Fighting Telemarketing Scams

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Introduction

Fraudulent telemarketing is an insidious modern problem. It takes many forms and is widespread, difficult to detect, and vastly underreported. Fraudulent telemarketers prey on all consumers, even well-informed, cautious ones; senior citizens are especially hard-hit. Consumers, lending institutions, credit card companies, and legitimate businesses lose millions of dollars each year to telephone fraud. Current methods of fighting this type of fraud include actions by the Federal Trade Commission (FTC) and civil and criminal actions under the Racketeering and Corrupt Organizations Act\(^1\) (RICO) and state laws. These enforcement mechanisms are clearly insufficient, however, because millions of consumers continue to be victimized each year. This Note outlines the evolution of telemarketing fraud, discusses the limitations of current enforcement mechanisms, and proposes realistic solutions to the problem.

I

Background: The Evolution of Telemarketing Fraud

A. History of Telemarketing

Most telemarketing is a legitimate,\(^2\) albeit irritating\(^3\) business practice.\(^4\) Marketing and selling products by telephone began during the 1930s and 1940s as a response to the decreased labor force during World War II,\(^5\) and began to flourish when the oil crisis of the early 1970s made door-to-door sales travel impractical and expensive.\(^6\) During the last decade the business of telephone sales has expanded dramatically, due in part to an increase in public confidence in purchasing goods by phone.\(^7\) Items ranging from magazine and news-

\(^3\) Bob Bulmash, founder of Private Citizen Inc., a coalition of citizens opposed to incoming telemarketing, is quoted as saying, “Telemarketing is derived from Greek . . . ‘tele’ meaning distant or far off, ‘marketing’ meaning to disrupt dinner.” David Arnold, Hated or Not, Telemarketers Are the Sellers of Choice, BOSTON GLOBE, Jan. 20, 1994, Metro Section, at 1.
\(^4\) Teresa Riordan, Dread Ringers, WASH. POST, Feb. 23, 1992, Magazine Section, at W12.
\(^6\) Riordan, supra note 4, at W12.
\(^7\) Id.
paper subscriptions\(^8\) to cemetery plots\(^9\) and securities\(^{10}\) are sold by telephone at a fraction of the cost of marketing via direct mail or in person.\(^{11}\) Communications technology developed during the 1980s\(^{12}\) allows telemarketers to make as many as 7400 calls per hour,\(^{13}\) helping telemarketing to flourish into a five hundred billion dollar per year business\(^{14}\) that employs as many as four million people.\(^{15}\) By the turn of the century, telemarketing revenues are estimated to reach one trillion dollars.\(^{16}\)

**B. Telemarketing Fraud**

Telephone swindles are almost as old as the telephone itself. As early as the 1920s, con artists operated telephone scams from basement boiler room hideaways.\(^{17}\) The boom in the telemarketing industry during the 1980s\(^{18}\) brought an increase in the crime associated with it.\(^{19}\) The anonymity of the telephone, combined with the ease of escaping detection, makes telemarketing fraud a lucrative and profitable business for scam artists\(^{20}\) who con consumers out of an estimated fifteen billion to forty billion dollars each year.\(^{21}\)

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8. Id.
9. Id.
10. Id.
11. Arnold, supra note 3, at 1. In 1991 telemarketing industry revenues were $435 billion; costs totalled only $60 billion. Riordan, supra note 4, at W12.
12. Riordan, supra note 4, at W12. Most telemarketing calls are dialed automatically by computerized machines known as predictive dialers. A customer list or database is entered into the computer, which then dials the numbers automatically. The machine is able to detect busy signals, and will disconnect if the call goes unanswered after a certain number of rings. The call is put through to a telemarketer only if a human voice is detected at the other end. Id. at W14.
13. Id.
15. Id.
16. Id.
17. Telefraud: They've Got Your Number, CONSUMER REP., May 1987, at 289 [hereinafter Telefraud].
18. See Riordan, supra note 4, at W12.
19. See Arnold, supra note 3, at 1.
1. **Anatomy of a Telemarketing Scam**

A typical telemarketing scam may be described as follows. A telephone con artist known as a "yak" sets up shop in a temporary office known as a "boiler room." The yak purchases telephone service and a mailbox, and sets to work selling worthless goods, useless services, or bogus investment opportunities. Before the victims discover the fraud, the yak unplugs the telephones and moves to another location to begin a new scam.

a. **The Boiler Room**

Fraudulent telemarketing operations are often referred to as "boiler room" scams. The term takes its name from the earliest telephone-sales scams of the 1920s that literally operated out of basement boiler rooms in order to avoid detection. Modern boiler rooms are often shabby, temporary offices in low rent areas, equipped with little more than a bank of telephones. Telephone swindlers do not need fancy office space because all of their deception is done over the telephone. If an operation senses that it is about to be detected, it need only disconnect the telephone service and move to another office, either down the street or out of the state.

During the past several years, certain areas of the country have gained and lost popularity as boiler room locales. While the warm climates of Florida and Southern California were once attractive, these states have managed to curtail telemarketing fraud through strict regulation. Las Vegas and other Nevada locations were fa-

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23. See id. at 289, 291.
27. *Id.* at 289, 290.
28. *Id.* at 289.
29. *Id.*
30. Spiegel, supra note 25.
32. See Riordan, supra note 4, at W12.
34. *Telefraud*, supra note 17, at 292.
vored as boiler room locations during the 1980s; however, in 1989
Nevada enacted creative legislation to address the problem.

Unfortunately, state laws do not eliminate boiler rooms; they merely force the operators to become more creative. The largest and most successful are migratory, moving from one state to another within a matter of weeks. The National Consumers League recently tracked the movements of one fraudulent prize operation from Phoenix, to Houston, then back to Phoenix. The company would operate for two to three weeks in one city, then resurface weeks later in another.

To escape jurisdiction, most operations direct their efforts to victims located outside of the state where the boiler room is located. Others use telephone lines in one state and shipping services in another to contact victims located in still other states. Boiler rooms rely on express package services, toll-free telephone numbers, illegal factoring, and even attorneys and certified public accountants (CPAs) to support their schemes.

b. The Yak

The voices behind telemarketing scams belong to clever swindlers known as "yaks." These con artists are skilled salespeople—persuasive and persistent. Instead of selling legitimate products or services, however, yaks induce victims to pay for goods that will never be shipped or that are worth far less than the yaks claim, or to "in-

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39. For discussion of prize scams, see infra text accompanying notes 85-110.
40. 1993 House Hearing, supra note 38, at 33 (statement of John F. Barker, Vice-President, National Consumers League).
41. Id.
42. Id. at 35.
43. Id.
44. Id.
45. See infra notes 176-79 and accompanying text.
46. 1993 House Hearing, supra note 38, at 35.
47. Id. at 15 (statement of Barry Cutler, Director, Bureau of Consumer Protection, Federal Trade Commission). See infra notes 170-73 and accompanying text for explanation of factoring.
49. See id. at 10.
50. See id. at 10-11.
51. See id.
vest” in nonexistent securities or stocks. To contact consumers, they dial telephone numbers obtained from various sources, including mailing lists and advertisements, or even at random. Yaks may identify likely victims by using “sucker lists”—lists of individuals who have previously fallen for similar scams—that are traded among con operators. A proven sucker’s name may sell for hundreds of dollars.

Once a yak has a would-be victim’s interest, he begins his pitch, using a variety of tactics to wear down the victim’s defenses. The perpetrator of a “prize” scam, for example, will eagerly “congratulate” a person for having won a valuable prize, and will then pressure the consumer to send money or disclose a credit card number to cover “shipping charges” or to purchase lower priced goods in order to “qualify” for the prize. Even a cautious listener may be overwhelmed by the seller’s aggressiveness and enthusiasm.

This type of urgency is a common theme in sales pitches. Fraudulent sellers require their victims to commit immediately, without a chance to compare prices or think about the purchase. If a consumer hesitates, the pressure increases. Con artists depend upon victims who act impulsively, before they realize that they are being conned. A yak who purports to sell an investment opportunity, for example, might convince the consumer that only a few shares remain, or that the market is rising rapidly. In United States v. Judd, an operation uncovered in Mississippi involved a land sale scheme that spurred victims to buy land by falsifying the number of lots sold and the number

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52. See Around the Nation—Phone Sales Crackdown, WASH. POST, Mar. 5, 1993, at A9.
53. Chapman, supra note 21, at 10.
54. Telefraud, supra note 17, at 289.
55. Boiler room operations may also purchase “qualified” leads—names of people who have shown an interest when contacted—from lead-finding companies. Telefraud, supra note 17, at 289.
57. Sennott, supra note 56, at A8.
58. Telefraud, supra note 17, at 289.
59. See infra notes 85-110 and accompanying text.
61. Id.
62. See Telefraud, supra note 17, at 290.
63. See id.
64. United States v. Judd, 889 F.2d 1410 (5th Cir. 1989). Judd and his accomplices telemarketed land that was falsely guaranteed to contain coal deposits. The fraudulent operation owned the land it was selling, but it did not own the mineral rights to the coal. When the scheme was uncovered, fifteen individuals were indicted on 154 counts of fraud. Id. at 1411-12 n.1.
remaining available. The information would be recorded in the victim's file so that each yak who spoke to the victim would give the same false information.

Yaks are especially adept at diffusing consumer skepticism, as in the following excerpt from an actual telemarketer's script. This is a typical response to a customer reluctant to give his or her credit card number over the telephone:

[W]e contact MC/VISA to verify [sic] your credit . . . . If we misused any credit card number, not only would we lose that merchant number but no doubt, our bank would freeze our account for a complete audit of all business on MC/VISA.

To an unsophisticated consumer eager to make a bargain purchase, this cryptic assurance might be convincing.

Sophisticated swindlers will even refer consumers to the “manager,” actually another con artist, or to a “singer”—an accomplice masquerading as a satisfied customer. The operators of the Judd scheme habitually referred potential investors to singers called “bird dogs,” who were paid three hundred dollars per transaction to pose as “previously satisfied investors.” Other yaks would sometimes pose as “project managers” in order to close deals. There were, of course, no real project managers. Swindlers designed these referral tactics to fool potential victims into believing that the operation was legitimate.

While some con artists work alone, many others are merely minor participants in larger parent operations. Some may not even realize that they are working for criminal business ventures. Most, however, are fully aware of the fraud and often use aliases and other false information to avoid being connected with the trails of scams they perpetrate.

65. Id. at 1416.
66. Id.
67. FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 568 (7th Cir. 1989).
68. See id.
69. Judd, 889 F.2d at 1412.
70. Id. at 1416.
71. Id.
72. See id.
73. 1992 Senate Hearing, supra note 2, at 4-5. These larger, so-called “root” operations may provide credit card merchant accounts, sales scripts, factoring services, and even prizes and merchandise to smaller scam operations. Id. at 18.
74. Telefraud, supra note 17, at 291. These unwitting accomplices are nonetheless prosecuted if the fraudulent operation is discovered. See id.
75. Chapman, supra note 21.
76. See id.; 1992 Senate Hearing, supra note 2, at 2.
c. The Scam

Though the variations are endless, telemarketing scams usually take one of three basic forms. In “prize” scams, victims are notified that they have already won a valuable prize and are required to send money, purchase merchandise, or call a 900 number to claim or qualify for the prize.77 "Merchandise" and "travel" scams are often perpetrated in the guise of marketing studies or promotions.78 Consumers are pressured to purchase travel coupons and merchandise of all kinds, from perfume and vitamin pills to kitchen appliances79 and exercise equipment,80 often at alleged discounts.81 Finally, “investment scams” are often elaborate schemes whereby victims purchase investments such as securities82 or gold bullion;83 of course, the only person who realizes gains from such investments is the scam artist.84

(i) Prize Scams

Fraudulent prize schemes are very common.85 A 1992 Louis Harris survey indicated that over ninety percent of Americans had been solicited by a telemarketing prize scheme.86 Some prize scams lure victims using postcards87 or advertisements,88 while others are carried out solely by telephone.89 Yaks call victims and tell them that they are guaranteed to win one of several prizes.90 A typical prize list includes cars, vacation packages,91 large-screen televisions, cash awards, and jewelry or electronics equipment.92 All of the prizes sound valuable,
but one of the choices—usually the jewelry or electronics equipment—is nearly worthless.\textsuperscript{93} Victims are then informed that receipt of the prize is conditional—they must pay money or buy merchandise in order to claim the award.\textsuperscript{94}

The varieties of conditions are endless. For example, victims may be required to pay a service fee, sales tax, or a shipping charge in order to receive the prize.\textsuperscript{95} Such charges may range from ten or twenty dollars to thousands of dollars.\textsuperscript{96} The victim pays the charge, thinking that the in cash outlay will be compensated by the value of the prize.\textsuperscript{97} The amount received from each victim may be small, but the sheer volume of victims makes the prize scam extremely profitable for con artists.\textsuperscript{98}

In another scenario, consumers may be informed that they need only make a small purchase in order to qualify for the prize. The consumer then pays from ten to over four thousand dollars\textsuperscript{99} for merchandise such as pens, gold-plated letter openers, skin care products, and vitamin pills.\textsuperscript{100} Popular qualifier merchandise includes items whose values are difficult to ascertain, such as vitamin and weight-loss supplements, cosmetics, and perfume.\textsuperscript{101} A product made from cheap ingredients can easily sound more valuable than it is,\textsuperscript{102} and often the consumer is not interested in the qualifier merchandise anyway.\textsuperscript{103} To the victim, the payoff seems reasonable: pay a small amount for unwanted goods or services but receive a valuable prize.\textsuperscript{104}

Frequently, both the prizes and the qualifier merchandise are virtually worthless. Some victims never receive prizes.\textsuperscript{105} If they do, the prize received is invariably the smallest of the listed awards,\textsuperscript{106} Usu-

\begin{footnotes}
\item[94] See, e.g., Sennott, supra note 56, at A8.
\item[95] \textit{Beware}, supra note 60, at 22.
\item[96] \textit{Id.} See Sennott, supra note 56, at A8.
\item[97] Sennott, supra note 56, at A8.
\item[98] \textit{1993 House Hearing}, supra note 38, at 21.
\item[99] \textit{Id.; see Sennott, supra note 56, at A8.}
\item[100] Sennott, supra note 56, at A8.
\item[101] \textit{Phone Sales Crackdown}, supra note 52, at A9.
\item[102] Gowen, supra note 93, at 127; \textit{Phone Sales Crackdown}, supra note 52, at A9; see also \textit{1992 Senate Hearing}, supra note 2, at 6.
\item[103] Kathleen Pender, \textit{How Scam Artists Entice Travelers with Phony Vacations}, S.F. \textit{Chron.}, Jan. 17, 1994, at B1; \textit{Phone Sales Crackdown}, supra note 52, at A9; see also Gowen, supra note 93, at 189.
\item[104] See Gowen, supra note 93, at 189.
\item[105] See Sennott, supra note 56, at A8; \textit{Phone Sales Crackdown}, supra note 52, at A9; \textit{1992 Senate Hearing}, supra note 2, at 6.
\item[106] \textit{Beware}, supra note 60, at 22-23.
\item[107] Sennott, supra note 56, at A8.
\end{footnotes}
ally, by the time the victims discover the fraud, the con artist has relocated. Not surprisingly, the Harris Survey revealed that sixty-nine percent of respondents who participated in a prize scheme received nothing for their money.

(ii) Merchandise Scams and Travel Scams

Merchandise scams and travel scams are similar in many ways to prize scams. In such schemes, yaks often resort to creative role-playing to lure their victims into paying far more for vacations and travel club memberships than those trips or services are worth. Consumers are frequently overwhelmed by yaks’ enthusiastic and persistent sales pitches. Guarantees are freely offered, but the yaks have no intention of honoring them.

Common merchandise scams involve low quality electronics equipment such as cameras, radios, and similar items with a high claimed value. Such items are inexpensive for con artists to produce or purchase and can be sold at highly inflated prices. A victim attempting to return such merchandise pursuant to a guarantee may be stonewalled, ignored, or may find that the fraudulent operation has disappeared.

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110. Beware, supra note 60, at 22.
111. The following is a script developed by a fraudulent telemarketing operation in Illinois:

Hi, my name is _____ with T.C. & T. of Houston, Texas. How are you today? Great!!!! Mr./Mrs./Ms. _____, The reason I am calling, is you have been computer selected to be offered a special, vacation voucher to Hawaii for only $329.90! This is being offered to less than 1% of all the credit card holders in the U.S.
At that price, I'm sure you'd like to go, however, I do have to ask some qualifying questions first . . . . (regardless of [the consumer's] questions, the answer is:)
First, Mr./Mrs./Ms. _____, let's see if you qualify . . . .
I'm glad you said (yes) to those qualifications . . . . Now I can tell you what we can do for you, and why we can offer you this wonderful vacation package at such a low price.
We have tested the feasibility of telephone marketing, and the results have been so great that we have been allowed to continue to offer this special vacation package to preferred people like you.

FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 567 n.2 (7th Cir. 1989). The operation was later held liable for violating the Federal Trade Commission Act, 15 U.S.C. § 41 et seq. Id. at 570.
112. See id.
113. 1988 Senate Hearing, supra note 21, at 58.
114. Id.
115. Id.
116. See, eg., Gowen, supra note 93, at 189.
Even more popular than merchandise scams are those involving travel and other services such as credit repair, club memberships, and employment referrals.117 The National Consumer's League estimates that one out of every seven cases of fraud involves travel.118 Most likely, this is because the value of travel, unlike most goods, cash, or cars, is easy to overstate.119 Con artists are able to take advantage of consumers' uncertainties about the price of these services by persuading them that the offer is only good for the duration of the telephone call, thereby precluding price comparisons.120 Moreover, the delay between the time the victims purchase the travel service (usually in the form of a voucher or coupon) and the time the trip is arranged gives the yaks a longer window of opportunity before the fraud is detected.121

A typical travel scam operates as follows. Yaks phone consumers and gain their interest in a discount vacation package. The yak explains that the offer is open for a limited amount of time, so the consumer must act immediately or miss the opportunity for the discount.122 The offer usually includes low priced airfare or accommodations, but requires customers to book their travel through a particular travel agency—the boiler room.123 The typical scam offers apparent bargain prices, but when the customer finally books the trip, prices for the other elements of the vacation are so inflated that the trip costs more than it would have without the "bargain" certificate.124

In other situations, boiler room operators make booking travel very inconvenient, either through black-out dates, location requirements, or other hurdles. Passport Internationale, a Florida telemarketing operation later targeted by the FTC,125 used such a scheme to defraud consumers. Passport required customers who had already purchased travel coupons to submit their desired travel dates sixty days in advance, and to submit three preferred dates that were at least thirty days apart.126 Most customers purchased costly upgrades

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117. 1993 House Hearing, supra note 38, at 44-45; Echo Montgomery Garrett, You Have Won!, MONEY, Oct. 1993, at 180; Phone Sales Crackdown, supra note 52.
118. Pender, supra note 103, at B1. This estimate, however, is not limited to telemarketing-related travel fraud.
119. Id.
120. Id.
121. 1988 Senate Hearing, supra note 21, at 58.
122. Telefraud, supra note 17, at 290.
123. See id.
124. Id.
125. 1993 House Hearing, supra note 38, at 15.
126. Id.; see Pender, supra note 103, at B1.
in order to obtain reasonable travel dates.\textsuperscript{127} Other times, the coupons simply expired before the frustrated customers could book the trip.\textsuperscript{128} Instead of realizing they have been defrauded, many victims of travel scams believe that they simply procrastinated too long.

Travel and merchandise frauds often deceive consumers by masquerading as marketing research or promotion events. A variety of claims are advanced to explain the telephone sale, each designed to confuse and pressure the consumer into making an immediate purchase without shopping around.\textsuperscript{129} For example, a yak may tell the consumer that the merchandise—be it a vacation package, a weight-loss plan, or a water purifier\textsuperscript{130}—is being test marketed, hence the apparent bargain prices.\textsuperscript{131}

(iii) Investment Scams

By far the most innovative and dangerous of fraudulent telemarketing schemes are investment scams. While prize, merchandise and travel scams are avoided relatively easily by cautious, informed consumers,\textsuperscript{132} investment scams are often elaborate enough to fool even cautious investors.\textsuperscript{133} Fraudulent investment scams may lead consumers on for months or years, beginning with a small investment and eventually luring unsuspecting victims to invest tens and even hundreds of thousands of dollars.\textsuperscript{134} The FTC estimates investment fraud from telemarketing at eleven billion dollars per year.\textsuperscript{135}

Boiler room operations take elaborate steps to make their businesses look legitimate.\textsuperscript{136} Two former telemarketing con artists testified before the House Subcommittee on Commerce, Consumer, and

\begin{itemize}
\item \textsuperscript{127} 1993 House Hearing, supra note 38, at 18.
\item \textsuperscript{128} Id.
\item \textsuperscript{129} See, e.g., FTC v. Amy Travel Serv., Inc., 875 F.2d 564 (7th Cir. 1989) (discussed supra at note 111).
\item \textsuperscript{130} Water purifier frauds were such a popular scam item that California enacted a statute making it unlawful to misrepresent the presence of contaminants in water or the performance of a water treatment device. \textsc{Cal. Bus. & Prof. Code} §§ 17577.2 to .5 (West 1993).
\item \textsuperscript{131} See, e.g., Amy Travel, discussed supra at notes 111-12.
\item \textsuperscript{132} See Gowen, supra note 93. It may seem that there is a fine line between perpetrating a fraud and merely using aggressive sales tactics to take advantage of overly eager consumers. The line drawn by courts, however, is whether the sellers knew or should have known that they were misrepresenting their products or services to consumers. \textit{Amy Travel}, 875 F.2d at 574. The consumer's gullibility is not a defense. \textit{Id}.
\item \textsuperscript{133} Chapman, supra note 21, at 12.
\item \textsuperscript{134} Telefraud, supra note 17, at 289-92.
\item \textsuperscript{135} 1993 House Hearing, supra note 38, at 33.
\item \textsuperscript{136} See Chapman, supra note 21, at 10-12.
\end{itemize}
Monetary Affairs about a typical scenario.\textsuperscript{137} Telemarketing operations buy "aged"\textsuperscript{138} corporations off the shelf\textsuperscript{139} from attorneys who will then verify the corporations' legitimacy.\textsuperscript{140} Operators join the Better Business Bureau of the Chamber of Commerce, and they hire attorneys and CPAs to create the appearance of a legitimate business.\textsuperscript{141} The telemarketers can then assure consumers that they have been incorporated for a number of years, and that no complaints have been lodged against them.\textsuperscript{142} Such claims, although meaningless, are completely verifiable by would-be investors. The telemarketers print up glossy brochures, prospecti, and written guarantees.\textsuperscript{143}

The con artist can then choose an investment source. Recently uncovered scams have involved gemstones (which turn out to be worthless industrial-grade chips, encased in plastic to preclude independent appraisal),\textsuperscript{144} shares in a fictitious commodity called "Indium,\textsuperscript{145} and "dirt mines" where victims purchase piles of dirt "guaranteed" to contain enough gold to recover their investments (which turn out to be, of course, piles of dirt).\textsuperscript{146}

After a yak peddling a fraudulent investment gains a victim's interest and trust, the con is tailored to the victim's wealth.\textsuperscript{147} Since many of those defrauded are repeat victims, the yak may know a good deal about the victim's financial status in advance.\textsuperscript{148} The yak pressures the victim to make an initial investment, and then may send status reports, telling the victim how successful the investment has been and encouraging larger and larger investments.\textsuperscript{149}

If the consumer wishes to cash out the investment, however, the yak's story changes. He may allege that the mine turned out to be a dud, or that the market has taken a downturn. In reality, of course, the yak never made the investment.\textsuperscript{150} Some consumers may not even

\textsuperscript{137} Id. at 11; Beware, supra note 60, at 22-23.
\textsuperscript{138} An aged corporation is one that has been incorporated for a number of months or years, regardless of whether it has actually conducted any business.
\textsuperscript{139} To purchase a corporation "off the shelf" means to purchase the corporate name and assets (if any) of an existing corporation, as opposed to incorporating an existing business.
\textsuperscript{140} Chapman, supra note 21, at 11.
\textsuperscript{141} Id. at 12.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} 1993 House Hearing, supra note 38, at 34.
\textsuperscript{145} Id.
\textsuperscript{146} Id. at 20.
\textsuperscript{147} Gowen, supra note 93, at 137.
\textsuperscript{148} Id. at 196.
\textsuperscript{149} Telefraud, supra note 17, at 289-93.
\textsuperscript{150} Id.
realize that they have been defrauded but simply believe that they made a bad investment. More often, the yak simply disappears, leaving the consumer with worthless gemstones, shares in a non-existent commodity, or a pile of dirt.

2. How Con Artists Get Consumers' Cash

Telemarketing con artists have a variety of ways of actually getting consumers' money. The most common is through the use of credit cards, but with current computer banking technology even consumers who never send money or authorize credit card debits can be victims. The simplest telemarketing scams rely on innocent consumers who send money orders or reveal their credit card numbers over the telephone in response to merchandise or prize offers. When they obtain credit card numbers, the boiler rooms then bill the cards for inferior products, or submit unauthorized charges to the consumers' accounts. Other swindlers use the credit card privileges of legitimate merchants to obtain credit card numbers then charge those accounts without the customers' knowledge.

Some yaks may pose as representatives from a lender, credit card company, or other service as a part of sales or prize qualification schemes. They ask consumers to "verify" their identities by reciting their credit card numbers, claiming that this is a prerequisite to eligibility for the prize or purchase opportunity. Consumers, believing that they are speaking to the credit card company, are thus unaware that they are actually disclosing the account numbers rather than simply verifying them. One operation apparently acquired lists of credit card numbers and simply asked victims for the expiration dates in order to establish the cards' "validity." The boiler room claimed that revealing the expiration date amounted to an acceptance of the offer.
In a similar scheme, operators may ask consumers to reveal checking account numbers in order to confirm a prize or purchase.\footnote{162} In the case of repeat victims, yaks may use sucker lists\footnote{163} to obtain the account numbers of consumers who have revealed them to other telemarketers.\footnote{164} After obtaining the account numbers, con artists then use direct withdrawal to remove funds from the victims' accounts electronically.\footnote{165} Consumers may not even be aware of the charge until their next account statements arrive.\footnote{166} As mentioned above, there is often a significant delay between the time the consumer is charged and the delivery of the merchandise or service.\footnote{167} With travel scams, for example, the victim is billed immediately, but typically does not attempt to book the trip until many months later.\footnote{168} This delay creates a window of several months during which an operator can retain the same scam, yet remain undetected.\footnote{169}

Some fraudulent telemarketers, unable to obtain merchant numbers needed to receive credit card debits or direct withdrawals,\footnote{170} rely on illegal factoring to obtain payments.\footnote{171} MasterCard and VISA merchant contracts forbid factoring,\footnote{172} whereby legitimate merchants process credit card sales generated by boiler room scams.\footnote{173} By the time the fraud is discovered and consumers begin to challenge the charges, the telemarketer has typically disappeared.\footnote{174} The lender and the legitimate merchant are left to fight over the losses generated by credit card chargebacks; normally the unwitting merchant must cover the losses.\footnote{175}

As consumers have become more aware of credit card fraud, and thus more reluctant to reveal account numbers over the telephone, many fraudulent telemarketers have begun to rely on other methods.
of payment. Some request that the victim send a check or money order to a mail drop via overnight express. The use of express services serves two purposes for the con artist. First, urgency is often a tactic of many schemes. Use of express couriers reinforces the victim's sense that he or she must act immediately or lose a valuable opportunity. Second, fraudulent telemarketers who avoid using the U.S. Postal Service avoid charges of mail fraud, a federal felony offense. Because express services and couriers often do not require identification or address verification, yaks can pay their bills in cash and ensure that their shipments and receipts cannot be traced to them.

Some fraudulent telemarketers require their victims to send money orders instead of personal checks. Continuing the theme of urgency, operators often convince consumers to send money orders by claiming that they are unable to verify the consumer's creditworthiness before the offer expires or before the supply of goods, prizes, or investment opportunities is exhausted. By demanding money orders instead of personal checks, fraudulent telemarketers can cash the orders immediately, instead of waiting for personal checks (usually from another state) to clear. Moreover, the scam artists avoid being traced through bank records in the event the fraud is detected.

3. The Disappearing Act

Telemarketing fraud is widespread, difficult to detect, and hard to prosecute because perpetrators are easily able to cover their tracks. The yaks never come face-to-face with their victims, so no eyewitness identification can take place. The primary tools of a telemarketing scam—telephone service, office space, and express shipping services—are easily acquired anonymously, and can be abandoned almost instantly when a fraud is detected. Even the most elaborate and sophisticated schemes, such as those involving investments and products, can be dismantled almost overnight.

176. See, e.g., Tassy, supra note 24, at B4.
177. See supra text accompanying notes 45-46.
178. 18 U.S.C. § 2314 (1988). The Postal Service is one of the nation's more active investigative agencies, so telemarketers benefit further from escaping its attention. 1992 Senate Hearing, supra note 2, at 12.
179. 1992 Senate Hearing, supra note 2, at 12.
180. See, e.g., Gowen, supra note 93, at 127.
181. See, e.g., id.
182. See, e.g., id.
183. 1988 Senate Hearing, supra note 21, at 58.
184. See 1993 House Hearing, supra note 38, at 45.
Boiler room operators can usually close down and move on before authorities are ever alerted because consumers initially believe that they are dealing with a legitimate business. Victims may contact the boiler room to complain about the value of the merchandise received or the lack of return on their investments. Only the lack of a satisfactory response will lead victims to believe that they have been defrauded. Thus, the scam operators are alerted to consumer discontent before the victims contact authorities about the fraud. By the time an investigation begins, the boiler room has disappeared, leaving behind a trail of victims but little trace of its operators' whereabouts.

More important, almost all scams are conducted strictly interstate, making it virtually impossible for local authorities investigating a victim's complaint to investigate or pursue the fraud at its source. Even if local authorities are able to pinpoint the state where the fraud originated, it is difficult to research and gather evidence in another, often distant state. Furthermore, local authorities have neither the incentive nor the resources to investigate a crime that did not victimize local residents. This jurisdictional Catch-22 creates a very effective loophole, enabling fraudulent telemarketers to slip through the cracks in local law enforcement.

Victims' frequent reluctance to report the fraud adds to the difficulty in detecting and prosecuting fraudulent telemarketers. According to the Harris survey, only thirty-one percent of those polled who felt they had been cheated by fraudulent telemarketers actually reported their loss. The actual incidence of fraudulent telemarketing may be vastly underestimated, thus, authorities are frequently unaware of the full scope of the problem. Furthermore, victims' testimony is often the only evidence against the perpetrators when charges are brought against a fraudulent operation. Lack of such testimony therefore makes verdicts difficult to obtain.

Part of the reason for victims' reticence is likely psychological. Fraud, unlike other torts or crimes, requires some degree of action by

185. See, e.g., Gowen, supra note 93, at 127.
186. See id.
187. See 1993 House Hearing, supra note 38, at 35.
188. Obstacles facing state authorities who prosecute fraudulent telemarketers are discussed in greater detail infra text accompanying notes 276-305.
189. 1993 House Hearing, supra note 38, at 35.
190. 1992 Senate Hearing, supra note 2, at 28.
191. Id. at 9.
the victim. Telemarketing fraud in particular requires the victim's active participation. If the consumer simply hangs up on the fraudulent telemarketer, no theft can take place. Victims, however innocent and well-intentioned, must send money or disclose a credit card or bank account number to perpetrators. Those who discover the fraud may feel foolish, ashamed, and even guilty for having been fooled. Thus, even victims who have been repeatedly defrauded for large amounts may be reluctant to report it to authorities. Two victims who testified at the Senate Subcommittee on Communications hearings on telemarketing fraud had not even told family members of the fraud. One consumer even refused to testify, out of shame over the incident.

Even victims who wish to report telemarketing fraud may not know where to turn. The Harris survey found that only five percent of those polled had heard of state or local consumer protection offices. Only fourteen percent knew that the United States Attorney General handles consumer protection complaints. Two-thirds of those surveyed did not know where to call to find out whether a telephone solicitation was legitimate.

4. Victims of Telemarketing Fraud

Losses due to telemarketing fraud extend beyond the victims who are defrauded. The practice clearly victimizes consumers who fall prey to its sales pitches, but there are many other victims as well. Credit card companies, lending institutions, and legitimate telemarketers all suffer from the financial loss and decline in consumer confidence wrought by telemarketing scams. Anyone who holds a credit card or has a bank account pays for telemarketing fraud through increased interest rates or annual fees. Finally, the business and reputation loss to legitimate telemarketers trickles down to other industries in the form of reduced sales to suppliers and manufac-

194. Id.
195. See Gowen, supra note 93; Chapman, supra note 21.
196. 1992 Senate Hearing, supra note 2, at 10.
197. Id.
198. 1993 House Hearing, supra note 38, at 33.
199. Id.
200. 1992 Senate Hearing, supra note 2, at 28.
201. 1993 House Hearing, supra note 38, at 44-45.
202. Id. at 45.
turers of goods sold by telephone and lost employment opportunities in telemarketing. 203

a. Consumers

Consumers are the most obvious victims of fraudulent telemarketing practices. Although no one with a telephone is immune to fraud, telephone scam artists prefer to target some of the most vulnerable members of society—the elderly. 204 According to one former scam operator, retired persons make good victims for several reasons. 205 They tend to be home during the day, and are often bored, lonesome, and eager to chat on the telephone. Some older people have poor memories, and few of them commit telephone conversations to writing or ask for written guarantees. 206 They are often trusting, and therefore vulnerable to the yaks’ specious oral guarantees. Most important, older people frequently have substantial savings that they are eager to spend on what they believe to be bargain merchandise, discount travel, and lucrative investment opportunities. 207

Even worse, the elderly are most likely to be repeat victims of telemarketing scams. The same vulnerability and sense of hope that initially lead them to believe yaks’ sales pitches may cause them to fall for such schemes repeatedly. Investment scams, in particular, may target victims who previously sent money to bogus investors. 208 An operation may charge large fees, for example, to “consolidate” the victim’s fraudulent investments. 209 Other scams simply capitalize on the victim’s enthusiasm and desire to make money fast. One gemstone scam claimed to have found a buyer for the victim’s stones, but required the victim to purchase one more stone to “complete the collection” 210 and seal the deal. The victim would then pay even more money to the con artist, send in the worthless stones, and receive nothing in return. 211

The stories of elderly people losing their life savings to telemarketing scams are numerous and tragic. 212 A ninety-four year-

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203. Fraudulent telemarketers frequently fail to pay for rent and other services, thereby causing losses to landlords, long distance telephone companies, express package services, and suppliers. 1992 Senate Hearing, supra note 2, at 9.
204. Id. at 5. See Sennott, supra note 56, at A8.
207. See id.; 1993 House Hearing, supra note 38, at 21.
208. See Telefraud, supra note 17, at 292.
209. 1993 House Hearing, supra note 38, at 32-34.
210. Id. at 34.
211. Id.
212. See, e.g., Spiegel, supra note 25; Sennott, supra note 56, at A1.
old psychologist was driven into bankruptcy after losing $179,000 to more than seventy different boiler rooms over a period of two years. An elderly woman who lost $69,000 to prize and merchandise scams continued to fall prey to the telemarketers, who called even as her family attempted to recover the money she had already lost.

While the elderly are the most common and most tragic victims of telemarketing fraud, no group is immune. Even cautious consumers and investors can fall prey to the elaborate schemes. For instance, a California school teacher lost $20,000 to an investment scam claiming to be a film production company. The operation had sent her a prospectus, a contract, and glossy brochures detailing the alleged movie-in-progress, convincing her it was legitimate before she invested. An Ohio attorney who invested $60,000 in a Texas oil well scam received a total of $5.41 for his investment. A New Hampshire doctor, convinced by a certificate of authenticity and money-back guarantee, sent four thousand dollars to a New York boiler room for three fake Salvador Dali prints.

The psychological impact of telemarketing fraud intensifies victims’ losses. The shame and humiliation of having been “taken” by a fraudulent sales pitch only worsens the financial injury. No matter how convincing a scam appeared, or how small the loss, consumers often feel they could have and should have avoided being victimized. The same feelings of guilt and foolishness that prevent consumers from reporting the fraud in the first place may render consumers reluctant to make any investments, or to purchase any goods over the telephone. Thus, telemarketing fraud could have devastating effects on many areas of the economy.

b. Legitimate Telemarketers

Despite the prevalence of fraud in the industry, legal telemarketing is still an important, economically significant business practice. Legitimate telemarketing firms are numerous, profitable, and provide millions of valuable sales and employment opportunities. Fraud, however, gives the telemarketing industry a bad name. Already “the
most maligned profession since used car sales," the telemarketing industry suffers from the reputation of being a business fraught with fraud. Publicity about fraudulent telemarketers makes consumers generally more suspicious and reluctant to purchase goods by telephone, and telemarketers may have difficulty regaining the confidence of consumers who have been defrauded by unscrupulous scam artists. Furthermore, many sales opportunities are lost when victims, who otherwise would have purchased legitimate goods by telephone, purchase substandard goods from con artists instead. Finally, telemarketing has been made more costly and more difficult due to closer scrutiny from credit card companies, lenders, and vendors.

c. Credit Card Companies and Lenders

Telemarketing scam operators frequently bill fraudulent charges to the victims’ credit cards. Consumers who discover the fraud (when they receive substandard goods or no goods at all) will often cancel the transactions with their lending institutions, a process known as a chargeback. Lenders normally recoup the chargebacks from the merchants. In the case of boiler room sales, however, the sellers can seldom be located to be held accountable for the charges. Thus, when consumers challenge fraudulent credit card charges, lending institutions must normally absorb the resulting losses. These losses can be substantial. MasterCard and Visa have estimated that financial institutions lose over three hundred million dollars per year to telemarketing fraud.

Other boiler room operators factor the fraudulent charges through legitimate merchants. In such cases, either the factor—the legitimate business making the charges on behalf of the boiler room operation—or the lender must absorb the charges. Some operators even factor credit card charges through several merchants at once to

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221. Id.
222. Id.
224. Id.
225. 1988 Senate Hearing, supra note 21, at 59-61.
226. Id. at 59.
227. 1993 House Hearing, supra note 38, at 45.
228. Id.
229. Id. at 42.
230. Id. at 45. This figure has increased from MasterCard and Visa’s 1988 estimate of $100 million per year. 1988 Senate Hearing, supra note 21, at 59.
231. 1988 Senate Hearing, supra note 21, at 60. See supra notes 170-73 and accompanying text for explanation of factoring.
232. 1988 Senate Hearing, supra note 21, at 60.
avoid detection.\textsuperscript{233} Losses to the legitimate merchants forced to absorb fraudulent charges are significant, and may even drive factoring merchants into bankruptcy.\textsuperscript{234}

II
Current Prosecution Mechanisms and Their Limitations

The current mechanisms for prosecuting telemarketing fraud are inadequate to combat this growing problem. The primary devices used to prevent and prosecute fraudulent telemarketing are the Federal Trade Commission Act (FTC Act),\textsuperscript{235} the Racketeering and Corrupt Organizations Act (RICO),\textsuperscript{236} and state consumer protection laws. Although the FTC has recently been active in investigating telemarketing fraud on a national level, the agency has inadequate resources and insufficient rulemaking authority to combat the problem effectively.\textsuperscript{237} Actions under RICO are complex and difficult to prosecute because they require a showing of often hard-to-prove patterns of criminal activity.\textsuperscript{238} State laws alone, no matter how strong, are inadequate to combat interstate telemarketing fraud on a nationwide scale.

A. Federal Trade Commission Act

The FTC, under the authority of the FTC Act,\textsuperscript{239} has been the most active regulatory agency in the fight against interstate telemarketing fraud.\textsuperscript{240} As of February 1993, the FTC had brought over ninety telemarketing fraud cases in federal court.\textsuperscript{241} Unfortunately, however, the FTC has insufficient investigative abilities, funding, and rulemaking authority to pursue fraudulent telemarketing effectively.

Although the FTC is empowered to conduct investigations as it deems necessary,\textsuperscript{242} it is not historically an investigative agency. It relies on consumer complaints to detect and prosecute fraudulent

\begin{itemize}
  \item \textsuperscript{233} Id.
  \item \textsuperscript{234} Id.
  \item \textsuperscript{237} H.R. Rep. No. 103-20, supra note 223, at 2-4.
  \item \textsuperscript{238} Id. at 7.
  \item \textsuperscript{239} 15 U.S.C. § 41 et seq. (1988).
  \item \textsuperscript{240} H.R. Rep. No. 103-20, supra note 223, at 2-3.
  \item \textsuperscript{241} Id.
  \item \textsuperscript{242} See 16 C.F.R. § 18(b) (1994).
\end{itemize}
telemarketing operations.\textsuperscript{243} The FTC is relatively new to the business of combatting telemarketing fraud, and depends upon cooperation from local attorneys general, the United States Attorney, the United States Postal Service,\textsuperscript{244} and even the Federal Bureau of Investigation\textsuperscript{245} (FBI) to investigate complaints of fraudulent telemarketing. Because it has limited funding for investigations, the FTC is forced to enlist the aid of other law enforcement agencies to conduct discovery, obtain evidence, and pursue actions against telemarketing scams.\textsuperscript{246} Nonetheless, by working with authorities in many states, the FTC has been able to construct a database of fraudulent telemarketers, the National Telemarketing Fraud Database,\textsuperscript{247} to aid in its investigations of consumer complaints.\textsuperscript{248}

The FTC Act prohibits “unfair or deceptive . . . practices” that affect interstate commerce\textsuperscript{249} and authorizes the FTC to seek injunctive relief against such unfair or deceptive trade practices. Currently, neither the FTC Act nor the FTC rules specifically address telemarketing fraud.\textsuperscript{250} This omission may restrict the FTC’s ability to obtain injunctive relief because such relief depends upon the FTC’s ability to convince courts that a suspect firm’s telemarketing practices are, in fact, unfair or deceptive.\textsuperscript{251}

Such a showing can be more difficult than it seems. Consumer testimony is frequently the only available proof of telemarketing fraud, especially in cases where the products or guarantees are misrepresented.\textsuperscript{252} As a defense to such testimony, defendants are often able to allege that the consumer misunderstood the terms of the offer, or that a refund was never requested.\textsuperscript{253} Consequently, the defendants may be required to pay restitution to a few consumers, but are generally free to resume their telemarketing activities immediately.

Notwithstanding these limitations, injunctive relief is the FTC’s main weapon against fraudulent telemarketers who operate across

\begin{itemize}
\item \textsuperscript{243} See 16 C.F.R. § 2.1 (1994).
\item \textsuperscript{244} 1993 \textit{House Hearing}, supra note 38, at 18.
\item \textsuperscript{245} Id. at 16.
\item \textsuperscript{246} Id.
\item \textsuperscript{247} The National Telemarketing Fraud Database is used to aid law enforcement agencies in discovering and ferreting out fraudulent telemarketers by identifying common characteristics and signs of fraudulent operators. See id.
\item \textsuperscript{248} Id.
\item \textsuperscript{250} H.R. Rep. No. 103-20, \textit{supra} note 223, at 3.
\item \textsuperscript{251} Id.; see also FTC v. Pioneer Enters., 1992-2 \textit{Trade Cas. (CCH)} 69,154.
\item \textsuperscript{252} See H.R. Rep. No. 103-20, \textit{supra} note 223, at 3-4.
\item \textsuperscript{253} See id.
\end{itemize}
The FTC can request courts to issue preliminary injunctions against fraudulent telemarketing operations in order to prevent further injury to consumers pending a final judgment. Final relief usually includes restitution of consumers' money, fines, and permanent injunctions prohibiting defendants from engaging in any further telemarketing operations. Courts may also require defendants to post bonds before they can resume telemarketing activities in order to protect future consumers.

Injunctive relief can have little effect, however, if it is not enforced. A further limitation of the FTC's power is that it lacks authority to bring criminal contempt charges. Instead, it must rely on state and federal law enforcement agencies to bring criminal contempt charges against telemarketers who violate injunctions. Telemarketing fraud has a high rate of recidivism, and the danger that injunctions will be violated is great. When scam artists are able to make huge amounts of money quickly, the deterrent effect of civil sanctions such as fines and penalties may be minimal. Imprisonment may be the only effective solution.

B. RICO

Fraudulent telemarketers may be prosecuted in federal court under RICO. RICO has both civil and criminal provisions, thus a private party or the government may bring a RICO action. To obtain a verdict against an offending telemarketer under the RICO statute, the plaintiff or prosecutor must show that the telemarketer engaged in a pattern of racketeering activity.

254. Id. at 3.
255. 1993 House Hearing, supra note 38, at 19.
257. See, e.g., FTC v. Wetherill, 1993-1 Trade Cas. (CCH) 70,203.
258. 1993 House Hearing, supra note 38, at 19.
259. Id. at 20.
260. See id. at 19.
261. Id.
262. Id.; see also 1989 House Hearing, supra note 84, at 114 (testimony of convicted former broker: "You definitely need tougher penalties. I think without a doubt, jail...is a deterrent...[J]ail is one of the biggest deterrents to end what is going on in the industry today").
The statute defines racketeering to include wire fraud\textsuperscript{267} and mail fraud.\textsuperscript{268} Wire fraud is defined as:

\[\text{[A]ny scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . transmitted by means of wire, radio, or television communication in interstate or foreign commerce, [and] any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice . . .}\] \textsuperscript{269}

Because fraudulent telemarketing usually falls within this definition, the racketeering element is easily met.

A "pattern" is somewhat more difficult to prove. In order to show a pattern of activity to trigger RICO liability, the prosecutor must introduce evidence of at least two fraudulent acts showing a continuity of activity.\textsuperscript{270} Courts are reluctant to find continuity over short periods of time, however.\textsuperscript{271} Generally, a threat that the activity will continue into the future is required, but "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this [continuity] requirement."\textsuperscript{272} A finding of continuity is intensely factual, and may be difficult to prove because prosecutors often have little physical evidence of the fraud and only a few consumer complaints on which to base a case.\textsuperscript{273} Because of the transient nature of telemarketing boiler room operations, it is often difficult to show that a single operation is responsible for activities extending over a period of time. Thus, the continuity requirement is frequently a barrier to civil recovery as well as criminal liability under RICO.

A finding of a RICO offense further requires an "enterprise," or a relationship between the predicate acts alleged to constitute the pattern.\textsuperscript{274} A relationship exists when the acts "have the same or similar purposes, results, participants, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated events."\textsuperscript{275} Boiler rooms relocate and reappear so rapidly that authorities often cannot prove that one operation having the same participants is responsible for multiple offenses. The enterprise

\begin{itemize}
\item \textsuperscript{267} 18 U.S.C. § 1343 (1988).
\item \textsuperscript{268} \textit{Id.} § 1341.
\item \textsuperscript{269} \textit{Id.} § 1343.
\item \textsuperscript{270} \textit{Id.} § 1961(5).
\item \textsuperscript{271} See First Nat'l Bank and Trust Co. v. Hollingsworth, 931 F.2d 1295, 1303 (8th Cir. 1991).
\item \textsuperscript{272} \textit{Id.} at 1303.
\item \textsuperscript{273} H.R. REP. NO. 103-20, supra note 223, at 3-4.
\end{itemize}
requirement therefore makes RICO relatively ineffective as a weapon against clever boiler room operators.

Lack of physical evidence and the transient nature of telemarketing scams pose significant problems in proving a pattern of corrupt activity in order to trigger RICO liability. Although successful RICO actions can lead to both civil remedies and criminal charges, the difficulty of prosecuting actions under the statute deters its use against fraudulent telemarketers. Thus, much of the burden of criminal prosecution of is left in the hands of state authorities.

C. State Telemarketing Laws

Many states have enacted strict consumer protection laws regulating the activities of telemarketers. This section focuses on the laws of three states where telemarketing fraud has proliferated: California, Florida, and Nevada. Some state laws include a registration requirement to facilitate locating the telemarketer if a consumer complaint is registered. Many include consumer disclosure requirements. State telemarketing laws also typically incorporate substantial criminal penalties, such as fines or imprisonment, for fraudulent telemarketers. Typical state law civil remedies include injunctions against further telemarketing sales activities, restitution and rescission, and actual and exemplary damages.

1. California

California, once a popular location for boiler rooms,\textsuperscript{276} enacted telemarketing regulations in 1985.\textsuperscript{277} These regulations require all telemarketing businesses to register with the Consumer Law Section of the Department of Justice\textsuperscript{278} for an annual fee of fifty dollars.\textsuperscript{279} The registration law defines telephonic sellers\textsuperscript{280} and requires them to submit the names, addresses, dates of birth, driver’s license numbers,

\textsuperscript{276}. Telefraud, supra note 17, at 289.
\textsuperscript{277}. \textit{CAL. BUS. \\ & PROF. CODE} § 17511 et seq., added by 1985 Cal. Stats. ch. 1009, § 1.
\textsuperscript{278}. \textit{CAL. BUS. \\ & PROF. CODE} § 17511.3 (West Supp. 1994). Registration was formerly handled by the Secretary of State’s office.
\textsuperscript{279}. \textit{Id.}.

\textsuperscript{280}. The California Business and Professions Code defines a telephonic seller as follows: “[A] person who, on his or her own behalf or through salespersons or through the use of an automatic dialing-announcing device . . . causes a telephone solicitation or attempted telephone solicitation . . . [when] the telephonic seller initiates telephonic contact with a prospective purchaser.” \textit{Id.} § 17511.1. Section 17511.1 also defines as sellers telephonic solicitors who require purchases or any charges, other than actual shipping charges, in exchange for a gift or prize; a seller responding to inquiries generated by advertisements is also subject to the law if the product the seller offers is a precious metal, gemstone, or mineral deposits. \textit{Id.}
and criminal records of all persons involved in telephone sales.\textsuperscript{281} Operators must furnish copies of their sales scripts, information such as brochures or literature, and descriptions of the products or services being sold.\textsuperscript{282} The law expressly includes sellers doing business in California and those who solicit prospective purchasers who live in California.\textsuperscript{283}

The registration requirement enables the Attorney General’s office to distinguish boiler room operations from legitimate ones on the basis of the information contained in the form.\textsuperscript{284} Moreover, having detailed information on file makes it easier to investigate and prosecute frauds once they are reported by consumers. Pursuant to the registration law, California authorities were able to charge more than fifty individuals within the first year after the statute was enacted.\textsuperscript{285}

Under the California law, telephone sellers must disclose relevant and material information to prospective purchasers before a sales transaction is completed.\textsuperscript{286} If the seller represents that the buyer will receive a free item or a gift, the seller must disclose its address, the odds of receiving the prize having the highest value (if multiple prizes are represented), and the number of individuals who have received the prize during the last twelve months.\textsuperscript{287} If the seller offers minerals, metals, or stones, it must disclose its address, its ownership in the mineral, and other information to substantiate any claims of the resource’s earning or profit potential.\textsuperscript{288} Finally, if the seller represents that office equipment or supplies are being sold at discount prices, it must reveal its address and the name of the manufacturer of each allegedly discount item the customer wishes to purchase.\textsuperscript{289} These disclosure requirements protect consumers without unduly burdening legitimate telemarketing businesses, because they are narrowly tailored to target common fraud areas.

2. \textit{Florida}

The Florida Communications Fraud Act\textsuperscript{290} (Act), enacted in 1987,\textsuperscript{291} makes it a felony offense to defraud via telephone for any

\begin{itemize}
\item \textsuperscript{281} Id. § 17511.4.
\item \textsuperscript{282} Id.
\item \textsuperscript{283} Id. § 17511.3.
\item \textsuperscript{284} Telefraud, supra note 17, at 293.
\item \textsuperscript{285} Id.
\item \textsuperscript{286} Cal. Bus. & Prof. Code § 17511.5 (West Supp. 1994).
\item \textsuperscript{287} Id.
\item \textsuperscript{288} Id.
\item \textsuperscript{289} Id.
\item \textsuperscript{291} 1987 Fla. Laws ch. 87-382, § 1.
\end{itemize}
aggregate amount over three hundred dollars. Fraudulent operations netting under three hundred dollars are punishable as misdemeanors. In adopting the Act, the Florida Legislature explicitly recognized the insidious nature of telemarketing fraud:

The Legislature recognizes that schemes to defraud have proliferated in the United States in recent years and that many operators of schemes to defraud use communications technology to solicit victims and thereby conceal their identities and overcome a victim’s normal resistance to sales pressure by delivering a personalized sales message.294

The statute was enacted because Florida’s liberal business laws had made it a haven for telemarketing scam artists.295 Within two weeks after the Act became effective, at least ten boiler room operators fled the state in response to subpoenas.296

3. Nevada

Telemarketing fraud became a growth industry in Nevada during the 1980s.297 The state is thus one of the more recent entrants into the field of telemarketing fraud legislation. The Nevada Legislature enacted extensive legislation directed against telemarketing fraud in 1989.298 Nevada’s law requires registration of telemarketers and all sales employees.299 The initial registration fee is six thousand dollars, with renewal fees of one hundred dollars per year.300 Each seller must also post a bond of fifty thousand dollars to provide security in the event a consumer is defrauded.301 Sellers must make disclosures to consumers similar to those required in California.302 All telemarketers must provide refunds upon a customer’s written request if goods or services are defective.303 Finally, telephone sellers are forbidden to disclose the names or addresses of their customers to other businesses.304 This requirement prevents the distribution and sale of

293. Id. § 817.034(4)(b)(2).
295. Telefraud, supra note 17, at 289.
296. Id. at 292.
299. Id. § 599B.120.
300. Id.
301. Id. § 599B.100(2).
302. Id. § 599B.170. For California’s disclosure requirements, see supra text accompanying notes 276-89.
303. NEV. REV. STAT. ANN. § 599B.190.
304. Id. § 599B.200.
sucker lists among boiler room operators. Civil and criminal penalties are available against violators of any provision of the law, including failure to register.\textsuperscript{305}

D. Conclusion

Despite the attention of state legislatures to the problem of telemarketing fraud, state laws cannot eradicate the scams. First, even the most exhaustive state law can do little to protect against calls made from out of state. For example, although the California and Nevada registration laws specifically apply to out-of-state sellers, state authorities have little redress if they cannot locate out-of-state sellers who fail to register. Similarly, the state law criminal penalties are often impossible to enforce against out-of-state offenders, because it is difficult to obtain jurisdiction. Even if the out-of-state boiler room operators can be located, proving contact with California or Nevada consumers may be impossible.

Furthermore, the Florida law's success at driving fraudulent telemarketers beyond the state's borders serves to underscore the need for federal regulation. Boiler rooms driven out of one state will seek out other states that lack strict laws or stringent enforcement. State enforcement can never be successful if some states lack the resources or the initiative to prosecute.

III Possible and Proposed Solutions

Congress has discussed the issue of telemarketing fraud repeatedly, with no resolution.\textsuperscript{306} Solutions proposed at these hearings have included a citizen's private right of action against fraudulent telemarketers, federal actions by state authorities, and increased FTC oversight of telemarketers.\textsuperscript{307} These solutions, however, only address part of the problem. An effective federal law should emphasize deterrence, detection, and prosecution of fraudulent telemarketing activities without unduly interfering with legitimate telemarketers. This section suggests three elements of a comprehensive law: requiring national registration of all telephone sales operations; increasing the FTC's investigative and prosecutorial power; and enabling state authorities to sue fraudulent telemarketers in federal court.

\textsuperscript{305} Id. §§ 599B.245 to .260.
\textsuperscript{306} S. REP. NO. 130, 103d Cong., 1st Sess. 2-3 (1993).
A. Congressional Efforts to Combat Telemarketing Fraud

Each Congress since 1983 has discussed the problem of telemarketing fraud without resolution, but in 1993, both houses of the 103rd Congress unanimously passed The Consumer Protection Telemarketing Act. It would have required the FTC to promulgate rules to prohibit deceptive, fraudulent, and abusive telemarketing practices. Unfortunately, President Clinton failed to sign the bill into law. Finally, the Senate and the House in 1993 introduced a new bill to amend the FTC Act to authorize increased FTC rulemaking to combat telemarketing fraud and to appropriate funds to expand the FTC's investigative and adjudicative abilities. The proposed amendments were still being debated last session.

Thus far, all proposed telemarketing legislation has focused on expanding the FTC's power to combat fraudulent telemarketing. Testimony as early as the 1988 Senate hearings on proposed amendments to the FTC Act criticized the Commission for its poor enforcement record against telemarketing scams. The FTC has also been accused of unnecessary delays in decisionmaking. More recently, however, FTC commissioners have testified that the FTC's improved efforts over the past several years have led to increased injunctions and civil penalties. Congress' lack of success in enacting telemarketing fraud legislation may be due in part to disagreement over the FTC's effectiveness as an enforcement agency. Nonetheless, it is certain that any Congressional action in this area will involve the FTC as the chief agency in the fight against telemarketing fraud.

308. In 1983 the 98th Congress Senate Committee on Commerce, Science and Transportation introduced S. 1714 to expand the FTC's authority to combat fraudulent telephone sales practices. The Senate, however, never acted on the bill. S. Rep. No. 103-130, 103d Cong., 1st Sess. 1-7 (1993). The 99th Congress Senate passed S. 1078, a variation on the earlier bill, but the House did not approve it. Id. In the 100th Congress, both the Senate and the House passed differing versions of S. 677, but the versions were never reconciled. Id. During the 101st Congress, the Senate again passed a bill, S. 1249, and again the House took no action. Id. The 102d Congress found another bill, S. 3150, reported to the Senate Committee, and again the full Senate did not act. Id. For an overview of these bills, see Patrick E. Michela, Comment, "You May Have Already Won . . .": Telemarketing Fraud and the Need for a Federal Legislative Solution, 21 Pepp. L. Rev. 553 (1994).

312. See 1988 Senate Hearing, supra note 21, at 44-49 (statement of the FTC).
B. Proposed Solutions

Perpetrators' easy mobility, anonymity, and high rate of repeat offense increase the prevalence of telemarketing fraud. Therefore, detecting and monitoring fraudulent operations are important components in investigation and prosecution. Because of the interstate nature of telemarketing fraud, any effective solution to the widespread problem must be a national one. Detection and monitoring can be accomplished at the state and local levels, but federal oversight is necessary to keep local officials apprised of interstate movement of fraudulent telemarketers. More important, the combined power of state and federal authorities to bring and enforce federal actions may be the only effective weapon against interstate offenders. Thus, an effective law will authorize a combination of state and federal actions: national registration of telephone sellers, increased FTC power to investigate interstate operations, and empowerment of local officials to bring actions against interstate telemarketers in federal courts.

1. National Registration of Telephone Sales Operations

Deterrence is the most effective goal in reducing the harm caused by fraudulent telemarketers. If the fraud is made less lucrative and harder to get away with, it will be far less prevalent. Many states, including California and Nevada, have effectively reduced fraudulent telemarketing, yet protected legitimate telephone sellers by enacting registration requirements. Unfortunately, however, the effect of a registration requirement in a single state is often to drive the boiler rooms into other states. If all telephone sellers were required to register with a single federal agency such as the FTC, fraudulent telemarketers could no longer continue their frauds by simply relocating them across state lines. A federal registration requirement could be imposed in addition to any state registration; states could be free to adopt stricter registration standards or to mirror the federal standard.

A federal registration law could require any business selling products by telephone to register annually, for a fee. Fees thus generated could pay for administration of such a requirement and maintenance of a computer databank of telephonic sellers. Registrants could be required to reveal information that would help authorities to identify the operation in the event of a consumer complaint, such as: the owner's name, place of business, and Social Security number; the name and nature of the business (such as seller of goods or services,

316. See supra text accompanying notes 276-89.
317. See supra text accompanying notes 297-305.
318. See Telefraud, supra note 17, at 293.
travel agency, or investment broker); a description of any goods or services sold; and copies of sales scripts and guarantees given to consumers. Businesses, once registered, could be issued an identifying registration number to be used to index and identify the business in the future.319

To further the end of deterring boiler room operations, a registration law must include substantial penalties for noncompliance. To facilitate discovery of noncomplying businesses, federal law could require all advertising by telemarketers, including unsolicited sales pitches, to disclose the seller's identifying number. Thus, advertisements or sales scripts that did not reveal the sellers' identification numbers would immediately be suspect.

Naturally, a registration requirement risks unduly burdening government agencies and legitimate businesses, without a corresponding effect upon the offending boiler room operators. Given the effectiveness of registration requirements at the state level, and the ineffectiveness of current FTC and other federal efforts to fight fraudulent telemarketing, however, a national registration requirement is an option worth trying. Congress should direct the FTC to construct registration requirements for all telemarketers, to expand the National Telemarketing Fraud Database,320 and to establish strict penalties for nonregistration.

2. FTC Investigative Authority

The major obstacles to the FTC's efforts to combat fraudulent telemarketers are problems in locating the perpetrators, inadequate investigative ability, and lack of authority to enforce judgments once they have been obtained. As discussed above, a registration requirement addresses the first obstacle by helping the FTC, local law enforcement agencies, and other federal agencies to identify and locate boiler room operations.

The second obstacle could be overcome if the FTC had greater independent investigative and enforcement ability. Currently, the FTC must rely on help from other agencies to compel physical evidence from defendants.321 Without the cooperation of the other agencies, the FTC's only evidence is consumer complaints and other

319. A registration requirement could also have a deterrent effect. Prospective operators with criminal records would be discouraged by the personal disclosure requirements, and strict noncompliance penalties would discourage telemarketers from operating without a license.

320. See supra notes 247-48 and accompanying text.

evidence obtained from victims. As a result, the FTC often lacks the ability to obtain injunctive relief in federal courts due to a lack of evidence of the defendants' intent or knowledge of fraud.

The last obstacle would be overcome if the FTC had the power to bring criminal contempt charges to enforce permanent injunctions.\textsuperscript{322} With the power to enforce injunctions itself, the FTC would not have to rely on help from other agencies to combat telemarketing fraud effectively. Moreover, effective federal enforcement would reduce the prosecutorial burden on local enforcement, which is often duplicative and ineffective beyond the borders of the enforcing state.

3. Authorize State Attorneys General to Bring Actions in Federal Court

No matter how effective the federal effort is in combatting fraudulent telemarketing, it will remain a local concern. Consumers will continue to seek help from local authorities, and immediate local action is quicker and more efficient than waiting for a federal agency to act. Unfortunately, however, individual state actions are often ineffective against activity that takes place outside the state's borders.\textsuperscript{323} In order to increase the effectiveness of local regulations, Congress should authorize state authorities to bring actions against interstate telemarketers directly in federal court, if they meet the amount in controversy requirement of fifty thousand dollars. If local authorities could go straight to federal court, national injunctions could be issued immediately. Nationwide injunctions would halt fraudulent operations entirely rather than just encouraging perpetrators to relocate to other states.

Moreover, because fraudulent telemarketing operations almost always have victims in more than one state, state authorities could consolidate their efforts in federal courts instead of simply duplicating litigation that has already begun in other states.\textsuperscript{324} Duplicative litigation is a waste of state law enforcement authorities' time and resources, and too often it turns out to be fruitless for victims. Defrauded consumers in some states recover nothing because the boiler room's assets have already been dispersed to victims in other states. A consolidated federal action could at least divide the restitution amount among all of the defrauded victims.

\textsuperscript{322} See id.

\textsuperscript{323} 1988 Senate Hearing, supra note 21, at 36-37.

\textsuperscript{324} For example, the FTC brought a federal action against Amy Travel Service, FTC v. Amy Travel Serv., Inc., 1990-2 Trade Cas. (CCH) 69,160, after six states had already sued Amy Travel during the same year. 1988 Senate Hearing, supra note 21, at 33. Although state authorities were able to act quickly against the travel scam, they were unable to obtain national injunctive relief, thus the FTC had to act also.
If local authorities were permitted to sue fraudulent telemarketers directly in federal court, their combined efforts, along with the FTC's, could pose a formidable threat to boiler room operators nationally. If national enforcement through this mechanism is as effective as local enforcement has been in certain states, the country could finally begin to see a decrease in the incidence of this pervasive and insidious type of fraud.

IV

Conclusion

Telemarketing fraud is a national problem, requiring a national solution. This type of fraud is particularly insidious because its perpetrators prey on victims within the privacy of their own homes. Too often, the victims of fraudulent telemarketers are elderly and ill-equipped to pursue legal remedies for themselves. Even worse, many victims tend to be repeat victims. Any effective solution will accomplish three goals: aid in detecting fraudulent telemarketers by recognizing the anonymous nature of the fraud; eliminate the jurisdictional problems and loopholes resulting from the interstate conduct of telemarketing fraud; and, protect legitimate telemarketing businesses from overly restrictive legislation. A balance between these concerns can be struck through a national registration requirement, a federal right of action by state authorities, and increased investigative authority vested in the FTC.