

October 4, 2011

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The Honorable Fred Upton  
Chairman  
House Committee on Energy and Commerce  
2125 Rayburn House Office Building  
Washington, DC 20515

The Honorable Henry Waxman  
Ranking Minority Member  
House Committee on Energy and Commerce  
2322A Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Upton and Ranking Minority Member Waxman:

As the author a number of law review articles on telemarketing law, and the former editor and publisher of the slip reporter service *TCPA Reports*, I wish to make you aware that the supporters of H.R. 3035, the *Mobile Informational Call Act of 2011*, have dangerously misled you about this bill.

In their September 23, 2011 letter, several debt-collection industry groups encouraged the Committee to pass H.R. 3035, as an amendment to the *Telephone Consumer Protection Act* ("TCPA"). However, they neglected to call to your attention the many negative effects of this bill. Their claim that "H.R. 3035 will continue the prohibition against the use of assistive technologies to call wireless numbers for telemarketing purposes" is categorically false. The TCPA's current proscriptions against many of the most odious telemarketing practices will be repealed by H.R. 3035 because it is crafted to exclude large categories of actual telemarketing solicitation calls from the definition of "telephone solicitation." Among other things, H.R. 3035 will:

- permit unlimited solicitation robocalls to cell phones from any company you ever gave your telephone number to, even if you asked them to stop, or even if you expressly told them the number you gave them was not to be used for solicitations.
- permit unlimited calls to cell phones from computerized auto-dialers that dial thousands of phone numbers a minute, and then simply hang up after some percentage of the consumers answer the phone even where the consumer has to pay to receive the hang-up call. (This practice is called an "abandon" by dialer operators and happens millions of times a day to telephone land-lines, but is currently prohibited to cell phones.)
- permit unlimited robocalls to cell phones from debt collectors that are calling wrong numbers, with no way for the wrongly-called party to stop those calls.
- permit unlimited survey and push-poll calls to cell phones, despite the fact that many consumers will have to pay just to receive those calls.
- permit unlimited solicitation robocalls to cell phones from tax-exempt nonprofit entities.

Because there have been many instances where scofflaw telemarketers sought to evade the TCPA's restrictions by forming sham nonprofit entities to make prerecorded telemarketing calls, the last category of calls in the list above is especially troubling.

The debt-collection industry group's claim that most consumer have "flat-rate" cell phone plans is misleading. Many consumers, including myself, use cell phone plans such as the AT&T GoPhone, where

a single call to the consumer can cost that consumer \$2.00, even if they do not answer the call. Many other consumers have plans that have a flat rate for a specific volume of calls, but then charge the consumer a per-minute charge when the plan's minutes are used up. Nor does this bill provide that a consumer has a right to require a business stop calling their cell phone.

Finally, this bill infringes on states rights and important principles of federalism. States have been at the forefront in protecting consumers from abusive marketing practices, but H.R.3035, preempts many states' laws regarding:

- charity solicitations calls
- automated marketing survey calls
- autodialed and prerecorded calls to residences, businesses, and cell phones
- junk faxes
- unsolicited text messages
- as well as many categories of telemarketing calls subject to state do-not-call laws

This bill reduces consumers' choices, seeks to authorize abusive invasions of privacy, and imposes potentially large costs on an unsuspecting public. If a consumer's cell phone will become thrown open to unlimited calls simply by disclosing their cell number to a business, consumers will simply provide false numbers like they currently do with businesses that want their e-mail addresses. This would ultimately reduce the ability to contact consumers that the proponents of H.R. 3035 seek to enable.

It is possible to provide a reasonable accommodation to the debt-collection and banking industries, without creating gaping loopholes in the protections currently afforded to cell phones. This can be done without eviscerating important protections individual states have seen fit to implement. The elements of this approach must be based on an honest consumer-friendly definition of "solicitation" and:

- 1) Ensure that the existing prohibition on all uninvited solicitation calls to cell phones is maintained intact (including solicitations from tax-exempt nonprofits and solicitations from businesses based on an EBR or mere sharing of a phone number by the consumer).
- 2) Permit non-solicitation calls to cell phones, when an established business relationship exists between the caller and the called party—only if the called party provided the telephone number to the caller.
- 3) Make no changes to the right of states to enact their own regulations regarding solicitation calls (including those by both charities and businesses), cell phone calls, faxes, text messages, and state DNC lists as applied to calls made to consumers in their states.
- 4) Ensure that any assistive technologies that are able to dial thousands of calls a minute—regardless of whether those calls are dialed from a fixed list of numbers—are required to be used in a responsible manner, and do not permit "hang-up" abandon calls to cell phones.

A balanced approach that meets these objectives while satisfying legitimate desires of the debt-collection industry will not be found in a bill drafted by the industry. It must address legitimate concerns that are soundly based in 20 years of experience under the existing TCPA gained from dealing with telemarketing scofflaws who have proven they will exploit the tiniest loopholes.

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