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December 7, 2011

Dear Members of Congress:

sent via fax

We, the undersigned Attorneys General, write to urge you to reject the Mobile Informational Call Act of 2011 (H.R. 3035), which seeks to amend the Telephone Consumer Protection Act (“TCPA”).

Our offices protect consumers by enforcing the TCPA and state laws concerning telephone solicitations, automated calls, junk faxes and text messages. Over at least the last 22 years, Congress and the states have enacted strong laws to protect consumers from unwanted and intrusive robocalls. Currently, federal law bans robocalls to cell phones unless the consumer gives prior express consent. H.R. 3035 would change the law and undermine federal and state efforts to shield consumers from a flood of solicitation, marketing, debt collection and other unwanted calls and texts to their cell phones. In the process, H.R. 3035 also would shift the cost of these calls – such as debt collection and marketing calls – to consumers, placing a significant burden on low income consumers. Furthermore, H.R. 3035 will create obstacles to effective enforcement of state consumer protection laws. H.R. 3035 goes far beyond the stated goal of giving debt collectors a new avenue to contact debtors and unnecessarily allows businesses to robocall or text consumers without the consumers’ prior express consent.

We urge you to reject H.R. 3035 as harmful to consumers.

We propose instead that Congress make two small but significant changes to the TCPA to better protect consumers: (1) protect consumers’ privacy by clarifying that prior express consent to robocalls must be obtained in writing; and (2) eliminate any suggestion from the TCPA that state statutes regulating interstate telephone and fax harassment are preempted

H.R. 3035 Shifts Costs to Consumers

Autodialed, pre-recorded calls specifically have been recognized as a residential intrusion “on a different order of magnitude” from mere annoyances such as door-to-door solicitors. *Bland v. Fessler*, 88 F.3d 729, 732-33 (9th Cir. 1996). When the calls are made to cell phones, the annoyance is compounded because the recipient must pay for them. While it is estimated that twenty-five percent of American households have given up their landlines and rely on their cell phones for contact, it is erroneous to assume that all consumers pay a flat rate for service. By the end of 2011, it is

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estimated that 25% of U.S. consumers will use prepaid wireless phones.¹ In addition, prepaid users tend to belong to lower income households.² Therefore, H.R. 3035 proposes to shift the cost of debt collection to the consumers and, in particular, to those who can least afford to pay it.

Wireless customers leave their carriers at an average rate of 2% per month.³ The rate is higher for prepaid customers who are not bound by a contract.⁴ In 2010, approximately 30% of complaints Indiana received about debt collectors involved autodialer calls to the wrong parties. A disturbing result of H.R. 3035 would be an increase in the number of automated calls to wireless subscribers who do not owe the debt that the caller is trying to collect. This would unfairly shift the cost of debt collection to innocent third parties.

In addition to debt collection calls, H.R. 3035 would give businesses carte blanche to contact wireless subscribers with calls for marketing research and, again, would shift the costs of those calls to non-consenting consumers. Moreover, just as H.R. 3035 would open the door for robocalls to cell phones for a commercial purpose, under the First Amendment, it would also open the doors to unlimited solicitations and other calls from charities. If H.R. 3035 is passed, it will not be long until cell phones are flooded with automated calls of all sorts.

H.R. 3035 Poses Dangers to Public Safety

Allowing robocalls to cell phones endangers public safety because of the inevitable increase in calls to wireless phones. Few can resist answering the “shrill and imperious ring”⁵ of the wireless telephone while driving. A 2009 study by the National Highway Traffic Safety Administration found that cell phone use was involved in 995 (or 18%) of fatalities in distraction-related crashes.⁶ More calls will likely mean more distracted drivers and, inevitably, more accidents.

H.R. 3035 Would Make Any Disclosure of a Wireless Telephone Number Consent To Be Robo-Called

H.R. 3035 proposes that disclosing one’s telephone number—during a transaction or at any time—equals consent to be robo-called on one’s wireless telephone. This means that a wireless subscriber could be subjected to any number of robotic “informational” follow-up calls just because he or she visited a store or a website. Consumers will not even be able to opt-out of receiving these robo-calls under the proposed legislation.

¹ New Millennium Research Council press release, July 28, 2011.

² Nicholas P. Sullivan, *Cell Phones Provide Significant Economic Gains for Low-Income American Households*, April, 2008.

³ Dave Mock, *Wireless Smackdown: Comparing Carrier Churn*, The Motley Fool, June 15, 2007

⁴ Dejan Radosavljevik, et al., *The Impact of Experimental Setup in Prepaid Churn Prediction for Mobile Telecommunications: What to Predict, for Whom and Does the Customer Experience Matter?* Transactions on Machine Learning and Data Mining, 2010.

⁵ Quoting *Humphrey v. Casino Mktg. Group, Inc.*, 491 N.W.2d 882, 491 N.W.2d at 898-99 (Minn. 1992).

⁶ <http://distraction.gov/stats-and-facts/index.html>.

We strongly recommend that Congress require that any consent to receive a prerecorded call on a wireless telephone be in writing and only after clear and conspicuous disclosures, just as is required in the Telemarketing Sales Rule, 16 C.F.R. § 310.4 (b) (1)(v) and proposed by the FCC in its 2010 Notice of Proposed Rule Making, 75 FR 13471-01. Furthermore, the law should clearly allow consumers to easily revoke their consent if they no longer want to receive and pay for intrusive robocalls on their cell phones.

H.R. 3035 Exempts Most Modern Dialing Systems

H.R. 3035 would revise the definition of “automatic telephone dialing system” to include only equipment that uses random or sequential number generators. Most modern automatic dialers, however, already use preprogrammed lists. As a result, H.R. 3035 would effectively allow telemarketers to robo-dial consumers just by avoiding already antiquated technology.

H.R. 3035 Would Preempt State Consumer Protection Laws

The language as written would eliminate the savings clause in 47 U.S.C. § 227(f) that emphatically does *not* preempt state statutes concerning telemarketing, junk faxes and prerecorded calls. The proposed language of H.R. 3035 states: “No requirement or prohibition may be imposed under the laws of any State with respect to any subject matter regulated under this section, except for telephone solicitations.” This language would preempt all state laws concerning junk faxes, unwanted text messages and automated calls. In addition, it would preempt any state Do Not Call law that imposes any requirements on charities, or contains any provision on telephone solicitations different from or stronger than those in the TCPA, such as state telemarketing holiday provisions.

Just how far this language goes to override State law is unclear. What, exactly, is the “subject matter regulated under this section”? Does it include, for example, calls conveying political messages, which the TCPA expressly disclaims as a subject of regulation? And how far does the purported exception “for telephone solicitations” extend? Does it include fax or text message solicitations? Does it permit states to regulate solicitation calls by charities, when state law defines such calls to be “telephone solicitations”? And does this exception preclude arguments that state laws regulating telephone solicitations are preempted by other components of the Federal Communications Act? Does it prevent states from imposing fines or bringing actions in state courts? There is no doubt that such loose language could easily be twisted in ways Congress does not intend.

H.R. 3035 not only undermines the principles of federalism that have worked for so long; it also ignores the decades of practical experience with a dual system of regulation in many areas of consumer protection. Consumer protection has long been within the states’ traditional police powers where federal preemption is rarely justified. As the chief law enforcement officers of our states, we regard the protection of our consumers from unfair and deceptive trade practices as one of our top law enforcement priorities. States have always been on the front line in enacting and enforcing laws to address new forms of fraud and deception affecting consumers. The states have traditionally served as laboratories for the development of effective laws and regulations to protect consumers and promote fair competition. For instance, the states led the way in

addressing identity theft and do not call laws, and our efforts were subsequently complemented through later federal enactments. Traditionally, States are enforcement partners with—not adversaries of—federal agencies like the FCC and FTC.

To understand what a radical change H.R. 3035 proposes, one must first understand the history of both the Federal Communications Act of 1934 and the TCPA. The FCA is concerned with regulation of telephone *services* and *facilities*. Federal regulation is necessary to ensure that a nation-wide and world-wide system of communication *transmission* works properly. However, prohibiting telephone abuses, such as harassing, obscene or fraudulent calls, even if they crossed state lines, has always been the terrain of the States. Congress enacted the TCPA in 1991 to complement—not replace—the States’ enforcement laws. Hence, Congress included the non-preemption language found in 47 U.S.C. §227(f)(1).

Previous efforts to preempt States under the TCPA have been unsuccessful. At the direction of Congress, the FCC created the national Do Not Call program in 2003. At that time, the FCC speculated that state laws that imposed greater restrictions on interstate calls might be preempted, and it invited petitions seeking preemption of state laws. After receiving several petitions and thousands of comments, the FCC never ruled on this issue. After nearly seven years, it is reasonable to infer that the FCC has concluded that the TCPA does *not* preempt State laws prohibiting interstate telephone harassment.

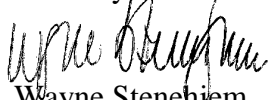
Rather than gutting state regulation concerning harassing calls and faxes, Congress should strengthen it. Efforts like H.R. 3035 show that States cannot take their residential privacy protections for granted any longer. The best way for Congress to eliminate uncertainty concerning preemption of state telephone and fax harassment laws is to remove the word “intrastate” from 47 U.S.C. § 227(f)(1). This modification would eliminate any distinction between interstate and intrastate laws, and thereby clarify that *no* state laws are preempted by the TCPA, even as applied to interstate calls. This slight modification should convince telemarketers and courts that States have every right to stop the invasion of residential privacy, and the imposition of costs on consumers by means of telephones and fax machines.

Conclusion

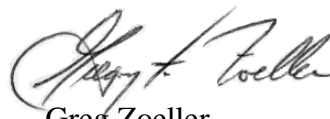
We urge you to protect consumers from robocalls to their wireless phones by rejecting H.R. 3035. Instead we ask you to revise the TCPA to make it clear that the TCPA does not preempt state laws, and that prior express consent for robocalls to wireless phones must be obtained in writing.



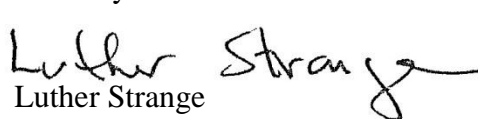
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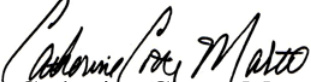
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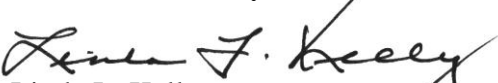
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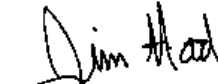
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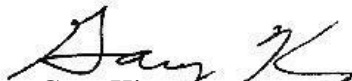
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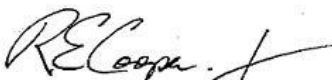


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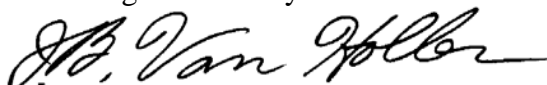
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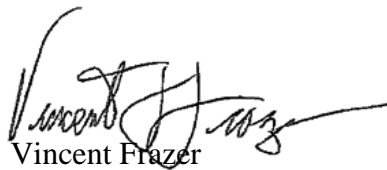
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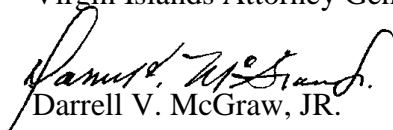
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