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May 5, 2003

Assemblyman David Goldwater:

Our firm represents American Express. This letter is sent in regard to SB 255, which recently passed out of the Senate and is scheduled to be heard by the Assembly Commerce and Labor Committee on Friday, May 9.

As you may know, SB 255 imposes restrictions upon telemarketing in Nevada. The bill establishes a state administered telemarketing program whereby consumers will have to call and be placed upon a registry (identified as a "do call" list), maintained by the Attorney General's Office in order to receive telemarketing calls. SB 255 is "unique" from the legislation of almost thirty other states that have established "do not call" lists, whereby, generally, consumers can elect to be placed upon a state maintained list that telemarketers are precluded from contacting.

At first blush, for all of us who have received unwanted telephone solicitations, SB 255 might sound like a good idea. However, if passed, the bill would impose an unnecessary, unreasonable and unconstitutional burden on businesses, consequently reducing competition and consumer choice. Legitimate and prudent companies such as American Express will be excluded from a market that they value and take great care to use in a manner designed not to alienate existing and potential customers. Contrary to the presumptions underlying SB 255, many consumers actually do take advantage of the offers provided through this method of marketing. Further, while telemarketing may in some instances prove to be an annoyance, it is a huge economic industry that many legitimate businesses rely upon.

While SB 255 provides for a "do call" registry, the realities of consumer behavior dictate that not enough consumers from Nevada will sign up for a "do call" list to warrant the effort of companies to conduct business in Nevada. By implementing a "do call" registry rather than a "do not call" registry, companies will effectively be limited to contacting existing customers, thus depriving them of an important marketing channel and increasing the cost of doing business in Nevada during these difficult economic times. Couple this with the likely increase in the cost of doing business, through inevitable tax and business entity cost increases this session, Nevada

ASSEMBLY COMMERCE & LABOR
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SUBMITTED BY: CHRIS MACKENZIE

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is jeopardizing its status as a business friendly state. With the State's current economic climate and impending tax hikes, it is not the time to be restricting otherwise lawful business activities.

Duplication of Law

There is no need to implement this legislation in Nevada at this point in time. The U.S. Congress has recently passed legislation for the implementation of a national "do not call" registry likely by this fall. In addition, the provision of SB 255 that requires notice to customers of their right to request to have companies they do business with to not call them, is already long-established federal law. The state interest in protecting consumers is already satisfied by existing and soon to be implemented Federal action.

Further, having a Federal "do not call" registry and a Nevada specific "do call" registration will likewise only cause customer confusion and unnecessarily increase a business' cost of operating in Nevada. Again, now is not the time to make it more difficult to do business in Nevada.

Constitutional Analysis

Regarding the unconstitutionality, while it may be bothersome to some, commercial speech is a protected right. In order to restrict this speech, a threshold inquiry must be conducted to determine if the speech is "a lawful activity and not misleading." If lawful and not misleading, no restriction on the speech can be imposed. However, if the speech is determined to be unlawful or misleading, it may be restricted, but only if: there is "a substantial state interest in regulating the speech; 2) the regulation directly and materially advances that interest; and 3) the regulation is no more extensive than necessary to serve the interest." Please see Michel v. Bare, 230 F.Supp.2d 1147 (2002), citing Central Hudson, 447 U.S. at 566.

Regarding the threshold inquiry, while American Express does not employ misleading telemarketing practices, it is likely that there is such activity being undertaken by other less scrupulous businesses in the general market place. Further, for the sake of brevity, in applying the first and second prong of the test above, assume that there is a material state interest in restricting telemarketing and that SB 255 advances that interest. However, even with these assumptions, SB 255 does not satisfy the final prong of the above test, i.e., that the regulation be "no more extensive than necessary to serve the interest."

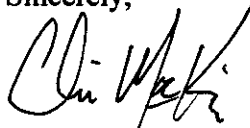
The "do call" list proposed by SB 255 is a restriction on commercial free speech more extensive than is necessary to serve Nevada's interest. Establishing a "do call" registry prevents commercial free speech to all consumers, unless the potential recipient of the speech, i.e., a consumer, contacts the State and has his or her name placed on said "do call" registry.

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Establishing a "do call" list is more extensive than is necessary to serve the State's asserted interest of protecting its citizens from unwanted phone calls. If the State insists on imposing its own restrictions on telemarketing, a "do not call" list that preserves existing business relationship is a less extensive restriction on free commercial speech that has withstood judicial constitutional scrutiny in other jurisdictions. The "do not call" approach allows consumers who do not want to receive telemarketing calls from companies that the consumer does not have a prior business relationship with, to be placed on a list to not receive those calls. The asserted state interest is protected by establishing a "do not call" list and, thus, is much more likely to survive a challenge on constitutionality. A "do call" registry cannot survive constitutional scrutiny. As such, a "do not call" list is the method adopted by the approximately thirty (30) other states that have ventured into this arena, as well as the United States Congress.

American Express and I appreciate you taking the time to read this letter, and we hope you will take heed of these concerns and vote against the passage of SB 255 if it comes up for a vote. Please do not hesitate to contact me if you have any questions and I would appreciate the opportunity to speak with you on this matter.

Sincerely,



Chris MacKenzie, Esq.

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