telemarketers have realized the potential profits they can earn from 900 numbers and use the technology in a growing number and expanding variety of illegal scams.¹⁰³

In the most common scam, the fraudulent telemarketer uses the 900 number to market non-existent or inferior goods or services. Consumers, therefore, "must incur a charge before they can learn whether the product is of any use to them."¹⁰⁴ One such scam involved an offer to provide "gold" and "platinum" credit cards. Advertisements placed by two companies, First Capital Financial and Interactive Communications Tech-

100. Barry Cutler, *Statement of the Federal Trade Commission before the Select Committee on Aging*, in RECENT TRENDS IN TELEMARKETING FRAUD, at 7 (PLI Corp. L. & Prac. Course Handbook Series No. B4-6985, 1991) [hereinafter RECENT TRENDS IN TELEMARKETING FRAUD].

101. *Id.* at 8. Numbers containing the prefix "900" are charged to the consumer's telephone bill at a much higher rate than normal calls. The charges for 900-number services can be as expensive as four to five dollars per minute. Therefore, 900 numbers can be extremely lucrative for fraudulent telemarketers. *Id.*

Two other factors make 900 numbers attractive for fraudulent telemarketers. First, because the money is being made over the phone instead of through charges to customers' credit cards, the telemarketer does not have to meet the stringent requirements imposed by credit-card companies for merchant accounts. See *infra* notes 117-23 and accompanying text. Second, the phone companies rather than the boiler room operators collect the money and, thus, are not subject to the requirements of the Fair Credit Billing Act, discussed *infra* notes 112-16 and accompanying text. H.R. REP. NO. 14, 102d Cong., 1st Sess. (1991).

102. RECENT TRENDS IN TELEMARKETING FRAUD, *supra* note 100, at 8.

103. *Id.* See also 46 States Act on Fraudulent "900" Numbers, L.A. TIMES, May 21, 1992, at D7. "Some '900' numbers carry charges of \$25 a call or higher, making them a magnet for unscrupulous operators who use them to defraud." As a result, the three major long distance carriers, AT&T, Sprint, and MCI, entered into a system with 46 states' attorneys general to quickly exchange information about fraudulent 900 numbers. *Id.*

104. RECENT TRENDS IN TELEMARKETING FRAUD, *supra* note 100, at 8; see also H.R. REP. NO. 14, 102d Cong., 1st Sess. 8-9 (1991) ("The deceptive solicitations induce consumers to place the call by misleading them as to the information or product to be received . . .").

nology, led consumers to believe that the cards were similar to the gold and platinum cards offered by VISA, American Express, and MasterCard.¹⁰⁵ After placing the call and incurring the charges, consumers learned that the "credit cards" allowed them to purchase merchandise only from the telemarketers' catalogs.¹⁰⁶

In another common scam, the fraudulent telemarketer fails to disclose the per-minute cost of the call or misrepresents the average costs of completed calls to the 900 numbers. In one instance, Transworld Courier Services ran a help-wanted advertisement in the classified section of a newspaper, seeking construction workers.¹⁰⁷ The advertisement listed a toll-free 800 number to call, but when a job-seeker called the number, a recorded message referred him to a 900 number. Neither the newspaper advertisement nor the recorded message on the 800 number instructed callers that the charge for a call to the 900 number would be \$15 to \$18.¹⁰⁸

Other concerns with 900 numbers involve promotions that induce children to call 900 numbers "for 'free' gifts or stories or to speak to various cartoon characters or celebrities."¹⁰⁹ These services are troubling because, even if the advertisements disclose the price of the calls, children can still make the calls without parental consent or supervision. In addition, parents often cannot determine the nature of the call, which may not be apparent from the description on the phone bill.¹¹⁰

4. Credit Cards & Factoring

In some fraudulent telemarketing scams, the telemarketers encourage victims to pay with their credit cards. These boiler room operators prefer that customers pay for merchandise with credit cards because, in most cases, customers receive their bill long after the sale is completed. In most instances, the victims

will usually not find out about the fraud—usually inferior or nonexistent merchandise or services—for several weeks, and then once they discover the fraud or deception, they will often either deduct the amount involved on the next credit card bill or seek credit on the following one—long after the telemarketer has been paid.¹¹¹

105. RECENT TRENDS IN TELEMARKEETING FRAUD, *supra* note 100, at 8-9.

106. *Id.*

107. *Id.* at 8.

108. *Id.* Other similar scams refer callers from one 900 number to another 900 number. Also, sometimes advertisements will disclose the price per minute but fail to mention that there is a minimum length of the call. *Id.*

109. RECENT TRENDS IN TELEMARKEETING FRAUD, *supra* note 100, at 8 n. 19.

110. *Id.*

111. THE SCOURGE OF TELEMARKEETING FRAUD, *supra* note 40, at 25.

In addition, many state attorneys general encourage the use of credit cards because the consumer will be protected under the Fair Credit Billing Act¹¹² if the telemarketing operation turns out to be a scam.¹¹³ Under the Fair Credit Billing Act, a consumer may contest a credit card bill by sending written notice to the credit card issuer regarding the dispute.¹¹⁴ The credit card issuer must investigate, and if it cannot verify the charges within ninety days, it must credit the card holder's account for the amount of the charge.¹¹⁵

When a business accepts credit cards for payment, the business must enter into a merchant account agreement with a bank, which will process the charges for the credit card company.¹¹⁶ When a consumer requests a chargeback under the Fair Credit Billing Act, the merchant bank and the credit card company suffer the loss.¹¹⁷ Often, by the time the merchant bank and credit card company learn of the fraudulent scheme, the boiler room has been closed and the fraudulent telemarketers have moved to a different location.¹¹⁸

Because of the losses suffered by merchant banks and credit card companies, credit card companies and financial institutions have significantly limited telemarketers' access to merchant accounts.¹¹⁹ As a result, telemarketing firms, both fraudulent and legitimate, find it difficult to open merchant accounts to process credit card charges.¹²⁰ Therefore,

112. 15 U.S.C. §§ 1601, 1602, 1610, 1631, 1632, 1637, 1666-1666j (1988).

113. THE SCOURGE OF TELEMARKETING FRAUD, *supra* note 40, at 25 n.58. Some telemarketers use the Fair Credit Billing Act to their advantage, telling customers that they are entitled to a chargeback if they are not satisfied with the merchandise. *Id.* at 27.

114. 15 U.S.C. § 1666(a) (1988).

115. 15 U.S.C. § 1666(a)(3)(B) (1988).

116. THE SCOURGE OF TELEMARKETING FRAUD, *supra* note 40, at 28-29. The credit card companies require the merchant banks to investigate businesses applying for these agreements. However, the merchant banks sometimes do not fully investigate and often never make an on-site inspection. The result is that many of these banks suffer the losses from fraudulent telemarketing. *Id.*

117. *Joint Hearing*, *supra* note 46, at 168-69. The bank or financial institution that issued the credit card is usually reimbursed for the losses by the bank that initially processed the fraudulent transaction for the merchant. *Id.*

118. *Id.* at 165-66. In fact, "[m]any current telemarketing schemes purposefully are structured to involve significant time delays between the time at which charges incurred on the credit card and the delivery of the promised goods or services." *Id.* The delay increases the likelihood that credit card companies will not find out about the scam until too late.

119. *Id.* at 172.

120. *Id.* at 172-73. VISA and MasterCard require that, prior to granting a merchant

many fraudulent telemarketers, induce legitimate companies that have credit card merchant accounts to “factor” or “launder” their credit card drafts for a percentage of the sale.¹²¹ These laundering arrangements allow fraudulent telemarketers to “circumvent the safeguards the credit card systems and the financial institutions . . . have established to preclude access by the fraudulent operator.”¹²²

5. Bank Drafts

In addition to encouraging victims to pay by credit card, fraudulent telemarketers defraud consumers by taking money directly out of the victim's checking account. Direct debiting of a consumer's checking account can be proper and legal when done appropriately.¹²³ However, fraudulent telemarketers often abuse the process.¹²⁴ The House Committee on Government Operations described how a debit draft scam can be operated. First, a fraudulent telemarketer sends postcards notifying consumers that they have won a prize, typically a car or cashier's check. When a customer calls to claim the prize, the telemarketer tells the consumer that he must pay shipping charges of approximately \$400. Rather than obtain credit card information, the telemarketer obtains the customer's checking account number, telling him that they will not debit his account until he is satisfied with the prize.¹²⁵

The telemarketer then imprints the information onto a bank draft with the customer's name, address, telephone number, and a dollar amount.¹²⁶ The bank processes the fraudulent drafts in the same manner as a check, even though the drafts do not have an authorizing signa-

account to a business, all member financial institutions conduct credit checks and/or financial background investigations, physically inspect the merchant's place of business, and research the VISA and MasterCard databases to determine whether the merchant had been previously involved in fraud. VISA and MasterCard also independently investigate merchants with an unusually high number of chargebacks. *Id.*

121. RECENT TRENDS IN TELEMARKETING FRAUD, *supra* note 100, at 9. The commissions often range from 6 to 15 percent. Some merchants launder as much as \$100,000 in credit-card charges per day for large telemarketing firms. *Id.*

122. *Joint Hearing, supra* note 46, at 174.

123. RECENT TRENDS IN TELEMARKETING FRAUD, *supra* note 100, at 10.

124. *Id.* The Rhode Island Attorney General told a House subcommittee, “[T]he potential for this process is frightening. It has a very real potential for undermining the financial security of citizens from all walks of life.” *Joint Hearing, supra* note 46, at 2. It also demonstrates the weakness in “the manner in which the financial network in our society allows for the transfer of funds.” *Id.*

125. THE SCOURGE OF TELEMARKETING FRAUD, *supra* note 40, at 30.

126. RECENT TRENDS IN TELEMARKETING FRAUD, *supra* note 100, at 10.

ture. This has become possible because most banks, in order to deal with the large volume of checks they process, use bulk filing, making it impossible to monitor all checks.¹²⁷

Many victims of this type of scam do not realize that they have opened their accounts to unauthorized withdrawals. Usually before the victims can seek any recourse, the fraudulent telemarketer has closed the operation and moved on to another city.¹²⁸ Victims often continue to suffer unauthorized withdrawals because unscrupulous telemarketers will often sell the victims' account numbers to other scam artists.¹²⁹

Fraudulent telemarketers obtain consumers' account numbers in other ways as well. Some tell customers that they need the information for "verification" purposes only. Later, when the consumers receive their bank statements, they discover that money has been siphoned from their accounts.¹³⁰ In other instances, fraudulent telemarketers charge customers for an amount higher than the customer authorized.¹³¹

The number and variety of fraudulent scams continue to increase as fraudulent telemarketers invent sophisticated new schemes, capitalizing on hot products and public fears. Fraudulent telemarketers employ increasingly more effective methods to persuade consumers to part with their money. It is imperative that legislation be enacted that is designed to stop these fraudulent practices. The problems can only be remedied through a concerted effort between federal, state, and local authorities.

Although the scams may be difficult to categorize, some scams and methods are quite common. As the next section demonstrates, the victims of telemarketing fraud are as diverse as the tactics employed to cheat them.

C. The Victims of Telemarketing Fraud

A single boiler room operation can easily defraud consumers on a national scale.¹³² Telemarketing fraud costs American consumers be-

127. THE SCOURGE OF TELEMARKEING FRAUD, *supra* note 40, at 30. Telemarketers also might process the drafts electronically, thus eliminating the problem of signatures. *Id.*

128. *Id.* at 31.

129. *Id.*

130. RECENT TRENDS IN TELEMARKEING FRAUD, *supra* note 100, at 10.

131. *Id.*

132. H.R. REP. NO. 688, 102d Cong., 2d Sess. 5 (1992) ("Telemarketing differs from other sales activities in that it can be carried on without any direct contact between

tween \$15 and \$40 billion annually.¹³³ Telemarketing fraud, therefore, is a national problem that impacts people from all parts of the country and from all walks of life.¹³⁴ In addition, telemarketing fraud results in more subtle costs to the American economy in general. Because fraudulent telemarketers may not report their illegally obtained funds as income, the IRS loses millions of dollars per year in taxes.¹³⁵ Also, the economy suffers a loss of investment capital that would otherwise finance legitimate business opportunities.¹³⁶

The victims of telemarketing fraud are difficult to categorize because it affects all Americans. However, due to the manner in which boiler rooms operate, certain groups bear a greater percentage of the losses. The elderly, businesses, financial institutions, and legitimate telemarketing firms are generally the groups that are hit hardest by telemarketing fraud.

1. The Elderly

Boiler room operators intentionally focus on older Americans and prey upon the elderly's desire to increase their limited income. One convicted boiler room operator stated:

We targeted the . . . elderly in our fraud. Retirees were easily accessible by phone [and] usually at home during the day We found the elderly intent on enlarging their nest egg . . . and often interested in generating money for their grandchildren The elderly are vulnerable because their memory is poor [and] they rarely memorialize phone conversations into writing But, perhaps their most notable weakness is that once they recognize the deceit, they are often too embarrassed to relay the events to . . . local law enforcement.¹³⁷

One elderly victim testified before the House Committee on Government Operations that she had been "ill over th[e] fraudulent transaction,"

sellers who may be based in one State and customers who may be based in another State.").

133. See *supra* note 63 and accompanying text.

134. Denise Gellene, *FBI Launches 12-State Telemarketing Sweep; Fraud: Authorities Arrest Dozens and Impound Property Worth More Than \$1 Million in a Nationwide Crackdown*, L.A. TIMES, Mar. 5, 1993, at D1. One estimate stated that nine out of ten Americans have received at least one "suspicious solicitation" over the telephone. Following a twelve-city telemarketing crackdown, FBI Director William Sessions stated that he expected to find victims of the raided companies in "virtually every state of the union." *Id.*

135. THE SCOURGE OF TELEMARKEING FRAUD, *supra* note 40, at 7.

136. *Id.* at 8.

137. *The Nature and Extent of Telemarketing Fraud*, *supra* note 1, at 2. See also Tracy Everbach, *Five in Area Charged in Alleged National Telemarketing Scam*, DALLAS MORNING NEWS, June 3, 1993, at D2. FBI agent Randal Harris testified that defendant telemarketers claimed their best clients were "the elderly, people who are over 60 and are lonely and enjoy getting a phone call." *Id.*

and that she could not bear to tell her son, and only living relative, about it.¹³⁸ Indeed, in some cases, this reluctance on the part of retirees to come forward has been a boon to fraudulent telemarketers and has seriously hampered the efforts of law enforcement officials to curb fraudulent practices.¹³⁹ Without the victims of these frauds reporting to the proper authorities, federal, state, and local officials will continue to have a difficult time combatting the scams. In addition, because telemarketing fraud goes under-reported, federal and state authorities generally devote fewer resources to eliminating the problem.¹⁴⁰

Telemarketing fraud often has devastating effects on the elderly. In investment scams, which require victims to invest large sums of money, private citizens often lose their entire savings.¹⁴¹ Many elderly victims have had to cut back their monthly expenditures as a result of fraud, and some have had to take low-paying jobs to survive.¹⁴² In addition, the fraudulent telemarketing scams often leave the elderly victims in great fear of facing the future without any savings to rely upon.¹⁴³

2. Businesses

Businesses are also a prime target of boiler room operators. Fraudulent telemarketers often perpetrate their frauds upon businesses by pos-

138. *The Nature and Extent of Telemarketing Fraud*, *supra* note 1, at 10.

139. *See Telemarketing Fraud Legislation*, The Rueter Transcript Report, Mar. 10, 1993, available in LEXIS, Nexis Library (statement of Senator Biden):

When [the elderly] are taken advantage of . . . they believe they have somehow done something that if they were more vigilant wouldn't have happened, they're reluctant to tell anybody.

That's why [fraudulent telemarketers] prey on the elderly. They do it because they know of [the elderly's] pride, and they know of their unwillingness to tell their son, their daughter . . . what happened to them. They're embarrassed. They're ashamed. And, in a way, it's a cover that these scam artists have available to them.

Id.

140. THE SCOURGE OF TELEMARKEING FRAUD, *supra* note 40, at 2.

141. THE NATURE AND EXTENT OF TELEMARKEING FRAUD, *supra* note 1, at 7-10 (Grace Singletary, an 84 year old widow was duped into investing \$20,000, her entire life savings, in a phony movie scam).

142. THE SCOURGE OF TELEMARKEING FRAUD, *supra* note 40, at 5-6.

143. THE NATURE AND EXTENT OF TELEMARKEING FRAUD, *supra* note 1, at 10. Grace Singletary described the severe emotional distress she had suffered as a result of the telemarketing scam: "I have been emotionally and mentally drained. I have not been able to sleep nor act like myself, according to my friends . . . I worry constantly about a future without any savings." *Id.*

ing as legitimate office supply companies. In these scams, a boiler-room operator calls a business and asks to speak to the person in charge of ordering supplies for the business. Once the contact is on the line, the boiler room operator represents himself as that business' regular office supply vendor and encourages the contact to buy supplies by telling him that the prices are about to be raised.¹⁴⁴

After the first shipment of supplies has been made, the reloaders call the contact at the company and offer to send him a free gift (often to his home address) to "express appreciation for the order."¹⁴⁵ The scam then becomes blackmail because the contact, whom boiler room operators call a "mooch,"¹⁴⁶ participates in the scam, fearful that his boss will learn that he has accepted gifts.¹⁴⁷ After the reloader has placed the mooch in this position, he can continue to sell overpriced office supplies because he may always exploit the fear of the mooch.¹⁴⁸ In one instance, a company was charged \$1,113 (plus \$234 for shipping) for 8½" x 11" paper valued at \$36 and \$29.95 for a box of 1,000 paper clips.¹⁴⁹

One investigator called the victims of an office-supply scam operated out of a boiler room in California and found over 3,000 victims of that scam alone.¹⁵⁰ This investigator estimated that office-supply scams in California alone are a \$200-million-a-year business.¹⁵¹ He testified before a House subcommittee that he could not find one business or charity that had not been contacted by some kind of office-supply scam. He said that "every receptionist, bookkeeper, and purchasing agent that he contacted in his research knew exactly what he was talking about—and he found very few who had avoided becoming a victim."¹⁵²

Although telemarketing fraud aimed at businesses is widespread and ever-increasing, federal and state law enforcement agencies have not devoted the resources to combatting this type of fraud as they have to halting telemarketing fraud targeting individuals.¹⁵³ This disparity may

144. THE SCOURGE OF TELEMARKEETING FRAUD, *supra* note 40, at 23.

145. *Id.*

146. *Id.* "[A] mooch is someone who takes a gift in return for ordering office products at extremely inflated prices. The gift is nothing more than a commercial bribe."
Id.

147. *Id.*

148. *Id.* Orlo Ellison testified to the House Committee on Government Operations that whenever the mooch in his company would protest a shipment or a bill, the reloader would say, "Well, let me talk to your boss, maybe he would like to have a television sent to his house." Mr. Ellison said that, in effect, these scams amount to "tele-blackmail." *Id.*

149. *Id.*

150. *Id.* at 24.

151. *Id.*

152. *Id.*

153. *Id.* at 24-25.

stem from a feeling of "greater sympathy for individuals over businesses,"¹⁵⁴ which may be understandable though not wholly justified.¹⁵⁵ Nevertheless, unlike the elderly, businesses can better protect themselves against telemarketing fraud without the aid of the government and, therefore, should be responsible for educating themselves of the potential dangers. Telemarketing fraud will continue to plague businesses unless businesses not only learn about the dangers of telemarketing fraud but also complain loudly enough to law enforcement officials to force them to devote the resources necessary to combat the fraud.

3. Financial Institutions

One industry suffering greatly from fraudulent telemarketing is the banking industry. Two major credit card companies, VISA and MasterCard, have watched with growing concern the increased number of chargebacks¹⁵⁶ resulting from telemarketing fraud and the consequent losses to their member financial institutions. The companies recently estimated that financial institutions lose over \$300 million per year in telemarketing frauds involving payment by credit card.¹⁵⁷ For example, several banks suffered losses due to telemarketing fraud in excess of \$1 million each, and two had suffered losses of more than \$2.5 million each.¹⁵⁸ In addition to these "direct" losses from chargebacks, financial institutions must spend millions of dollars annually on the processing of chargebacks, the investigation of fraudulent telemarketers, and the development and implementation of procedures designed to limit fraudulent telemarketers' access to the credit-card system.¹⁵⁹

Financial institutions in general are aware of the magnitude of the problem and are actively involved in the efforts to develop new laws.¹⁶⁰

154. *Id.* at 25.

155. It is not unusual for businesses to lose over \$100,000 through fraudulent office supply scams, while losses of that magnitude by individuals are uncommon. *See id.* at 27.

156. *See supra* notes 112-15 and accompanying text.

157. S. REP. NO. 80, 103d Cong., 1st Sess. 2 (1993).

158. *Joint Hearing, supra* note 46, at 168-69. In 1990, the Office of the Comptroller of the Currency reported that the failure of one national bank was due, in part, to losses from telemarketing fraud. *Id.* at 169.

159. *Id.* at 169.

160. Representatives of VISA and MasterCard have testified at Congressional hearings and have submitted written reports to aid Congress in the drafting of appropriate legislation. *See, e.g., Joint Hearing, supra* note 46, at 162.

With the aid of the banking industry, the federal government should enact laws that protect the public as well as financial institutions from the damage inflicted by fraudulent telemarketers.

4. Legitimate Telemarketers

Three hundred thousand legitimate telemarketers nationwide generate \$435 billion in sales each year,¹⁶¹ and most major businesses today conduct at least some of their operations by way of telemarketing.¹⁶² These businesses, and several telemarketing industry groups, have realized that the growth of fraudulent telemarketing scams severely hampers their efforts to conduct business over the phone.¹⁶³ Joan Mullen, president of the Telemarketing Division of Zacson Corporation, testified before a Congressional subcommittee on behalf of the American Telemarketing Association (ATA) that telemarketing fraud has a significant negative impact on legitimate telemarketers:

Telemarketing fraud not only makes victims of the public, it also victimizes legitimate telemarketers who are negatively affected by abuses. Most businesses that use telemarketing do so in a conscientious and professional manner. The significance of ethical standards is clearly understood and the necessity of professionalism is critical to success in this competitive environment.

Although press coverage frequently indicates otherwise, only a small percentage of businesses engage in fraudulent activity over the telephone. As in all other cases of business fraud, there is a great deal of sensationalism. Nevertheless, it is devastating to all concerned to the duped and cheated consumers and businesses as well as to the legitimate telemarketers who must combat the negative effects.¹⁶⁴

In addition to creating a negative impression of telemarketing in the minds of many consumers, the growth of fraudulent telemarketing has "created an atmosphere of fear and distrust in the banking communi-

161. Tehrani, *supra* note 14, at 88.

162. STONE & WYMAN, *supra* note 23, at 2. Bob Stone and John Wyman list 120 major companies, such as IBM, Pepsico, Ford Motor Company, and Sears Roebuck & Co., that employ telemarketing in at least one facet of their operations. *Id.*

163. *Ted Schwartz on Telemarketing, Quality and Service Agencies*, TELEMARKEETING, Mar. 1992, at 24. Ted G. Schwartz, president and CEO of APAC TeleServices, one of the largest telemarketing firms in the country, realizes fraudulent telemarketing has had a negative impact on the industry in general. He says, "One unpleasant call made by an unscrupulous operator will unfortunately leave a negative impression on a consumer." *Id.*

164. *Hearing on S. 2213, H.R. 4104, and S. 2326, supra* note 15, at 62; see also *Telemarketing Fraud: Hearing on S. 2213 and H.R. 4104 Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science, and Transp.*, 100th Cong., 2d Sess. 62 (1988) (John T. Hamilton, Vice President and President-Elect of the ATA stated: "[The] ATA abhors all forms of fraud, whether by telephone, direct mail or face-to-face [O]ur profession is being victimized right along with the people being defrauded.").

ty."¹⁶⁵ As a result, banks and credit-card companies have implemented stringent requirements on telemarketing firms that wish to process credit-card orders through merchant accounts.¹⁶⁶ These requirements have had a negative impact on legitimate telemarketers, many of whom have had their merchant accounts terminated without warning.¹⁶⁷

Another factor that affects legitimate telemarketers is the lack of uniformity among state laws.¹⁶⁸ In the absence of federal legislation, states must formulate statutes to deal with the fraudulent telemarketing problem.¹⁶⁹ The disparity between the various state laws makes it difficult for a legitimate telemarketer to operate with complete confidence that his actions will not violate any particular state law.¹⁷⁰

Telemarketing organizations have become very involved in efforts to combat telemarketing fraud. The ATA has developed Telemarketing Standards and Ethics Guidelines to aid legitimate telemarketers and a consumer guidelines booklet to educate the public. Furthermore, ATA has aided state and federal authorities in apprehending illegal telemarketers.¹⁷¹ The Direct Marketing Association (DMA), another leading telemarketing industry organization, has produced "Guidelines for Telephone Marketing Practices" and encourages all members to follow these guidelines.¹⁷²

In addition, both the ATA and the DMA are actively involved in efforts by Congress to enact a federal telemarketing bill, and they serve as the voice of the legitimate telemarketing industry at many congressional

165. Ronald Dans, *CEO Corner: Direct Debiting — An Alternative to Credit Card Processing*, TELEMARKETING, Aug. 1991, at 46.

166. *Id.* See also *supra* notes 116-20 and accompanying text.

167. One telemarketer was terminated even though he had a twelve-year relationship with his bank, a \$1,000,000 line of credit, and less than two-percent chargebacks. Dans, *supra* note 165, at 46.

168. Interview with Alan B. Pick, *supra* note 54.

169. *Id.*

170. *Id.*; see also *infra* notes 387-99 and accompanying text.

171. *Senators Probe Need for Act to Curb Telemarketing Fraud*, 63 Antitrust & Trade Reg. Rep. (BNA) No. 1577, at 162 (August 6, 1992); see also *Hearing on S. 2213, H.R. 4104, and S. 2326*, *supra* note 15, at 62.

172. *Guidelines for Telephone Marketing Practices*, reprinted in STONE & WYMAN, *supra* note 23, at 205-09. The Guidelines require that telemarketers make calls only during "reasonable" hours and disclose all pertinent information, including the name of the telemarketing firm, the cost of the merchandise, and all other charges, such as shipping and handling. The Guidelines prohibit telemarketers from using deceptive or misleading sales tactics and require that they abide by all federal, state, and local laws. *Id.*

hearings. The two organizations have observed the efforts of state and local law enforcement groups in battling telemarketing and have seen that these efforts have proven ineffective. The ATA and the DMA realize that the disparate legislative solutions of the states and the varying levels of funding by different law enforcement agencies have resulted in uneven enforcement. Therefore, any effective solution to the telemarketing problem must come from the federal level. The next section will detail the states' attempts at combatting fraudulent telemarketing.

III. STATE AND LOCAL ATTEMPTS AT COMBATTING TELEMARKETING FRAUD

In the absence of a federal statutory framework to battle fraudulent telemarketing practices, states have largely been left to themselves to combat boiler room operators. State-by-state enforcement activity has resulted in limited success including several convictions and closures of illegally run boiler rooms.¹⁷³ Overall, however, attempts by state authorities to combat telemarketing fraud have been ineffective, and state and federal authorities are now calling for federal legislation. This section will detail the various attempts by state and local law enforcement agencies and state legislatures to combat fraudulent telemarketing and the problems they have faced. State telemarketing statutes will be addressed in significant detail because of their value in providing a framework for federal legislation.

A. *State and Local Law Enforcement Efforts at Combatting Telemarketing Fraud*

Many states have been aggressive in their efforts to combat telemarketing fraud. State and local law enforcement agencies have exhibited a willingness to devote personnel and resources in an effort to combat the growth of the fraudulent telemarketing industry.¹⁷⁴ Unfortunately, because of the nature of fraudulent telemarketing, state officials' efforts have met with only limited success.¹⁷⁵

Boiler room operators, unlike legitimate telemarketers, are very mobile and can move from state to state whenever problems are detected by state authorities.¹⁷⁶ In addition, a boiler room in one state can sell prod-

173. See *infra* notes 176-83 and accompanying text.

174. THE SCOURGE OF TELEMARKETING FRAUD, *supra* note 40, at 130-33.

175. See *id.* at 131.

176. S. REP. NO. 396, 101st Cong., 2d Sess. 2 (1990). Legitimate telemarketers "generally operate from a fixed site," thus giving the consumer recourse if problems arise. Boiler rooms, on the other hand, are "mobile and anonymous," making it difficult for consumers to seek redress. *Id.*

ucts to consumers in the other forty-nine states. Although a boiler room may have tens of thousands of victims nationwide, the number of known victims per state may be less than fifty.¹⁷⁷ Therefore, state officials with limited jurisdictions and even more limited resources are often unable to bring cases or seize assets of fraudulent telemarketers in other states.¹⁷⁸ Even when state officials locate a boiler room and prepare to raid it, they often find it has been closed and the perpetrators of the fraud have moved on.¹⁷⁹

Also, state officials have had only limited success in using civil suits as a method of battling telemarketing fraud. Injunctions and restraining orders from state courts cannot stop fraudulent telemarketers from doing business in other states.¹⁸⁰ Usually, out-of-state fraudulent telemarketers faced with injunctions simply stop doing business in the state granting the injunction or ignore the order, believing that they are out of the reach of state officials.¹⁸¹ The Attorney General of Colorado testified before a House subcommittee and illustrated the problems state authorities face in combatting telemarketing fraud.¹⁸² The attorney general said that of the many fraudulent telemarketing operations Colorado authori-

177. THE SCOURGE OF TELEMARKEING FRAUD, *supra* note 40, at 10. A state official, therefore, has little motivation to combat telemarketing because it may appear to affect only a few citizens of any particular state. *Id.*

178. *Id.* at 10. It is "difficult and costly for State authorities to pursue . . . [telemarketing] frauds, because of the difficulty and costs of pursuing telemarketers hundreds or thousands of miles away." *Id.* On occasion, however, state officials have traveled to other states to apprehend boiler room operators. In one case, an employee of New Mexico's attorney general's office flew to California, located a boiler room operator with the help of local police, and filed extradition papers. *Id.* at 101. Although such efforts send a powerful message to fraudulent telemarketers, they are very costly and occur infrequently.

179. S. REP. NO. 396, 101st Cong., 2d Sess. 2-3 (1990).

180. H.R. REP. NO. 781, 100th Cong., 2d Sess. 5 (1988). In 1984, the State of North Carolina brought an action against a California boiler room and obtained an injunction under North Carolina law. In 1987, the State of Illinois sued the same boiler room and obtained an injunction under Illinois law. In September 1987, the FTC brought an action against the firm for violations of the FTC Act. This example illustrates the ineffectiveness of state enforcement; state enforcement results in "both uneven protection of consumers and duplicative investigations and court proceedings." *Id.*

181. THE SCOURGE OF TELEMARKEING FRAUD, *supra* note 40, at 11 ("[W]hen State agencies obtain injunctive or similar relief, the best they can hope is that out-of-State telemarketers will cross that State off their map and concentrate their fraudulent pitches on the 49 others [sic] States.").

182. *Id.* at 131.

ties attempted to shut down, they had been successful only in eliminating the portion of the operations occurring within Colorado or effecting Colorado residents. The authorities could not close down the boiler room operations in other states.¹⁸³

In some instances, federal authorities have aided state officials, encouraging cooperation between states and offering grants to help defer the cost of investigation and prosecution.¹⁸⁴ One example, the Leviticus Project,¹⁸⁵ was set up by the Justice Department to combat coal, oil and gas, and precious metals fraud. The Leviticus Project has been effective in closing many boiler rooms and putting their managers behind bars.¹⁸⁶ However, federal funding of state telemarketing enforcement has been narrowly limited.¹⁸⁷ Without more resources, states cannot effectively combat the fraudulent telemarketers preying on their citizens.¹⁸⁸

Federal law enforcement agencies have been considerably more successful. On March 4, 1993, more than 800 FBI agents raided over fifty telemarketing businesses in twelve states.¹⁸⁹ "Operation Disconnect," as the raids were called, was said to be the largest telemarketing raid ever and resulted in the arrest of more than 240 individuals and the seizure of over \$4 million in assets.¹⁹⁰ The raids were the culmination of three

183. *Id.*

184. *Id.* at 11. Multi-state efforts are encouraged by federal authorities and can be an important method for combatting telemarketing fraud. *Id.*

185. The Leviticus Project was named for the third book of the Bible which states, "Thou shalt not defraud thy neighbor." Maria L. La Ganga, *5 Seized in Raids on "Boiler Rooms,"* L.A. TIMES, Apr. 21, 1989, at A3. The Project is funded by the Justice Department. *Id.*

186. *Id.* With \$175,000 supplied by the Leviticus Project, the Los Angeles and Orange County District Attorneys in conjunction with securities officials from several states, raided 12 boiler rooms in early April 1989 and arrested 5 suspects. This raid, as well as several others during 1988 and 1989, resulted in 31 criminal prosecutions as of mid-1991. THE SCOURGE OF TELEMARKETING FRAUD, *supra* note 40, at 101-02.

187. Because the Leviticus Project's goal is to fight oil and gas, precious metals, and coal scams, it does not fund raids on boiler rooms conducting other types of scams. THE SCOURGE OF TELEMARKETING FRAUD, *supra* note 40, at 102.

188. La Ganga, *supra* note 185, at A3. Many state and local officials have made it clear that the main obstacle to enforcement against boiler room operators is funding. David Katz, assistant U.S. Attorney and head of the Southern California Fraud Task Force said, "What we've always needed [to fight telemarketing fraud] is more resources." *Id.*

189. Gellene, *supra* note 16, at D1; Jerry Urban, *4 Houston-Area Residents Held in Phone Sales Scam,* HOUSTON CHRON., Mar. 5, 1993, at A29; Press Release: "Operation Disconnect," U.S. Dep't of Justice, U.S. Attorney, Western District of New York, Mar. 4, 1993.

190. Gellene, *supra* note 16, at D1; Urban, *supra* note 189, at A29; *FBI Provides Update on Telemarketing Fraud,* U.S. NEWswire, Mar. 10, 1993, available in LEXIS, Nexis Library (FBI agents seized "over \$4 million in bank accounts, weapons, computers, cars, boats, Rolex watches, jet skis and other items").

years of investigations by the FBI, in which agents posed as sales representatives for automatic telephone dialing systems.¹⁹¹ The success of "Operation Disconnect," especially in light of the general failure of state law enforcement efforts, demonstrates the need for concerted efforts from the federal government to effectively combat fraudulent telemarketing.

Another major problem facing both state and federal officials alike is the high incidence of recidivism in telemarketing fraud.¹⁹² Boiler rooms tend to operate as a "training ground" for lower level employees.¹⁹³ When state officials succeed in closing down a boiler room, generally only the principals of the scam are charged.¹⁹⁴ Fronters, most of whom are not charged, move to other boiler rooms and to higher positions or begin to operate their own fraudulent scams.¹⁹⁵ Shutting down boiler rooms, therefore, is not always effective; often one closed boiler room will spawn several more.

These problems in combatting telemarketing fraud at the state level have led many states to enact comprehensive telemarketing statutes designed to give state officials the power to close boiler rooms and to make the opening of new boiler rooms less attractive to fraudulent telemarketers. However, as demonstrated below, these statutes have also had limited success, highlighting the need for federal action.

B. State Statutory Solutions

In an attempt to remedy the difficulties faced by law enforcement officials, several states in the mid to late 1980s began to enact comprehensive fraudulent telemarketing statutes aimed at reducing the fraudu-

191. Gellene, *supra* note 16, at D1; *FBI Provides Update on Telemarketing Fraud*, *supra* note 190. By June 1993, some telemarketers arrested in "Operation Disconnect" had been convicted. Ten out of eleven defendants from a San Diego boiler room were found guilty in federal district court. Philip J. LaVelle, *10 Out of 11 Guilty in Telemarketing Scam; FBI Applauds Result, Says a Strong Message Sent*, SAN DIEGO UNION-TRIB., June 24, 1993, § B, at 2.

192. THE SCOURGE OF TELEMARKEING FRAUD, *supra* note 40, at 12.

193. *Id.* at 93.

194. *Id.* In one instance, five boiler rooms, with 150 to 200 salespeople, were shut down by federal authorities. Only five individuals, the principals, were criminally prosecuted, "while the almost 200 brokers went free to continue their work elsewhere." *Id.* at 94.

195. *Id.* at 93. "In at least three instances, salesmen at MMPI [an oil and gas leasing boiler room] departed with client files and started their own [oil] and gas and precious metals boiler room." *Id.*

lent telemarketers' opportunities to bilk consumers.¹⁹⁶ Other states have recently introduced telemarketing bills in their state legislatures.¹⁹⁷ The statutes enacted have focused on the states' goals of providing buyers with reliable information, safeguarding the public against fraud, deceit and financial hardship, and "insur[ing], foster[ing], and encourag[ing] competition and fair dealings among telephonic sellers."¹⁹⁸

Although the statutory enactments of the different states vary widely,¹⁹⁹ many of the statutes contain similar provisions. The statutes generally: (1) define telemarketing or "telephonic sales;" (2) grant exemptions from the law to certain types of telemarketers; (3) require that telemarketers register with the state attorney general or a state agency; (4) require telemarketers to post a bond to ensure they will satisfy customer complaints; (5) require the telemarketer to make certain disclosures to consumers; and (6) provide remedies for violation of the telemarketing statute.²⁰⁰ In addition, many of the statutes contain strikingly similar

196. See, e.g., ALASKA STAT. §§ 45.63.010-100, 45.68.010-900 (1993); ARK. CODE ANN. §§ 49-95-101 to 49-95-108 (1992); Cal. Bus. & Prof. Code §§ 17511-17511.12 (West 1987 & Supp. 1993); COLO. REV. STAT. §§ 6-1-301 to 6-1-305 (1993); FLA. STAT. ANN. §§ 501.601-626 (West Supp. 1992); IDAHO CODE §§ 48-1001 to 1010 (Supp. 1992); KAN. STAT. ANN. §§ 50-670 to 50-675 (1992); LA. REV. STAT. ANN. §§ 45.810-818 (West 1992); NEV. REV. STAT. §§ 599B.010-.250 (1991); OR. REV. STAT. §§ 646.551-571 (1989); R.I. GEN. LAWS §§ 5-61-1 to 5-61-6 (1992); S.D. CODIFIED LAWS ANN. §§ 37-30-1 to 37-30-29 (Supp. 1992); TENN. CODE ANN. §§ 47-18-1501 to 47-18-1510 (1993); UTAH CODE ANN. §§ 13-26-1 to 13-26-10 (Supp. 1992); WASH. REV. CODE ANN. §§ 19.158.010-901 (West Supp. 1992). This list is not intended to be an exhaustive treatment of all state telemarketing laws. Rather, the discussion in this Comment will focus on certain common provisions of many of the state laws to give the reader a broad overview of state statutory solutions to telemarketing fraud. For an excellent collection of all state laws regarding telemarketing, see DIRECT MARKETING ASS'N, *TELEMARKETER'S GUIDE TO STATE LAWS: COMPILATION OF STATE LAWS AFFECTING TELEMARKETING* (1992).

197. Leah M. Fliter, *Telemarketing's Corpus Juris: Discussions of Legislation and Issues Raised by New Technology*, *TELEMARKETING*, July 1991, at 16. As of April 22, 1991, 42 state legislatures were working on enacting telemarketing statutes. Of the remaining eight states, several had already enacted telemarketing statutes. *Id.*

198. CAL. BUS. & PROF. CODE § 17511 (West 1987); see also IDAHO CODE § 48-1001 (Supp. 1992) (purpose of the statute is to "prohibit representations which have the capacity, tendency, or effect of misleading a purchaser").

199. Some states that have not enacted comprehensive telemarketing statutes to deal with all fraudulent telemarketing have enacted more limited statutes to deal with narrow problems, such as Automatic Dialed Announcing Devices (ADAD), e.g., ME. REV. STAT. ANN. tit. 10, §§ 1498-99 (West Supp. 1992); N.H. REV. STAT. ANN. §§ 359-E:1 to E:6 (Supp. 1992); and 900-number or "pay per call" services, e.g., IDAHO CODE §§ 48-1101 to 1107 (Supp. 1992); WASH. REV. CODE ANN. §§ 19.162.001-.070 (West Supp. 1992).

200. See Jim Seigler, *CEO Corner: Proposal for Change: An Omnibus Telemarketing Law for Texas*, *TELEMARKETING*, Sept. 1991, at 54 (proposing Texas telemarketing statute containing provisions regarding licensing, regulatory powers, ADADs, and providing civil penalties).

language.²⁰¹ Each of the provisions listed above will be discussed in greater detail below.

1. States' Definitions of "Telemarketing"

State telemarketing statutes differ widely in their definition of "telemarketing" or "telephonic seller." The definition significantly affects the way in which a particular statute will be enforced and its overall effectiveness because the manner in which telemarketing is defined determines to whom the statute applies. The degree of specificity in the different definitions vary widely and some definitions are rife with loopholes for cunning boiler room operators to exploit.

Nevada and Utah both define telemarketing in very simple terms. Utah defines "telephone solicitor" as "a person . . . or other entity which makes or places telephone calls for the purpose of selling or soliciting sales over the telephone."²⁰² Utah, therefore, by its definition of telephone solicitor, exempts inbound programs in which the consumer, and not the telemarketer, "makes or places" the initial telephone call.²⁰³ Nevada's definition includes inbound programs by stating that a seller is someone who makes a telephone solicitation, "including one made after a potential customer has responded to a solicitation sent by mail."²⁰⁴ However, this definition still exempts some types of inbound programs.²⁰⁵

A second group of statutes have somewhat more detailed definitions of telemarketing. For example, Idaho's statute defines telemarketing as either (1) "[a]ny unsolicited telephone call . . . for the purpose of . . . inducing . . . the [recipient] to purchase or invest in goods or services,"²⁰⁶

201. Compare FLA. STAT. ANN. § 501.604(2) (West Supp. 1992) (providing exemption for "person[s] making calls for religious, charitable, political, educational, or other noncommercial purposes") with WASH. REV. CODE ANN. § 19.158.020(3)(b) (West Supp. 1992) (exemption for "person[s] making calls for religious, charitable, political, or other noncommercial purposes").

202. UTAH CODE ANN. § 13-26-2(4) (Supp. 1992).

203. This, of course, would exempt many illegal lotteries because most telemarketers operating chance promotions mail out "sweepstakes" certificates advising consumers to call in.

204. NEV. REV. STAT. § 599B.010(6) (1989).

205. The telemarketer must still make a solicitation. If the telemarketer is not actually making a solicitation, as with some illegal chance promotions, he or she would be exempt under Nevada law.

206. IDAHO CODE § 48-1002(10)(a) (Supp. 1992); see also FLA. STAT. ANN. § 501.603(1)(a) (West Supp. 1992); WASH. REV. CODE ANN. § 19.158.020(2)(a) (West

or (2) any "other communication" in which a prize or free gift is offered, a return call is invited, and a sale is expected to be made during the return call.²⁰⁷ Florida and Washington, which employ a similar definition, also include "other communications" in which the seller "misrepresents the price, quality, or availability of . . . goods" and invites a call by the recipient.²⁰⁸ Hence, the Florida and Washington definitions include inbound programs that involve chance promotions as well as those involving misrepresentations. However, these definitions still leave many telemarketers unaffected by the statute.

The last group of statutes have very detailed definitions of telemarketing. The definitions in these statutes take into account the various fraudulent telemarketing scams discussed above and are designed to stop such abuses. The definitions used by the California, Oregon, and Rhode Island statutes are designed to protect the consumers against illegal lotteries,²⁰⁹ office supply scams,²¹⁰ precious metal, gem, or oil and gas scams,²¹¹ and telemarketers "passing off" their goods as manufactured by someone other than the actual telemarketer.²¹² In addi-

Supp. 1992).

207. IDAHO CODE § 48-1001(10)(b) (Supp. 1992); *see also* FLA. STAT. ANN. § 501.603(1)(b) (West Supp. 1992); WASH. REV. CODE ANN. § 19.158.020(2)(b) (West Supp. 1992).

208. WASH. REV. CODE ANN. § 19.158.020(2)(c) (West Supp. 1992); *see also* FLA. STAT. ANN. § 501.603(1)(c) (West Supp. 1992). "Other communication" is defined as "written or oral notification or advertisement transmitted through any means." WASH. REV. STAT. ANN. § 19.158.020(2)(d) (West Supp. 1992).

209. *See* CAL. BUS. & PROF. CODE § 17511.1(a)(2) (West Supp. 1992) (statute applies to telemarketers who represent to prospective purchasers that they will receive a prize or gift and encourages them to "purchase or rent . . . goods or services" or "[p]ay any money . . . including . . . a delivery or handling charge"); *see also* OR. REV. STAT. § 646.551(1)(a)(A) (1989); R.I. GEN. LAWS § 5-61-2(h)(1)(B) (1987).

210. R.I. GEN. LAWS § 5-61-2(h)(1)(C) (1987) (the definition encompasses telemarketers who imply "that a prospective purchaser who buys office equipment or supplies will, because of some unusual event or imminent price increase, be able to buy these items at prices which are below those that are usually charged"). California and Oregon statutes contain nearly identical provisions. CAL. BUS. & PROF. CODE § 17511.1(a)(4) (West Supp. 1992); OR. REV. STAT. § 646.551(1)(a)(C) (1989).

211. OR. REV. STAT. § 646.551(1)(a)(F) (1989) ("telephonic seller" includes solicitations in which "the items for sale are gold, silver or other precious metals, diamonds, rubies, sapphires or other precious stones or any interest in oil, gas or mineral fields"); *see also* CAL. BUS. & PROF. CODE § 17511.1(a)(7) (West Supp. 1992); R.I. GEN. LAWS § 5-61-2(h)(1)(F) (1992).

212. R.I. GEN. LAWS §§ 5-61-2(h)(1)(D) (1987) (seller represents to buyer that "seller is a person other than the person he or she is") and 5-61-2(h)(1)(E) (1987) (seller represents that "the items for sale are manufactured or supplied by a person other than the actual manufacturer or supplier"); *see also* CAL. BUS. & PROF. CODE §§ 17511.1(a)(5) & (6) (West Supp. 1992); OR. REV. STAT. §§ 646.551(1)(a)(D) & (E) (1989).

tion, California's statutory definition is designed to protect consumers against scams involving loans,²¹³ credit cards,²¹⁴ and "any . . . investment opportunity of any type whatsoever."²¹⁵

California, Oregon, and Rhode Island all protect against both inbound and outbound telemarketing programs. However, Rhode Island protects only against inbound programs involving the sale of metals, gems, "or any interest in oil, gas or mineral fields, wells, or exploration sites."²¹⁶

Since these statutes focus on the methods used by fraudulent telemarketers, they are effective in reducing the more common types of telemarketing fraud. However, telemarketers are adept at devising new scams and, consequently, may find a way to circumvent the definitions in the statutes. Therefore, the most effective definition of telemarketing is one that is sufficiently broad to include all telemarketers, such as the definition used in the Utah statute²¹⁷ and the two pending federal bills.²¹⁸ When all telemarketers are included under the provisions of a statute, the law will be more effective because it will ensure that everyone selling goods or services over the telephone will operate by the same guidelines.

2. Exemptions

Although the statutes vary in their definition of telemarketing, each law exempts certain types of telephonic sellers from complying with particular provisions of the regulations, such as registration and bonding requirements.²¹⁹ Some exemptions are common to most, if not all, the statutes,²²⁰ while others are evidence of differing regional policy con-

213. CAL. BUS. & PROF. CODE § 17511.1(a)(8) (West Supp. 1992).

214. CAL. BUS. & PROF. CODE § 17511.1(a)(9) (West Supp. 1992).

215. CAL. BUS. & PROF. CODE § 17511.1(a)(7) (West Supp. 1992). Although "investment" is not defined, the language appears broad enough to encompass any sales presentation in which the salesperson represents to the potential customer that the customer could see a return on his or her investment.

216. R.I. GEN. LAWS § 5-61-2(h)(2) (1987).

217. See *supra* note 202 and accompanying text.

218. See *infra* note 296 and accompanying text.

219. See *infra* notes 233-66 and accompanying text.

220. See, e.g., CAL. BUS. & PROF. CODE § 17511.1(e)(7) (West Supp. 1992) (providing exemption for sellers of "a newspaper of general circulation"); FLA. STAT. ANN. § 501.604(6) (same).

cerns.²²¹ This section will discuss some of the more common exemptions.

Because state legislators do not want to enact laws that will inhibit open and robust commerce, telemarketing statutes are designed to discourage only fraudulent telemarketing practices. Therefore, many of the exemptions are designed to exempt businesses that do not make telemarketing the primary focus of their sales efforts or that use telemarketing only to follow up with existing customers.²²² Commonly, the statutes exempt companies soliciting business from existing customers,²²³ companies soliciting service contracts from existing customers,²²⁴ and companies that employ telemarketing as a small portion of their sales activities.²²⁵

Certain businesses are also routinely given exemptions under state law. Solicitations made by businesses in highly regulated industries such as public utilities,²²⁶ financial institutions,²²⁷ and securities and futures

221. For example, the Nevada statute exempts persons "to whom a nonrestricted gaming license has been issued." NEV. REV. STAT. § 599B.020(1)(t) (1991). Also, the Washington statute exempts persons "soliciting the sale of food fish or shellfish." WASH. REV. CODE ANN. § 19.158.020(3)(v) (West Supp. 1992).

222. STONE & WYMAN, *supra* note 23, at 94. Most sales executives find that 80% of their companies' sales come from 20% of their customers. Telemarketing, therefore, can be an important device for many businesses to keep in touch with their best customers. *Id.*

223. WASH. REV. CODE ANN. § 19.158.020(3)(c) (West Supp. 1992) ("[C]ommercial telephone solicitor' does not include . . . [a] person soliciting business solely from purchasers who have previously purchased from the business."). See also ARK. CODE ANN. § 4-95-107(2) (1992); CAL. BUS. & PROF. CODE § 17511.1(e)(8) (West Supp. 1992); FLA. STAT. ANN. § 501.604(23) (West Supp. 1992); IDAHO CODE § 48-1005(b) (Supp. 1992); KAN. STAT. ANN. § 50-673(b) (1992); NEV. REV. STAT. § 599B.020(u) (1991); OR. REV. STAT. § 646.553(2)(h) (1989); R.I. GEN. LAWS § 5-61-2(i)(6); UTAH CODE ANN. § 13-26-4(8) (Supp. 1992).

224. FLA. STAT. ANN. § 501.604(13) (West Supp. 1992) ("The provisions of this part do not apply to . . . [a] person who solicits contracts for the maintenance or repair of goods previously purchased from the person making the solicitation . . ."); see also LA. REV. STAT. § 816(3) (1992); NEV. REV. STAT. § 599B.020(s) (1991); UTAH CODE ANN. § 13-26-4(7) (Supp. 1992).

225. Utah, Washington, and Idaho exempt businesses that make less than 60% of their sales through telemarketing. IDAHO CODE § 48-1005(a)(ii) (Supp. 1992); UTAH CODE ANN. § 13-26-4(11) (Supp. 1992); WASH. REV. CODE ANN. § 19.158.020(3)(a)(ii) (West Supp. 1992). In addition, several states exempt businesses in which telephonic sales are "isolated transactions." FLA. STAT. ANN. § 501.604(1) (West Supp. 1992); IDAHO CODE § 48-1005(a)(i) (Supp. 1992); UTAH CODE ANN. § 13-26-4(10) (Supp. 1992); WASH. REV. CODE ANN. § 19.158.020(3)(a)(i) (West Supp. 1992).

226. CAL. BUS. & PROF. CODE § 17511.1(e)(14) (West Supp. 1992) ("[T]elephonic seller' or 'seller' does not include . . . [a] person or an affiliate of a person whose business is regulated by the [California] Public Utilities Commission."); see also ALASKA STAT. § 45.63.080(12) (1993); COLO. REV. STAT. § 6-1-302(1)(k) (1993); NEV. REV. STAT. § 599B.020(1)(f) (1991); OR. REV. STAT. § 646.553(2)(m) (1989); R.I. GEN. LAWS

brokers are often exempted from state regulation.²²⁸ These exemptions are given because the existing regulations provide enough guidance to the industry that additional telemarketing regulations are not necessary. Most states exempt solicitations involving newspapers and magazines,²²⁹ telephone services,²³⁰ and cable television.²³¹ Statutes also often exempt charitable solicitations.²³²

States' exemptions may pose problems for law enforcement because they leave large gaps that could be exploited by fraudulent telemarketers. Although some of the exemptions apply only to persons or companies registered under federal or state law (e.g., securities brokers, utilities,

§ 5-61-2(i)(10) (Supp. 1987); UTAH CODE ANN. § 13-26-4(2)(a) (Supp. 1992); WASH. REV. CODE ANN. § 19.158.020(3)(o) (West Supp. 1992).

227. "Financial institutions" generally include commercial banks, savings and loans, trust companies, and credit unions. See CAL. BUS. & PROF. CODE § 17511.1(e)(10) (West Supp. 1992); FLA. STAT. ANN. § 501.604(8) (West Supp. 1992); NEV. REV. STAT. § 599B.020(1)(k) (1991); OR. REV. STAT. § 646.553(2)(j) (1989); R.I. GEN. LAWS § 5-61-3(i)(8) (Supp. 1987); UTAH CODE ANN. § 13-26-4(4) (Supp. 1992); WASH. REV. CODE ANN. § 19.158.020(3)(k) (West Supp. 1992).

228. See, e.g., CAL. BUS. & PROF. CODE §§ 17511.1(e)(16) & (18) (West Supp. 1992); COLO. REV. STAT. § 6-1-302(1)(m) (1993); FLA. STAT. ANN. § 501.604(18) & (20) (West Supp. 1992); IDAHO CODE § 48-1005(h) (Supp. 1992); NEV. REV. STAT. §§ 599B.020(1)¶ & (r) (1991); OR. REV. STAT. § 646.553(2)(o) (1989); R.I. GEN. LAWS § 5-61-2(i)(12) (Supp. 1987); WASH. REV. CODE ANN. §§ 19.158.020(3)(q)-(r) (West Supp. 1992).

229. CAL. BUS. & PROF. CODE § 17511.1(e)(7) (West Supp. 1992); COLO. REV. STAT. § 6-1-302(1)(a) (1993); FLA. STAT. ANN. § 501.604(6) (West Supp. 1992); IDAHO CODE § 48-1005(e) (Supp. 1992); NEV. REV. STAT. § 599B.020(d) (1991); OR. REV. STAT. § 646.553(2)(f) (1989); R.I. GEN. LAWS § 5-61-3(i)(5) (Supp. 1987); UTAH CODE ANN. § 13-26-4(2)(b) (Supp. 1992); WASH. REV. CODE ANN. § 19.158.020(3)(j) (West Supp. 1992).

230. CAL. BUS. & PROF. CODE § 17511.1(e)(17) (West Supp. 1992) ("['T]elephonic seller' . . . does not include . . . [a] person soliciting exclusively the sale of telephone answering services . . ."); see also FLA. STAT. ANN. §§ 501.604(15) & (19) (West Supp. 1992); NEV. REV. STAT. § 599B.020(q) (1991); OR. REV. STAT. § 646.553(2)¶ (1989); UTAH CODE ANN. § 3-26-4(5) (Supp. 1987).

231. CAL. BUS. & PROF. CODE § 17511.1(e)(13) (West Supp. 1992); FLA. STAT. ANN. § 501.604(10) (West Supp. 1992); OR. REV. STAT. § 646.553(2)(L) (1989); R.I. GEN. LAWS § 5-61-3(i)(9) (Supp. 1987); WASH. REV. CODE ANN. § 19.158.020(3)(n) (West Supp. 1992).

232. ALASKA STAT. § 45.603.080(a) (1993); NEV. REV. STAT. § 599B.020(1)(e) (1991); OR. REV. STAT. § 646.553(2)(q) (1989); UTAH CODE ANN. § 13-26-4(2)(c) (Supp. 1992). Florida and Washington exempt political, as well as charitable organizations. FLA. REV. STAT. § 501.604(2) (West Supp. 1992) ("The provisions of this part do not apply to: . . . A person making calls for religious, charitable, political, educational, or other noncommercial purposes . . ."); see also WASH. REV. CODE ANN. § 19.158.020(3)(b) (West Supp. 1992).

cable television), other exemptions do not have the same limitations (e.g., newspaper and magazine sales, charitable organizations). It would not be difficult for an inventive boiler room operator to exploit these exemptions by devising a scam involving exempted businesses or phony charities. Therefore, an effective statute should not have many exemptions. In fact, the only way to ensure that a telemarketing statute will apply evenly to all telemarketers is to limit the number of vague and broad exemptions.

3. Registration and Licensing

State telemarketing statutes often require telemarketers who do not qualify for an exemption²³³ to register with the state attorney general or another state agency.²³⁴ Statutes that include such registration requirements "can make it easier to trace the operators and also to bring criminal actions for misleading or dishonest disclosures."²³⁵ Under the registration provisions, all telemarketers who wish to do business²³⁶ in a particular state must provide the state with certain information and a filing fee.²³⁷ Failure to register under a state registration statute subjects the telemarketer to criminal as well as civil penalties.²³⁸

As discussed above, recidivism is a major problem facing state attempts at combatting telemarketing fraud.²³⁹ Therefore, registration statutes generally require the telemarketer to provide information regarding any past criminal or fraudulent activities of all employees of the

233. Under most statutes, the telemarketer bears the burden of proving that he or she is entitled to an exemption. *See, e.g.*, CAL. BUS. & PROF. CODE § 17511.1(f) (West Supp. 1992) ("[T]he burden of proving an exemption or an exception from a definition is on the person claiming it . . ."); *see also* OR. REV. STAT. § 646.555 (1989).

234. *See, e.g.*, CAL. BUS. & PROF. CODE § 17511.3(a) (West Supp. 1992) (requiring registration with Consumer Law Section of the California Department of Justice); IDAHO CODE § 48-1004(a) (Supp. 1992) (requiring registration with the state attorney general).

235. THE SCOURGE OF TELEMARKEETING FRAUD, *supra* note 40, at 133.

236. "Doing business' in [a] state includes both commercial telephone solicitation from a location in [the state] and solicitation of purchasers located in [the state]." *See* WASH. REV. CODE ANN. § 19.158.050(1) (West Supp. 1992); *see also* FLA. STAT. ANN. § 501.605(1) (West Supp. 1992).

237. CAL. BUS. PROF. CODE § 17511.3(a) (West Supp. 1992) (\$50.00 filing fee); OR. REV. STAT. § 646.553(2) (1989) (\$400.00 filing fee); FLA. STAT. ANN. § 501.606(5)(b) (West Supp. 1992) (\$1,500.00 filing fee).

238. WASH. REV. CODE ANN. § 19.158.060 (West Supp. 1992) (failure to register constitutes a misdemeanor); FLA. STAT. ANN. § 501.623(1) (failure to register with the state of Florida is a felony of the third degree). California law provides for fines of up to \$10,000 *per transaction* and imprisonment of up to one year. CAL. BUS. & PROF. CODE § 17511.9 (West Supp. 1992).

239. *See supra* notes 192-95 and accompanying text.

telemarketing firm, including violation of state telemarketing laws.²⁴⁰ Past criminal or fraudulent activities are grounds for denial of a license or refusal to renew an existing license.²⁴¹ Also, falsification of information on the licensing application is grounds for denying or revoking a license.²⁴²

Registration statutes often require the telemarketer to supply information regarding the type of solicitation the telemarketer will be operating.²⁴³ This allows state officials to monitor the types of telemarketing programs being run in their state. Most statutes require telemarketers to file scripts used in the sales presentation, as well as information regarding the products and the prices paid by the telemarketer for the products.²⁴⁴ If the telemarketer is operating a chance promotion, some statutes require that the telemarketer supply information regarding the value of the prizes offered and the odds of winning each prize.²⁴⁵ Telemarketers who offer investments and make representations regarding the potential of the investments are required to provide information to substantiate the claims.²⁴⁶ Finally, telemarketers who are selling office

240. See CAL. BUS. & PROF. CODE § 17511.4(h) (West Supp. 1992) (requesting a "statement . . . as to . . . whether . . . [any principal or employee] has been convicted of a felony or misdemeanor involving an alleged violation of this article, or fraud, theft, embezzlement, fraudulent conversion, or misappropriation of property."); see also R.I. GEN. LAWS § 5-61-4(h)(1) (Supp. 1987).

241. See, e.g., FLA. STAT. ANN. §§ 501.612(a)-(c) (West Supp. 1992).

242. See, e.g., FLA. STAT. ANN. § 501.612(g) (West Supp. 1992).

243. See, e.g., FLA. STAT. ANN. § 501.605(2) (West Supp. 1992); CAL. BUS. & PROF. CODE §§ 17511.4(j)-(k) (West Supp. 1992).

244. CAL. BUS. & PROF. CODE §§ 17511.4(j)-(k) (West Supp. 1992) (requiring "description of the items the seller is offering . . . a copy of all sales scripts . . . [and] a copy of all sales information and literature"); FLA. STAT. ANN. § 501.605(2) (West Supp. 1992) ("The application shall be accompanied by a copy of any: Script, outline . . . sales information or literature to be provided by the applicant to a salesperson . . . and . . . to a purchaser . . .").

245. CAL. BUS. & PROF. CODE § 17511.4(l) (West Supp. 1992). The California statute requires telemarketers to provide: A list of the prizes, the value of each prize, the price paid by the telemarketer for each prize, the manner in which a winner is determined, the odds of winning each prize, the names and addresses of each winner of the prize with the highest value, and all rules, regulations, terms and conditions. *Id.*; see also R.I. GEN. LAWS § 5-61-4(l) (Supp. 1987).

246. CAL. BUS. & PROF. CODE §§ 17511.5(b)(2), 17511.4(m)(5) (West Supp. 1992). The California statute provides: "If the seller makes any representations as to the earning or profit potential of purchases of any metal, stone, or mineral, the [seller shall disclose to the purchaser, all] data to substantiate the claims made." *Id.*; see also R.I. GEN. LAWS § 5-61-4(m)(5) (Supp. 1987). California and Rhode Island also require similar information for telemarketers offering investments in oil and gas interests. See

supplies must disclose the names and addresses of the manufacturers and suppliers of all products offered.²⁴⁷

Several states also require all telemarketers, as part of the registration process, to appoint the attorney general or another state authority as the telemarketer's agent for service of process in the state.²⁴⁸ This requirement makes it easier for citizens to sue fraudulent telemarketers without having to go to the expense and effort of locating the telemarketer who, often, has been placing the phone calls from another state or who has left the state in which the victim resides.

Registration statutes benefit state officials in several ways. The disclosure of past criminal and fraudulent acts enables states to deny access to telemarketers likely to defraud citizens.²⁴⁹ Also, the information regarding the types of programs being offered by telemarketers allows states to deny licenses to telemarketers operating schemes likely to mislead or deceive.²⁵⁰ However, the registration statutes do nothing to help citizens swindled by boiler room operators who have avoided apprehension by state officials. For this reason, many states have enacted statutes requiring telemarketers to post surety bonds to reimburse customers for their losses. Bonding requirements are discussed in greater detail below.

4. Bonding

Several states require telemarketers doing business in the state to post a bond from a surety company, an irrevocable letter of credit from a federally insured bank, or a certificate of deposit from a federally insured financial institution.²⁵¹ The bond, typically for \$50,000,²⁵² provides secu-

CAL. BUS. & PROF. CODE § 17511.4(n)(5) (West Supp. 1992); R.I. GEN. LAWS § 5-61-4(n)(4) (Supp. 1987).

247. CAL. BUS. & PROF. CODE § 17511.5(d)(2) (West Supp. 1992); FLA. STAT. ANN. § 501.605(4)(b) (West 1989).

248. WASH. REV. CODE ANN. § 19.158.070 (West Supp. 1992) ("Each commercial telephone solicitor shall appoint the director of the department of licensing as an agent to receive civil process . . ."); *see also* CAL. BUS. & PROF. CODE § 17511.6 (West 1987) (requiring filing of an irrevocable consent appointing the attorney general agent for service of process).

249. FLA. STAT. ANN. § 501.612(a) (West Supp. 1993) (stating that officials can deny a license to a telemarketer who has been convicted of fraud, theft, embezzlement, "or any other crime involving moral turpitude").

250. *See* IDAHO CODE § 48-1001(2) (Supp. 1992) (stating that the intent of the legislature is to "prohibit representations that have the capacity, tendency, or effect of misleading a purchaser").

251. *See, e.g.,* FLA. STAT. ANN. § 501.611(1)(C) (West Supp. 1992) (allowing telemarketers to post either a bond, letter of credit, or certificate of deposit "which may be withdrawn only on the order of the [Florida Department of Agriculture and Consumer Services]"); *see also* NEV. REV. STAT. § 599B.100(1) (1989) (same). California requires a bond of all telemarketers. CAL. BUS. & PROF. CODE § 17511.12(a) (West

riety for consumers who sue and obtain judgments against fraudulent telemarketers. The statutes generally contain language requiring that the bond be "in favor of the [s]tate for the benefit of any person suffering injury or loss by reason of any violation of this chapter."²⁵³ The victim or any government agency, including the state, can bring a lawsuit against a telemarketer to recover on the bond.²⁵⁴ In addition to the general bond, California also requires a second bond from telemarketers operating chance promotions. Such a prize bond must cover the current market value of all prizes being offered.²⁵⁵

Bonding requirements also reduce the number of telemarketing scams operating in the state by discouraging fraudulent telemarketers from opening boiler rooms.²⁵⁶ To avoid posting the bond, fraudulent telemarketers will operate in states that do not have bonding requirements or operate without being bonded.²⁵⁷ However, if telemarketers operate unbonded in a state with a bonding requirement, they are subject to criminal and civil penalties. In addition, bonding companies require financial statements and collateral before issuing a bond. Such requirements reduce the number of fraudulent telemarketers operating in a state with a bonding requirement.²⁵⁸ Therefore, states that have enacted bonding requirements have generally experienced a decrease in the number of fraudulent telemarketing scams operating in the state.²⁵⁹ In addi-

Supp. 1992).

252. CAL. BUS. & PROF. CODE § 17511.12(a) (West Supp. 1992); FLA. STAT. ANN. § 501.611(2) (West Supp. 1992); NEV. REV. STAT. § 599B.100(2) (1991). *But see* LA. REV. STAT. ANN. § 45:813(3) (West Supp. 1993) (requiring \$10,000 or a letter of credit).

253. CAL. BUS. & PROF. CODE § 17511.12(a) (West Supp. 1992).

254. *See* FLA. STAT. ANN. § 501.611(4) (West Supp. 1992); NEV. STAT. ANN. § 599B.100(3) (1991).

255. CAL. BUS. & PROF. CODE § 17511.12(b) (West Supp. 1992) ("The proceeds of the [prize] bond shall be paid to any person suffering injury or loss by reason of any violation of this chapter The bond shall be maintained until the seller files with the Attorney General proof that the premium [prize] was awarded.").

256. THE SCOURGE OF TELEMARKETING FRAUD, *supra* note 40, at 133. Nevada's bonding requirement "helped drive most of the telemarketers to other nearby States." *Id.* Arizona found that their telemarketing bond requirement "substantially reduced the number of Arizona boiler rooms in operation." *Id.* at 134.

257. *Id.* at 133.

258. Interview with Alan B. Pick, *supra* note 54. While the collateral and financial statement requirements help to keep fraudulent telemarketers out of the state, the requirements also make it difficult for small legitimate telemarketers, who may not have substantial collateral or strong financial statements, to stay in business. *Id.*

259. THE SCOURGE OF TELEMARKETING FRAUD, *supra* note 40, at 133-34. However,

tion, legitimate telemarketers favor the bonding requirements, saying that they would "gladly pay the bond to 'weed out those bad apples.'"²⁶⁰

Generally, however, statutes set the amount of the bond too low to effectively compensate the victims of a large boiler room operation. Some boiler rooms gross as much as one to three-million dollars per week.²⁶¹ Thus, in the event that the boiler room is bonded and consumers win judgments against the bond, \$50,000 will not satisfy the judgments. In addition, since the premium for a bond is usually low,²⁶² the loss of that amount would not seriously impair a fraudulent telemarketer's ability to simply move to another state and post another bond.²⁶³

State bonding requirements are also troublesome for legitimate telemarketers. A single telemarketer who wishes to do business nationwide must register and post bond in several states. The price of numerous bonds can sometimes be prohibitive to small legitimate telemarketers.²⁶⁴

Although bonding requirements may be flawed, in most cases the flaws are not fatal and can be remedied.²⁶⁵ One of the major goals of the state statutory schemes is to inform consumers about the telemarketers and their products so that consumers can make an informed purchase.²⁶⁶ By requiring telemarketers to make certain disclosures, the statutes decrease some of the problems associated with the bonds because fewer consumers will be duped into buying products and trying to recover from the bonds.

California found that registration and bonding laws do not work unless they are stringently enforced. The state must follow through and prosecute violations of the laws to send a message to fraudulent telemarketers. The California securities enforcement chief testified before a House subcommittee that "if you don't follow up and if you don't coordinate efforts and if you don't track complaints . . . [the law] doesn't do anything." *Id.* at 133 n.326.

260. *Id.* at 134.

261. *Id.* at 135.

262. Bond premiums are generally only about 10% of the total bond amount. Interview with Alan B. Pick, *supra* note 54.

263. THE SCOURGE OF TELEMARKETING FRAUD, *supra* note 40, at 134-35.

264. Interview with Alan B. Pick, *supra* note 54.

265. See *infra* notes 374-76 and accompanying text.

266. See, e.g., CAL. BUS. & PROF. CODE § 17511(b) (West Supp. 1992) ("It is the intent of the Legislature in enacting this article to . . . provide each prospective telephonic sales purchaser with information necessary to make an intelligent decision regarding the offer made . . .").

5. Disclosures

Most telemarketing statutes require that the telemarketer disclose certain information to all potential customers.²⁶⁷ A broad goal of the telemarketing statutes is to eliminate consumer confusion and avoid misrepresentation by fraudulent telemarketers.²⁶⁸ Disclosure requirements accomplish this goal by ensuring that the customer receives all pertinent information he might need to locate a telemarketer who defrauds him.

The disclosure provisions generally require that telemarketers provide potential customers with preliminary information that will enable the customer to make an informed decision about whether to listen to the sales presentation. Most of the statutes require that, within a specified time,²⁶⁹ a telemarketer must clearly state to a potential purchaser the telemarketer's identity, business address, and the nature of the telephone call.²⁷⁰ Some statutes further specify that the telemarketer must supply the potential customer with the telemarketer's registration number.²⁷¹ After giving the purchaser this preliminary information, the telemarketer

267. See, e.g., CAL. BUS. & PROF. CODE § 17511.5 (West 1987); FLA. STAT. ANN. § 501.613 (West Supp. 1992); IDAHO CODE § 48-1004(c)-(f) (Supp. 1992); NEV. REV. STAT. § 599B.170, 599B.180(2), 599B.190(4) (1991); OR. REV. STAT. § 646.557 (1989); UTAH CODE ANN. § 13-26-6 (Supp. 1992); WASH. REV. CODE ANN. §§ 19.158.110(1), 19.158.110(4)-(6) (West Supp. 1992).

268. CAL. BUS. & PROF. CODE § 17511(b) (West 1987); IDAHO CODE § 48-1001(2) (Supp. 1992).

269. The telemarketer usually must make the disclosure immediately upon making contact with the potential purchaser. See FLA. STAT. ANN. § 501.613(1) (West Supp. 1992) (requiring disclosure within the first 30 seconds of the telephone call); UTAH CODE ANN. § 13-26-6(1) (Supp. 1992) (disclosure "within 15 seconds of making contact with the party called"); WASH. REV. CODE ANN. § 19.158.110(1) (West Supp. 1992) (disclosure within first minute of call). *But see* CAL. BUS. & PROF. CODE § 17511.5 (West 1987) (requiring the disclosure be made "at the time the solicitation is made and prior to consummation of any sales transaction").

270. FLA. STAT. ANN. § 501.613(1) (West Supp. 1992). "[A] commercial telephone seller . . . shall identify himself by stating his true name, the company on whose behalf the solicitation is being made, and the consumer goods or services being sold." *Id.*; see also UTAH CODE ANN. § 13-26-6(1) (Supp. 1992) ("A telephone solicitor . . . shall identify the business initiating the call and provide a summary statement of what the call is about . . ."); WASH. REV. CODE ANN. § 19.158.110(1) (West Supp. 1992) (stating that the telephone solicitor shall "[i]dentify himself or herself, the company on whose behalf the solicitation is being made, [and] the property, goods, or services being sold").

271. See, e.g., IDAHO CODE § 48-1004(c) (Supp. 1992); WASH. REV. CODE ANN. § 19.158.110(5) (West Supp. 1992).

must terminate the phone call if the purchaser indicates an unwillingness to continue the conversation.²⁷²

Several statutory schemes require that the telemarketer make special disclosures when offering a chance promotion. A telemarketer running a chance promotion must disclose to the potential purchaser the preliminary information discussed above as well as the following: (1) a description of the prizes;²⁷³ (2) the value of the prizes;²⁷⁴ (3) the terms and conditions of the promotion;²⁷⁵ (4) the odds of winning each prize;²⁷⁶ and (5) the total number (and, under some statutes, name and address) of people who have won the highest value prize within the past year.²⁷⁷

State telemarketing statutes often provide that any sale made over the telephone will not be final unless the telemarketer sends the purchaser a written confirmation of the order.²⁷⁸ Many states, therefore, require that telemarketers send written confirmation of a sale to the purchaser within a specified period of time.²⁷⁹ The written confirmation fulfills two requirements. First, the confirmation advises the customer of the name, address, and phone number of the telemarketer.²⁸⁰ Second, the written confirmation advises customers of their right to cancel the contract and receive a refund of all monies paid.²⁸¹ Several statutes provide

272. WASH. REV. STAT. ANN. § 19.158.110(1)(b) (West Supp. 1992).

273. FLA. STAT. ANN. § 501.614(1) (West Supp. 1992); NEV. REV. STAT. § 599B.180(1)(a) (1991).

274. FLA. STAT. ANN. § 501.614(2) (West Supp. 1992); NEV. REV. STAT. § 599B.180(1)(b) (1991).

275. CAL. BUS. & PROF. CODE §§ 17511.5(a)(1), 17511.4(1)(4)(A) (West Supp. 1992); FLA. STAT. ANN. § 501.614(3) (West Supp. 1992); NEV. REV. STAT. § 599.180(B)(1)(c) (1991).

276. CAL. BUS. & PROF. CODE §§ 17511.5(a)(1), 17511.4(1)(B) (West Supp. 1992); FLA. STAT. ANN. § 501.614(4), (5)(b) (West Supp. 1992); NEV. REV. STAT. § 599.180(B)(1)(d) & (e)(2) (1991).

277. CAL. BUS. & PROF. CODE § 17511.5(a)(3) (West Supp. 1992); FLA. STAT. ANN. § 501.614(5)(c) (West Supp. 1992); NEV. REV. STAT. § 599.180(B)(e)(3) (1991); OR. REV. STAT. § 646.557(c) (1991).

278. See UTAH CODE ANN. § 13-26-5(3) (Supp. 1992)

279. See, e.g., NEV. REV. STAT. § 599B.190(4) (1987) ("Within 3 days after any purchase of goods or services or upon delivery of the goods or services, whichever is later, the seller shall provide the purchaser with a written summary" of the purchaser's right to cancel the sale); see also FLA. STAT. ANN. § 501.615(3) (West Supp. 1993).

280. See, e.g., UTAH CODE ANN. § 13-26-5(3)(a) (1992). Although most telemarketing statutes require telemarketers to give this information orally to the customer as well, it is well recognized that many people do not bother to write such information down. See THE SCOURGE OF TELEMARKEETING FRAUD, *supra* note 40, at 5 (stating that elderly people "rarely memorialize phone conversations").

281. See FLA. STAT. ANN. § 501.615(3) (West Supp. 1992); IDAHO CODE § 48-1004(2) (Supp. 1992); NEV. REV. CODE § 599B.190(4) (1991); UTAH CODE ANN. § 13-26-5(3)(b) (1992); WASH. REV. CODE ANN. § 19.158.120(1) (West Supp. 1992).

telemarketers with disclaimer notices that the telemarketers must reprint verbatim.²⁸²

In addition to providing consumers with needed information and protecting the consumers' interests in the event that they are defrauded, state statutes also serve to discourage potential fraudulent telemarketers from opening boiler rooms by providing substantial penalties for violation of the telemarketing statutes.

6. Penalties/Remedies

State telemarketing statutes provide state authorities with several different remedies. As discussed above, state law provides penalties for telemarketers operating a telemarketing business without the proper registration.²⁸³ However, in addition to penalties for non-registration, the statutes also provide civil and criminal penalties for each violation of the particular telemarketing statute, such as failure to make specified disclosures or use of deceptive practices.²⁸⁴ Also, some statutes provide for attorneys' fees.²⁸⁵

Telemarketing statutes also empower state authorities to seek declaratory judgments and injunctive relief on behalf of victims of telemarketing scams.²⁸⁶ However, as discussed above, declaratory actions and injunctions are often ineffective in shutting down illegal telemarketing operations.²⁸⁷ The statutes, however, make it clear that the remedies

282. See, e.g., UTAH CODE ANN. § 13-26-5(3)(b) (1992). The Utah disclosure provides as follows:

NOTICE OF CANCELLATION

You, the buyer, may cancel this order without any penalty or obligation within three business days from the delivery of the merchandise or premium (gift, bonus, prize, or award), whichever is delivered later.

Id.

283. See *supra* note 236-38 and accompanying text.

284. California, Florida, and Rhode Island provide civil penalties of \$10,000 per violation of their respective statutes. CAL. BUS. & PROF. CODE § 17511.9(a) (West 1987); FLA. STAT. ANN. § 501.619 (West Supp. 1993); R.I. GEN. LAWS § 5-61-5(A) (1987). In addition, California and Rhode Island provide for imprisonment of up to one year. CAL. BUS. & PROF. CODE § 17511.9(b) (West 1987); R.I. GEN. LAWS § 5-61-5(B) (1987). Nevada provides a \$25,000 fine and up to 6 years imprisonment. NEV. REV. STAT. § 599B.250(1) (1987).

285. FLA. STAT. ANN. § 501.621 (West Supp. 1992).

286. See FLA. STAT. ANN. § 501.618 (West Supp. 1992) (declaratory judgment and injunction); WASH. REV. CODE ANN. § 19.158.090 (West Supp. 1992) (same).

287. See *supra* notes 178-81 and accompanying text.

listed are not exclusive and that fraudulent telemarketers can be prosecuted under any other applicable theory.²⁸⁸

Although state telemarketing statutes have had some success in combatting telemarketing fraud, states will never be able to effectively curtail the growth of telemarketing fraud and the consequent damage to the economy because of their limited resources and jurisdictions.²⁸⁹ State telemarketing statutes have led to some arrests and convictions, but they have failed to reduce the total number of telemarketing frauds being perpetrated nationwide. To combat telemarketing fraud on a national level, federal legislation must be enacted giving the Federal Trade Commission and state attorneys general the power to regulate the telemarketing industry and shut down boiler room operations.²⁹⁰

IV. FEDERAL LEGISLATION

Both the Senate and the House of Representatives have realized the necessity for action at the federal level, and both bodies have introduced legislation to combat telemarketing fraud. Between 1987 and 1991, several telemarketing bills were introduced in Congress, although none of them were enacted.²⁹¹ In 1991, the Consumer Protection Telemarketing

288. See, e.g., CAL. BUS. & PROF. CODE § 17511.10 (West 1987) ("The[se] remedies . . . shall be in addition to any other procedures or remedies for any violation or conduct provided for in any other law.").

289. *Joint Hearing, supra* note 46, at 95 (statement of Carole Byrum, Investigations Officer, U.S. Bank of Oregon) (discussing the ineffective attempts by state officials to combat telemarketing fraud and stressing the need for federal statutes criminalizing telemarketing fraud, credit card factoring, and debit drafts, and "heavy" financial penalties and prison sentences).

290. David R. Spiegel, *Foiling Phone Robbers*, NAT'L L.J., Nov. 16, 1992, at 14. "[S]ince telemarketing fraud is a national problem, it is imperative that it be addressed through federal legislation rather than piecemeal by state legislatures, as it has been up to now." *Id.*

291. H.R. REP. NO. 781, 100th Cong., 2d Sess. 7 (1988). On July 27 and December 3, 1987, the House Subcommittee on Transportation, Tourism, and Hazardous Materials of the Committee on Energy and Commerce held hearings on telemarketing fraud. *Id.* These hearings resulted in a determination by the Subcommittee that the scope of telemarketing fraud was too large to rely on enforcement by the FTC under the Federal Trade Commission Act (FTCA), 15 U.S.C. §§ 41-77 (1991), and by the states. *Id.* at 6.

On March 6, 1988, the House introduced the Telemarketing and Fraud Prevention Act of 1988, H.R. 4101, 100th Cong., 2d Sess. (1988). The bill required the FTC to promulgate rules governing telemarketing, authorized state attorneys general and consumers to sue in federal court to enforce the FTC rules, prohibited harassment over the phone, and established an FTC "clearinghouse" for inquiries about telemarketing. See generally *Telemarketing Fraud Prevention Act of 1988: Hearing on H.R. 4101 Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the*

Act was introduced in the House²⁹² and the Telemarketing and Consumer Fraud and Abuse Prevention Act was introduced in the Senate.²⁹³ By the adjournment of Congress at the end of 1992, the two bills had been amended so that they were nearly identical and both were close to enactment.²⁹⁴ The current Congress has recently revived the bills which may be passed in the current session.²⁹⁵ However, as of the writing of this Comment, the two bills differ significantly. This section will detail the major provisions and significant differences of the two bills.

A. *Consumer Protection Telemarketing Act*

The purpose of the Consumer Protection Telemarketing Act is to "strengthen the authority of the Federal Trade Commission to protect

House Comm. on Energy and Commerce, 100th Cong., 2d Sess. (1988). In March 1989, the House introduced the Telemarketing Fraud Prevention Act of 1989, H.R. 1354, 101st Cong., 1st Sess. (1989), which contained the essential features of the prior bill, with a few additions. See generally *Telemarketing Fraud Prevention Act of 1989: Hearing on 1354 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1989).

In April 1988, the Senate introduced a bill, the Consumer Fraud Prevention Act, S. 2326, 100th Cong., 2d Sess. (1988), which was based, in part, on the House Telemarketing Fraud Prevention Act. A later bill, the Telemarketing and Consumer Fraud and Abuse Prevention Act, S. 2494, 101st Cong., 2d Sess. (1990), introduced by the Senate on April 23, 1990, was also similar to the House bill, but it extended the subpoena power of the FTC and permitted court-ordered production of financial records without notice, "if the court [found] that the party [was] likely to transfer assets to avoid seizure." S. REP. NO. 396, 101st Cong., 2d Sess. (1990).

292. H.R. 3203, 102d Cong., 1st Sess. (1992).

293. S. 1392, 102d Cong., 1st Sess. (1991).

294. The Senate passed the compromise bill, but it was never considered by the full House. 1993 Daily Report for Executives (BNA) 14 d65, Jan. 25, 1993, available in LEXIS, Nexis Library.

295. Telemarketing and Consumer Fraud and Abuse Prevention Act, H.R. 868, 103d Cong., 1st Sess. (1993); David R. Spiegel, *Foiling Phone Robbers*, NAT'L L.J., Nov. 16, 1992, at 13. The bill was cleared by the Subcommittee on Transportation and Hazardous Materials of the House Energy and Commerce Committee on February 18, 1993. Antitrust & Trade Reg. Rep. (BNA) 1602, at 164 (Feb. 18, 1993). By August 1993, both bills had passed their respective chambers and were awaiting reconciliation by a joint committee. *Senate OK's Bill to Combat Fraud in Telemarketing*, TRAVEL WEEKLY, Aug. 9, 1993, at 3. See also *Senator Blasts Telemarketing Fraud*, DM NEWS, Mar. 22, 1993, at 88 (Senator Bryan stated that "Congress needs to pass [telemarketing] legislation this year").

Because the bills introduced in the 103d Congress are identical in nearly all respects to earlier versions of the bills, all cites in this section will be to the bill as it stood at the end of the 102d Congress.

consumers in connection with sales made with a telephone.²⁹⁶ The bill defines telemarketing as “a plan, program, or campaign which is conducted to induce purchases of goods or services by significant use of one or more telephones and which involves more than one interstate telephone call.”²⁹⁷ The statute’s only exemption is for solicitations of sales through the mailing of a catalog. To qualify for the exemption, the telemarketer must show that the catalog (1) contains illustrations or written descriptions of the goods being offered; (2) includes the business address of the seller; (3) contains multiple pages of written material; and (4) is produced at least once a year and used in solicitations in which the purchaser rather than the seller makes the first call.²⁹⁸ Thus, the House bill’s definition of telemarketing is much broader than the definitions in most of the state statutes discussed above.²⁹⁹ Under the House bill, nearly all businesses using the phone to solicit sales would have to comply with federal telemarketing regulations.

The House bill requires that the Federal Trade Commission (FTC) “prescribe rules prohibiting deceptive (including fraudulent) telemarketing activities and other abusive telemarketing activities” within 270 days after the bill’s enactment.³⁰⁰ The FTC’s rules, in turn, must include a definition of deceptive telemarketing activities and list “criteria that are symptomatic” of deceptive telemarketing and that differ from legitimate telemarketing practices.³⁰¹ The identification of criteria that distinguish deceptive telemarketing is “necessary to provide ‘bright line’ guidance to consumers, enforcement officers, and telemarketers as to what patterns of behavior may be considered to be examples of deceptive telemarketing activity.”³⁰²

The FTC’s rules must also prohibit telemarketers from placing unsolicited calls that “the reasonable consumer would consider coercive or abusive of such consumer’s right to privacy”³⁰³ and restrict the hours during which telemarketers can place phone calls.³⁰⁴ The bill instructs

296. H.R. 3203, 102d Cong., 2d Sess. (1992).

297. *Id.* § 8(4).

298. *Id.* The catalog exemption allows national catalog sellers such as Sears Roebuck, JC Penney, and Lands’ End to operate without interference from the federal statutes.

299. *See supra* notes 202-16, and accompanying text.

300. H.R. 3203, 102d Cong., 2d Sess. § 3(a)(1) (1992). The rules would be issued under § 5 of the FTCA, 15 U.S.C. § 45 (1991), which prohibits unfair or deceptive acts or practices. *Id.*

301. *Id.* § 3(a)(2).

302. H.R. REP. NO. 688, 102d Cong., 2d Sess. at 10 (1992).

303. H.R. 3203, 102d Cong., 2d Sess. § 3(a)(3) (1992). The rule should include proscriptions on such inappropriate practices as “threats or intimidation, obscene or profane language, refusal to identify the calling party, [and] continuous or repeated ringing of the telephone.” H.R. REP. NO. 688, 102d Cong., 2d Sess. at 11.

304. H.R. 3203, 102d Cong., 2d Sess. § 3(a)(3) (1992). The bill does not suggest the

the FTC that while promulgating the telemarketing rules, it should also "consider" adopting two additional requirements. First, the FTC should consider a rule requiring that goods and services be delivered or provided within a specified period of time or a refund provided to the consumer.³⁰⁵ Second, the Commission should consider a rule granting consumers the authority to cancel the order within a specified period.³⁰⁶

In its most important provision, the bill gives state attorneys general the power to "bring a civil action on behalf of its residents in an appropriate district court of the United States."³⁰⁷ In the federal suit, a state attorney general can seek injunctions against fraudulent telemarketers who violate the FTC rules, enforce compliance with the FTC rules, and "obtain damages, restitution, or other compensation . . . or . . . other relief as the court may deem appropriate."³⁰⁸ Under this provision, state attorneys general can obtain injunctions against boiler room operators that would apply nationwide. This authority greatly increases the power of state officials³⁰⁹ and enables them to halt fraudulent telemarketers' operations in all fifty states.³¹⁰

Before state attorneys general file any action against a boiler room operator, they must give notice to the FTC.³¹¹ State attorneys general are precluded from bringing the action against the telemarketer if the FTC is already prosecuting or investigating the same telemarketer.³¹² This rule prevents duplication of effort by federal and state officials, promotes efficiency, and avoids subjecting defendants to multiple related actions simultaneously.³¹³

hours the FTC should allow telemarketing to take place.

305. *Id.* § 3(a)(3)(A).

306. *Id.* § 3(a)(3)(B). This rule could be constructed similar to the rules requiring disclosure of consumers' cancellation rights enacted by many states. *See supra* notes 278-79 and accompanying text.

307. H.R. 3203, 102d Cong., 2d Sess. § 4(a) (1992).

308. *Id.*

309. S. REP. NO. 80, 103d Cong., 1st Sess. at 11 (1993). In addition to injunctions, state officials can seek "orders enforcing compliance with any rule, regulation, or order of the FTC under this legislation . . ." *Id.* at 10.

310. *Id.* at 11. In addition, the bill does not eliminate the rights of state attorneys general and other state officials to bring actions in state courts to enforce state laws. H.R. 3203, 102d Cong., 2d Sess. § 4(c) & (e)(2) (1991).

311. *Id.* § 4(b).

312. *Id.* § 4(d).

313. H.R. REP. NO. 688, 102d Cong., 2d Sess. at 13 (1992).

The bill also allows private persons "who have been adversely affected by any pattern or practice of telemarketing" that violates the FTC rules, to bring an action in an appropriate United States district court to enjoin the telemarketer, enforce the FTC rules, or obtain damages.³¹⁴ Private persons, like state attorneys general, must give the FTC prior notice of the filing of the action and cannot file an action if the FTC is already suing the telemarketer.³¹⁵ While this provision would appear to give private persons a powerful weapon by allowing them to seek federal injunctions, its use is limited to persons who have been damaged in excess of \$50,000.³¹⁶ This high threshold excludes the vast majority of victims of telemarketing fraud who typically lose only a few hundred dollars.³¹⁷ Although victims with low dollar losses could not bring actions in federal court, they are not completely without legal recourse because the bill does not "restrict any right which any person may have under any statute or common law."³¹⁸ However, state civil suits, as discussed above, have been relatively ineffective in combatting telemarketing fraud.

314. H.R. 3203, 102d Cong., 2d Sess. § 5(a) (1992). The bill also provides that the court may award attorneys fees and costs to the prevailing party. *Id.* at § 5(d).

Some commentators have suggested that individuals can prosecute fraudulent telemarketers under the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961-1968 (1990). *See also* Ellen M. Faro, Note, *Telemarketing Credit Card Fraud: Is RICO One Answer?*, 1990 U. ILL. L. REV. 675. Ms. Faro concludes that "application of civil RICO to telemarketing credit card fraud is a viable use of the RICO statute." *Id.* at 677. However, she points out that a RICO suit would be difficult to win because the plaintiff would have to satisfy the "strict pleading requirements" of Rule 9(b) of the Federal Rules of Civil Procedure and provide specific details of the operation of the fraud, such as the times the calls were placed and the location and identity of the caller. *Id.* at 704. She also asserts that plaintiffs would have a difficult time suing corporations under RICO because the statute would require the plaintiff to name a "person" in addition to naming the "enterprise." *Id.* at 698-700, 705-06. Finally, she argues for a liberal application of RICO to telemarketing fraud so that individuals could sue fraudulent telemarketers without meeting the technicalities of the law. *Id.* at 706-10.

The pending telemarketing legislation would not be hindered by such problems. Since the statute requires the FTC to enact guidelines that would target fraudulent telemarketing directly, the laws would be better suited to eliminating telemarketing. Rather than altering or liberalizing the application of an existing statute, a new statute should be enacted that would result in a better fit between the crime and the remedy.

315. H.R. 3203, 102d Cong., 2d Sess. § 5(b) & (c) (1992).

316. *Id.*

317. THE SCOURGE OF TELEMARKETING FRAUD, *supra* note 40, at 15 (testimony of California Deputy Attorney General Jerry Smilowitz). "The typical dollar loss on [telemarketing scams] is usually no more than \$400, but to many . . . complainants . . . the loss of \$400 is oftentimes very significant." *Id.*

318. H.R. 3203, 101st Cong., 2d Sess. § 5(e) (1991).

Under the House bill, the FTC also must "establish a clearinghouse for inquiries made to Federal agencies concerning telemarketing"³¹⁹ that would serve as a central repository of information on fraudulent telemarketers nationwide.³²⁰ The clearinghouse would provide the information it collects to law-enforcement officials or citizens who make inquiries regarding any telemarketer.³²¹ In this way, government would be aided in its attempts to combat telemarketing fraud because the clearinghouse would (1) inform federal and state agencies of the existence of investigations by other agencies; (2) prevent duplicative investigations; (3) encourage the use of limited resources more efficiently; (4) help federal and state officials identify recidivists; and (5) aid in the referral of certain types of telemarketing fraud cases to the appropriate investigatory agency.³²² The clearinghouse would also aid the public by serving as a "watchdog" to oversee the telemarketing industry in general and ensure that telemarketers are not engaging in fraudulent practices.³²³

In late 1992, the House dropped the clearinghouse provision from the bill due to concerns from the FTC over the cost and burden of implementing the system.³²⁴ The Senate bill, discussed below, originally contained a similar clearinghouse provision which was eliminated in later drafts of the bill for the same reasons.

319. *Id.* § 6(a).

320. Robert W. Stewart, *Phone Swindlers Net \$15 Billion a Year; Crime: Victims of Telemarketing Scams Are Usually the Elderly. A Congressional Report Blames Unfocused Law Enforcement Efforts*, L.A. TIMES, Dec. 29, 1991, at A5 (stating that "[o]ne of the most serious roadblocks to better enforcement is the federal government's failure to establish a central clearinghouse for law enforcement information").

321. H.R. 3203, 101st Cong., 2d Sess. § 6(a) (1991). Although the FTC currently provides information regarding investigations of telemarketing fraud, other agencies have refused to participate. A federal clearinghouse would remedy this situation and make information more readily available. *See id.*

322. THE SCOURGE OF TELEMARKEING FRAUD, *supra* note 40, at 36.

323. Larry Riggs, *Consumers League Starts Tele-Fraud Clearinghouse*, DM NEWS, Jan. 27, 1992, at 1. The National Consumers League determined that a national database was the best way to aid consumers by providing them with information regarding telemarketers. *Id.*

324. *Senate Passes Conference Vehicle on Telemarketing Fraud Prevention*, 63 Anti-trust & Trade Reg. Rep. (BNA) No. 1586, at 475 (Oct. 15, 1992).

B. Telemarketing and Consumer Fraud and Abuse Prevention Act

The Senate bill is nearly identical to the House bill in most significant respects. However, the Senate bill adds certain provisions not contained in the House bill that substantially change the nature of the bill.

The Telemarketing and Consumer Fraud and Abuse Prevention Act, like the House bill, requires the FTC to promulgate rules related to telemarketing fraud, including a definition of "deceptive telemarketing," and "consider" rules prohibiting calls during certain hours and giving consumers a right to cancel orders made over the phone.³²⁵ In addition, the Senate bill requires the FTC to consider enacting "recordkeeping requirements."³²⁶ The bill does not elaborate on what is meant by "recordkeeping requirements." However, at a hearing on an earlier version of a similar bill, Rep. Thomas A. Luken stated that if "the seller does not keep records adequate to demonstrate compliance with [the] rules, he is presumed to be in violation of the rule."³²⁷ Therefore, recordkeeping requirements shift the burden of proof to the telemarketer to demonstrate compliance with the rules to escape the presumption of a violation.

The Senate bill also gives rule-making power to federal agencies other than the FTC. Under the Senate bill, no later than six months after the effective date of the FTC's telemarketing rules, the Securities and Exchange Commission (SEC) and the Commodities Futures Trading Commission (CFTC) must promulgate rules "substantially similar" to the FTC's rules regulating telemarketing by people and entities regulated by either commission.³²⁸ Neither the SEC nor the CFTC must promulgate such rules, however, if either commission determines that existing laws provide enough protection or that "such a rule . . . is not necessary or appropriate in the public interest, or for the protection of customers."³²⁹ This provision of the Senate bill appears to be superfluous. Because the bill defines telemarketing broadly and makes virtually no exemptions, the FTC rules would apply to all telemarketers, including securities brokers and futures traders. Further, rules established by the CFTC and SEC may prove to be duplicative because members of these highly regulated industries must already comply with extensive disclosure rules.³³⁰

325. S. 1392, 102d Cong., 2d Sess., § 3(a)(2) & (3) (1992).

326. *Id.* § 3(a)(3)(C).

327. *Telemarketing Fraud Prevention Act of 1988: Hearing on H.R. 4104 Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 2 (1988) (statement of Rep. Thomas A. Luken).

328. S. 1392, 102d Cong., 2d Sess., § 3(d) & (e) (1992).

329. *Id.*

330. Interview with Alan B. Pick, *supra* note 54.

The Senate bill also gives the FTC authority to demand any person under investigation for deceptive telemarketing practices to "produce physical evidence for inspection, to give oral testimony in combination with documentary material, answers, or testimony"³³¹ pursuant to section 20(c)(1) of the Federal Trade Commission Act.³³² The person receiving the demand must produce the physical evidence "under sworn certificate, in such form as the demand designates."³³³ However, the investigative authority granted the FTC under this provision simply reiterates the powers the Commission already enjoys under the Federal Trade Commission Act.³³⁴ Although seemingly superfluous, the provision does clarify that the powers of the FTC are not inhibited in any way by the telemarketing bill.

The two federal bills will be very effective in accomplishing many of the broad goals of law enforcement to combat telemarketing fraud. However, the bills alone will not end the problem. Only by accompanying the bills with effective FTC rules, further statutes, and broad-based educational efforts can telemarketing fraud be eliminated.

V. RECOMMENDATIONS FOR FTC RULES, FURTHER LEGISLATIVE ENACTMENTS, AND OTHER PROGRAMS

The statutory scheme proposed by Congress in the two telemarketing bills addresses several of the most serious problems encountered by states in combatting telemarketing fraud. First, the definition of telemarketing applied by Congress is justifiably broad.³³⁵ A broad definition is necessary in a federal telemarketing statute because many of the state statutes contain numerous exemptions and loopholes for cunning telemarketers to exploit. Only by broadly defining telemarketing can law

331. S. 1392, 102d Cong., 2d Sess. § 7(b) (1992).

332. 15 U.S.C. § 57b-1(c)(1) (1988). The section provides: "Whenever the Commission has reason to believe that any person may be in possession . . . of any documentary material, or may have any information relevant to unfair or deceptive practices . . . the Commission may . . . issue . . . a civil investigative demand requiring such person to produce such documentary material" *Id.*

333. S. 1392 at § 7(d) (1992).

334. Compare 15 U.S.C. § 57(b)-1(c)(1) (1988) with S. 1392, 102d Cong., 2d Sess. § 7(d) (1992).

335. See S. 1392, 102d Cong., 1st Sess. § 2(4) (1991); H.R. 3203, 102d Cong., 1st Sess. § 8(4) (1991).

enforcement officials ensure that all telemarketers, legitimate and fraudulent, will play by the same rules.³³⁶

Second, giving state attorneys general the power to bring cases against fraudulent telemarketers in federal courts³³⁷ alleviates the most significant problem facing state law enforcement officials in battling boiler room operations. As discussed above, fraudulent telemarketers faced with a state court injunction generally stop selling in the state granting the injunction and concentrate on other states.³³⁸ This pattern has significantly hampered state officials' efforts to combat telemarketing fraud because, although state officials can often shut down a boiler room's operations in their state, the boiler room will continue to defraud thousands of people in other states. Under the legislation proposed by Congress, state officials will be able to completely close down boiler room operations nationwide.³³⁹

Third, requiring the FTC to promulgate rules proscribing abusive and fraudulent telemarketing practices,³⁴⁰ including the placing of calls during certain hours, serves the important goal of reducing calls that many consider annoying³⁴¹ or an invasion of privacy.³⁴² Legitimate

336. See *Hearing on S. 2213, H.R. 4104, and S. 2326, supra* note 15, at 72. Some business groups, however, contend that a broad definition will inhibit businesses that are not intended to be the focus of the bill. The National Retail Merchants Association (NRMA) commented on an earlier bill, H.R. 4101, with a similar telemarketing definition. The NRMA stated that "virtually all business transactions which involve the use of a telephone as a sales tool, and all related advertising and marketing practices could be covered by the bill's definition." *Id.*

337. See S. 1392, 102d Cong., 1st Sess. § 4(b) (1991); H.R. 3203, 102 Cong., 1st Sess. § 4 (1991).

338. See *supra* notes 179-81 and accompanying text.

339. See *Hearing on S. 2213, H.R. 4104, and S. 2326, supra* note 15, at 91. The DMA has strongly opposed provisions in previous bills giving state officials the power to seek federal injunctions against fraudulent telemarketing. The DMA has stated that giving state attorneys general this power would be "like riding in a car that has no seat belts" and would subject telemarketers to the whims of state officials who would "have the power to give nationwide effect to their views on what is fraudulent." *Id.* The DMA's concerns are well placed; however, the federal law, in practice, may eliminate those concerns. Pursuant to the bill, the FTC must also devise criteria that are symptomatic of fraudulent telemarketing. S. 1392, 102d Cong., 2d Sess. § 3(a)(2) (1992). To bring actions under the federal telemarketing statute, state officials will have to show violations of the FTC rules. Courts construing the federal bill will, therefore, apply the FTC's views and not state officials' views on what is fraudulent.

340. See S. 1392, 102d Cong., 1st Sess. § 3(a) (1992); H.R. 3203, 102d Cong., 1st Sess., § 3(a) (1992).

341. See Mark S. Nadel, *Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy*, 4 YALE J. ON REG. 99, 100 n.8 (1986) (in a survey conducted by Pacific Telephone, 86.9% of respondents indicated that they found unsolicited sales calls annoying).

342. *Id.* at 100 (25.1% of respondents to the Pacific Telephone survey said that they

telemarketers agree that annoying phone calls have a harmful effect on the telemarketing industry as a whole, and industry groups strongly support regulations that prohibit such calls.³⁴³ FTC rules controlling annoying and abusive phone calls would help to eliminate much of the public's animosity toward the telemarketing industry. The FTC could look to state law for guidance on rules proscribing annoying phone calls.³⁴⁴

Fourth, the proposed FTC rules that require delivery of goods within a specified time and allow the consumer to cancel the order if not satisfied³⁴⁵ will be conducive to halting some of the most egregious fraudulent telemarketing practices. Because fraudulent telemarketing practices often involve merchandise that is never delivered or is of inferior quality,³⁴⁶ these rules allow consumers to directly combat the boiler room operators. These rules, combined with a bonding requirement, afford consumers greater protection against fraudulent telemarketers.³⁴⁷

Although the two pending bills would help to solve some of the more insidious and troublesome problems plaguing state attempts to control telemarketing fraud, the bills do not go far enough. There are still several other problems that must be dealt with through federal legislation, FTC regulation, or private action.

A. Education

Fraudulent telemarketers would certainly agree with the words of P.T. Barnum appearing at the beginning of this Comment. In fact, many state

considered unsolicited sales calls an invasion of privacy).

343. See *Ted Schwartz on Telemarketing, Quality and Service Agencies*, TELEMARKETING, March 1992, at 21, 24 ("The old adage 'one bad apple spoils the whole bunch' can certainly be true here."); Tehrani, *supra* note 14, at 1 ("[T]he telemarketing industry is . . . concerned about the consumer's right to privacy and we value the consumer's right to choose the type of phone call they wish or wish not to receive.").

344. Nadel, *supra* note 341, at 106 (as of 1986, 45 states had laws prohibiting telephone calls made with the purpose, intent, or knowledge that the call will annoy the recipient).

345. See S. 1392, 102d Cong., 1st Sess. § 3(a)(3)(A)-(B) (1992); H.R. 3203, 102d Cong., 1st Sess. § 3(a)(3)(A) (1992).

346. See *supra* notes 88-89 and accompanying text.

347. This has been shown in the discussion of state telemarketing statutes above. Many of the state statutes contain both a provision for a bonding requirement and rules regarding delivery and cancellation. See, e.g., UTAH CODE ANN. §§ 13-26-5(2), 13-26-39(1) (Supp. 1992); WASH. REV. CODE ANN. §§ 19.158.050, 19.158.120 (West Supp. 1992).

officials and private groups have directly traced much of the growth of telemarketing directly to the ignorance of consumers.³⁴⁸ Since telemarketing fraud requires the active involvement and cooperation of the victim, state prosecutors have said that “public education is an indispensable element on the war on telemarketing fraud.”³⁴⁹ Consumers must learn that if a deal sounds too good to be true, it probably is. An effective and wide-reaching effort to educate consumers nationwide about how they can protect themselves against telemarketing scams could “significantly reduce the numbers of victims and the dollar losses from such schemes.”³⁵⁰

Several private groups have been very involved in the dissemination of information about telemarketing fraud. The ATA and the DMA have both developed brochures and pamphlets warning consumers of the danger signs of telemarketing fraud.³⁵¹ VISA and MasterCard have also developed literature that they send to cardholders in their billing envelopes.³⁵² A representative of the National Consumers League (NCL) testified before a House subcommittee that consumers are very hungry for information.³⁵³ She said that the NCL regularly warns consumers to look for various phrases that fraudulent telemarketers often employ, such as: “Double your money—no risk,” . . . “This is the best deal you will ever find,” . . . and “We need your credit card numbers for identification.”³⁵⁴

In addition to these private attempts at consumer education, several federal and state agencies disseminate information to the public. The FTC has produced over 800,000 pamphlets and brochures, recorded two videos, and distributed billing inserts in telephone bills.³⁵⁵ The FBI has produced a list of “tips” to assist consumers in avoiding telemarketing scams.³⁵⁶ The Advisory Committee on CFTC/State Cooperation³⁵⁷ has

348. THE SCOURGE OF TELEMARKETING FRAUD, *supra* note 40, at 125. One state prosecutor compared the fight against telemarketing fraud to the “war on drugs.” He said:

Just as we learned [the] war on drugs cannot be won by enforcement alone, we have learned [efforts to battle] telemarketing fraud must focus on victims, as well as the criminals.

We are teaching children to say no to drugs. We must teach consumers of all ages to hang up on boiler room operators.

Id.

349. *Id.* at 125.

350. *Id.* at 124.

351. *Hearing on S. 2213, H.R. 4101, and S. 2326, supra* note 15, at 90 (the ATA’s consumer guidelines “provide[] an easy to understand guide for consumers to follow when dealing with the telemarketing call”).

352. THE SCOURGE OF TELEMARKETING FRAUD, *supra* note 40, at 128.

353. *Id.* at 126.

354. *Id.*

355. *Id.* at 127.

356. *FBI Provides Update on Telemarketing Fraud*, U.S. NEWSWIRE, Mar. 10, 1993,

also proposed the incorporation of investment fraud lessons into the public school curriculum.³⁵⁸ In 1993, the United States Postal Service used a boiler room scam to raise awareness of telemarketing fraud among those who had already been stung by fraudulent telemarketers.³⁵⁹ Postal Service officials sent out 200,000 postcards to victims of prior scams, indicating that they had won fabulous prizes. When the victims called the 800-number, officials lectured them on telemarketing scams and warned them to be more cautious in the future.³⁶⁰

While such programs are helpful, government agencies need more funding to continue and expand their educational efforts. New ideas and programs must be developed to get information to the people who need

available in LEXIS, Nexis Library. The following are the FBI's tips:

1. Be skeptical of offers that sound too good to be true; they usually are.
2. Resist high pressure sales tactics. Don't allow yourself to be hurried into a decision.
3. Do not give your credit card number or checking account information to anyone over the telephone unless you know with whom you are dealing.
4. Don't make any purchase or investment you don't fully understand. Don't spend or invest more than you can afford.
5. Companies should be willing to provide their name, address, phone number and references. If not, be skeptical. Verify this information before making a purchase.
6. If you are skeptical about a company, check with the Better Business Bureau, your State Attorney General's office, or the local consumer protection agency before you make a purchase.
7. Report incidents of telemarketing fraud to your local Better Business Bureau, your state, or local law enforcement authority or your nearest FBI field office. You may also contact the National Fraud Information Center at 1-800-876-7060 for information concerning telephone frauds.

Id.

357. The Advisory Committee on CFTC/State Cooperation is a group chaired by the CFTC Commissioner, which serves as a forum for the sharing of information between state law enforcement officials and the CFTC. It is comprised of four state securities regulators, other state and federal law enforcement officials, and representatives of the futures industry. *THE SCOURGE OF TELEMARKEETING FRAUD*, *supra* note 40, at 96.

358. *Id.* at 127. This plan is based on the idea that "the earlier young people are made aware of the dangers of investment fraud, the more unlikely the possibility that they . . . will be victimized through fraudulent investment schemes." *Id.*

359. Shelby Gilje, *Uncle Sam Hopes "Sting" Puts Consumers on Alert*, *SEATTLE TIMES*, June 13, 1993, at L2.

360. *Id.* Out of 200,000 postcards sent, 40,000 people responded, even though they had previously been duped by other scams. *Id.*

it most. For example, inserting information about telemarketing fraud along with social security checks³⁶¹ would directly target the largest single group of telemarketing fraud victims.³⁶² Because elderly Americans, with fewer assets to lose, suffer disproportionately, any educational effort should focus on them.

State and federal authorities' hopes of eliminating telemarketing fraud will not be realized until consumers disregard the slick sales pitches of boiler room operators. Since "the best answer to [telemarketing] scams . . . is an informed, skeptical public,"³⁶³ boiler rooms will continue to plague this country until consumers learn to hang up the phone. Until that time, however, other programs can help to reduce telemarketing fraud.

B. Registration and Bonding

State successes with registration and bonding statutes³⁶⁴ demonstrate that Congress needs to enact federal registration and bonding requirements. Congress has previously considered such requirements³⁶⁵ and several state and federal agencies indicated a desire to see such requirements enacted.³⁶⁶ However, although most government officials agree that federal registration and bonding requirements would be beneficial, such provisions have never been part of any proposed federal legislation.

At a hearing in June 1991, two House subcommittees heard testimony on a proposal to require telemarketers to register with the Federal Communications Commission (FCC).³⁶⁷ Under the proposed plan, telemarketers would have to disclose all past civil lawsuits, criminal convictions and injunctions, and post a bond before obtaining long-distance telephone service.³⁶⁸ Under the proper regulatory scheme, the FCC could be given the authority to restrict a telemarketer's access to long-distance service if the telemarketer engaged in fraudulent or decep-

361. THE SCOURGE OF TELEMARKEETING FRAUD, *supra* note 40, at 124.

362. See Press Release: "Operation Disconnect," U.S. Dep't of Justice, U.S. Attorney, Western District of New York, Mar. 4, 1993 ("The single largest category of victims [are] the elderly.").

363. THE SCOURGE OF TELEMARKEETING FRAUD, *supra* note 40, at 124.

364. See *supra* notes 234-66 and accompanying text.

365. THE SCOURGE OF TELEMARKEETING FRAUD, *supra* note 40, at 133.

366. *Id.* at 133-34. The U.S. Attorney's Office in the Southern District of California, the Postal Inspection Service, and several state attorneys general testified before a House subcommittee that a federal bonding and registration requirement was necessary to combat telemarketing. *Id.*

367. See *Joint Hearing*, *supra* note 46, at 208-09 (written testimony of Kenneth M. Hearst).

368. *Id.* at 208-09.

tive acts or failed to register.³⁶⁹ By giving the FCC this authority, boiler room operators could be thwarted because "they simply would not get access to their primary weapon—the telephone."³⁷⁰

In addition to keeping fraudulent telemarketers off the phone lines, the registration requirements would aid authorities in tracking down boiler room operators and would reduce the prevalence of recidivism among fraudulent telemarketers.³⁷¹ Fraudulent telemarketers who register with the FCC to gain access to long-distance service would be easily traceable because the FCC would know exactly where the boiler room was located.³⁷² If the fraudulent telemarketer attempted to move the boiler room to another state, he would be unable to get long-distance service because the FCC would know of the operation in the first state.³⁷³

Bonding requirements would benefit the public because they would limit phone-line access to fraudulent telemarketers who would be unable or unwilling to post bond.³⁷⁴ Federal proposals for bonding requirements have generally stated that for bonding requirements to be effective, they must be set very high.³⁷⁵ Because some boiler rooms can gross several million dollars per week, a \$50,000 bond requirement would help only the first few individuals who succeed in obtaining a court judgment against a fraudulent telemarketer. Therefore, a higher bond amount would protect a greater number of consumers and would seriously impede fraudulent telemarketers' access to the phones.

However, a large bond amount may limit the ability of small legitimate telemarketers to stay in business because they would be unable to post the necessary collateral or provide strong financial statements to the bonding companies.³⁷⁶ However, this negative impact on legitimate telemarketers can be mitigated substantially if the federal regulations supersede state bonding requirements. In this way, the small telemarketer would not have to post both a state and a federal bond.

369. *Id.*

370. THE SCOURGE OF TELEMARKEING FRAUD, *supra* note 40, at 133.

371. *Joint Hearing*, *supra* note 46, at 208-09 (written testimony of Kenneth M. Hearst).

372. THE SCOURGE OF TELEMARKEING FRAUD, *supra* note 40, at 134.

373. *Id.*

374. *Id.* at 134. In Arizona, state officials found that a bonding requirement chased many boiler room operators to other states. *Id.* The bonding requirement would also keep out legitimate telemarketers who do not have the assets to satisfy customer complaints (if any arise).

375. *Id.* at 135.

376. Interview with Alan B. Pick, *supra* note 54.

C. Clearinghouse/Database

The original text of both House and Senate bills required the establishment of a "clearinghouse for inquiries made to Federal agencies concerning telemarketing."³⁷⁷ However, later drafts eliminated these provisions. In addition, federal budgetary concerns make it unlikely that such a clearinghouse provision will be included in any future legislation.³⁷⁸ A similar proposal for a national "do-not-call" database containing the names of consumers nationwide who wished not to be bothered by telemarketing calls was abandoned by the FCC when it became apparent that such a database would cost \$75 million to set up and \$25 million per year to maintain.³⁷⁹ The FCC, therefore, acted on President Bush's wishes that the do-not-call proposal be implemented "at the least possible cost to the economy."³⁸⁰

Although the cost of a federal clearinghouse would be high, cost alone does not justify abandoning the proposal. In fact, a clearinghouse would actually save state and federal government funds now expended on duplication of effort.³⁸¹ Law enforcement efforts have been seriously hampered by the nonexistent or inefficient sharing of information between state and federal authorities.³⁸² A clearinghouse, with a toll-free hotline, could provide law enforcement officials as well as consumers with "up-to-date information on questionable products and the background of sellers."³⁸³ It would not only aid law enforcement officials in prosecuting boiler room operators by giving them access to complaints from other states and investigative materials from other enforcement agencies, it would also serve as a "Better Business Bureau" for consumers wishing to lodge complaints against fraudulent telemarketers.³⁸⁴ The clearinghouse, therefore, would serve as a powerful tool for law enforcement as well as an essential element of public education efforts.

377. H.R. 3203, 102d Cong., 2d Sess. § 6(a) (1992).

378. See Paula M. Alberta, *FCC Will Let Telemarketers Regulate Themselves, But Congressman Objects*, DM NEWS, Sept. 28, 1992, at 3.

379. *Id.* Instead, the FCC imposed requirements that all telemarketers maintain their own do-not-call lists. Rep. Edward J. Markey, the sponsor of the bill creating the database, "accused the FCC of 'choosing the path of least resistance' and likened the rules' self-regulation provisions to 'putting the fox in charge to keep the other foxes out of the chicken coop.'" *Id.*

380. *Id.* President Bush, of course, did not take into account the enormous cost to the economy resulting from fraudulent telemarketing.

381. See THE SCOURGE OF TELEMARKEETING FRAUD, *supra* note 40, at 36 (state prosecutors who initiate investigations of fraudulent telemarketers currently have no way to know whether a federal agency or another state is also investigating the telemarketer).

382. David R. Spiegel, *Foiling Phone Robbers*, NAT'L L.J., Nov. 16, 1992, at 14.

383. *Id.*

384. THE SCOURGE OF TELEMARKEETING FRAUD, *supra* note 40, at 43.

D. FTC Guidelines

Under both pending bills, the FTC must promulgate rules defining deceptive telemarketing. As part of the definition, the FTC must "establish criteria that are symptomatic" of deceptive telemarketing.³⁸⁵ These criteria are intended to give both law enforcement officials and telemarketers a "bright line test" for determining what conduct will violate the federal statute.³⁸⁶ Thus, the FTC must ensure that the rules they enact are sufficiently clear to provide the necessary guidance.

Ultimately, these criteria could take the form of the FTC's recently enacted "Guidelines for the Use of Environmental Marketing Claims."³⁸⁷ The FTC enacted the environmental guidelines to address the application of section 5 of the Federal Trade Commission Act³⁸⁸ to environmental claims and to provide "general principles and examples of what would and would not run afoul of these general principals."³⁸⁹ The guidelines give manufacturers of "green" products definite examples of the types of marketing claims that the FTC would consider violative of section 5.³⁹⁰ The guidelines, which replaced a "vague, case by case approach," allow

385. H.R. 3203, 102d Cong., 2d Sess. § 3(a)(2)(B) (1992); S. 1392, 102d Cong., 2d Sess. § 3(a)(2)(B) (1992).

386. H.R. REP. NO. 688, 102d Cong., 2d Sess., at 10 (1992).

387. See Betty-Jane Kirwan & Leslie A. Tucker, *The Practitioner: Private Certification Provides Manufacturers One Avenue*, L.A. DAILY J., Oct. 16, 1992, at 7; Betty-Jane Kirwan & Leslie A. Tucker, *The Practitioner: A Few States Have Pioneered the Environmental Trend*, L.A. DAILY J., Oct. 2, 1992, at 7; Betty-Jane Kirwan & Leslie A. Tucker, *The Practitioner: Federal Guidelines Provide Minimum Standard for Claims*, L.A. DAILY J., Sept. 18, 1992, at 7 [hereinafter *Federal Guidelines*].

388. 15 U.S.C. § 45 (1988). Section 5 prohibits deceptive or misleading acts and practices in or effecting commerce.

389. Kirwan & Tucker, *Federal Guidelines*, *supra* note 387, at 7. See also Washington Regulatory Reporting Associates, *Owen Outlines Advertising Problem Areas*, FTC WATCH NO 373, Sept. 14, 1992, available in LEXIS, Trade Library, FTC:Watch File. FTC Commissioner Deborah K. Owen stated that the goal of the Guidelines was to "describe various claims, not those which should be avoided because they are likely to be misleading, and illustrate qualifying statements that may be added to avoid consumer deception." *Id.*

390. The guidelines state that for a manufacturer to claim that a product is "recyclable," the manufacturer must be able to demonstrate that "the product or package can be used as raw material in making a new product or package." *Id.* Further, the guidelines state that any claim that a chemical is "friendly" to the environment is deceptive because no chemicals are environmentally friendly. *Id.*

companies to conduct advertising campaigns with confidence that their marketing claims will not violate federal law.³⁹¹

The FTC could use a similar framework in devising guidelines for telemarketers.³⁹² The telemarketing guidelines could give concrete examples of claims and practices that the FTC would consider deceptive. For example, the FTC telemarketing guidelines could state that all telemarketers operating chance promotions must fully disclose the odds of winning each prize in the promotion either orally or in writing.³⁹³ The guidelines could state exactly the form the odds disclosure must take and instruct telemarketers that disclosure in any other form would be deceptive. Similar guidelines could be developed to determine the sort of claims, for example, that telemarketers can make in investment programs as well.

Guidelines such as these would enable telemarketers to conduct their business with the assurance that their practices are well within federal law.³⁹⁴ In addition, although the two bills are intended to supplement, not replace, state law,³⁹⁵ the FTC guidelines might influence state officials to amend state laws so that they are in accordance with the FTC rules. If state legislatures act to conform their law with federal law, both law enforcement and legitimate telemarketers would benefit. Also, a federal law would eliminate the pressure on states to enact telemarketing laws in the vacuum created by the absence of federal legislation.

Currently, actions by telemarketers that would violate the law in some states would be legal under the laws of other states.³⁹⁶ If uniform laws existed nationwide, law enforcement officials would operate under the same definitions of deceptive telemarketing. Law enforcement officials, therefore, would be better able to share information about violations of the law. In addition, evidence gathered against a telemarketer in one ju-

391. *Id.*

392. In fact, the FTC guidelines envisioned by the two telemarketing bills are also meant to address the application of § 5 to telemarketing. H.R. REP. NO. 688, 102d Cong., 2d Sess., at 10-11 (1992).

393. The FTC could use state statutes as a framework for enacting these guidelines. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 17511.4(1)(4)(B) & .5(a)(1) (West 1987).

394. Like the environmental guidelines, the FTC telemarketing guidelines would give telemarketers "greater assurance that the claims they make will satisfy truth-in-advertising laws." Kirwan & Tucker, *Federal Guidelines*, *supra* note 385, at 7.

395. *See, e.g.*, S. 1392, 102d Cong., 2d Sess. § 4(d) (1992) ("[N]othing in this Act shall prevent an attorney general from exercising the powers conferred on it by the laws of such State . . .").

396. For example, under California law, a telemarketer running a chance promotion must disclose to the purchaser "[t]he odds . . . of receiving each described item." CAL. BUS. & PROF. CODE §§ 17511.4(1)(4)(B) & .5(a)(1) (West 1987). Utah law does not contain a similar provision.

risdiction would easily apply to other areas of the country because the laws of all states would proscribe the same activities.³⁹⁷

Currently, legitimate telemarketers must contend with various statutory enactments by many states.³⁹⁸ Telemarketers must remain keenly aware of the differing statutes and regulations of the various states and must exercise utmost care to ensure compliance with all the laws.³⁹⁹ One oversight by even the most careful telemarketer can result in litigation and great expense. If states had uniform laws, telemarketers would be assured that their promotions and sales efforts were not in violation of the law in any state.

The two federal telemarketing bills would help to reduce the growth of fraudulent telemarketing. However, the bills do not go far enough. Only by enacting additional legislation and funding programs aimed at reducing telemarketing fraud can the federal government hope to significantly curb fraudulent telemarketing.

VI. CONCLUSION

Telemarketing is a dynamic, growing industry that has, over the past decade, significantly altered the way in which products are sold. Its direct, one-on-one contact with customers appeals to businesses of all types, and most major corporations today use telemarketing in some way. Despite its enormous growth, many experts say that telemarketing's potential has only begun to be tapped. Unfortunately, many unscrupulous people have also recognized the potential of telemarketing as an effective tool to bilk consumers out of billions of dollars each year.

State and local law enforcement agencies have been the most aggressive in combatting telemarketing fraud. However, due to underfunding and limited jurisdictions, these agencies have had little effect on the overall fraudulent telemarketing industry. The states' experiences have demonstrated that the only effective way to combat telemarketing fraud

397. See Kirwan & Tucker, *Federal Guidelines*, *supra* note 385, at 7. The environmental guidelines serve the same purpose. Federal environmental legislation helped to eliminate the danger of conflicting state laws, which might have necessitated manufacturers packaging their products differently in each state. *Id.*

398. See *supra* notes 196-290 and accompanying text.

399. Interview with Alan B. Pick, *supra* note 54. Mr. Pick stated that much of his time is spent staying abreast of current state telemarketing laws so that he can advise his clients on the intricacies of state law. *Id.*

is on a national level. Two bills introduced by the House of Representatives and the Senate help to solve some of the problems faced by state and local agencies, but they do not go far enough in combatting fraud.

In addition to the solutions offered in the two bills, Congress needs to enact a federal registration and bonding requirement, allocate funds to education on telemarketing fraud, and establish a central clearinghouse to gather information on fraudulent telemarketers. In addition, the FTC needs to enact guidelines to clarify for legitimate telemarketers as well as law enforcement officials what sort of activities would be considered deceptive. Only through a single, coordinated effort between federal, state, and local government can this problem be brought under control. Anything less will prove ineffective and could exacerbate the problem.

PATRICK E. MICELA