Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Rules and Regulations Implementing	)	CG Docket No. 02-278
the Telephone Consumer Protection	)	
Act of 1991	)	

Comments of the National Consumer Law Center
On behalf of its low-income clients and the
National Association of Consumer Advocates

These comments are submitted by the National Consumer Law Center,[1] on behalf of its low-income clients, and the National Association of Consumer Advocates.[2] These comments are in response to the Commission's request for comments[3] on the Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking filed by the Professional Association for Customer Engagement (PACE).

PACE seeks a ruling, posed in terms of a "clarification," that a dialing system is not an automatic telephone dialing system for purposes of the Telephone Consumer Protection Act (TCPA) unless it has the capacity to dial numbers without human intervention, regardless of whether a call is initiated by entering ten digits of a telephone number or by a one-click dialing method. Additionally PACE is asking the FCC to "clarify" that a dialing system's "capacity" is limited to what it is capable of doing, at the time the call is placed.

The proposed "clarification" would be an incorrect interpretation of both the letter and the purpose of the TCPA. It would also be harmful for consumers because it would allow a multitude of unwanted calls to cell phones. Cell phone calls still – almost universally – create an expense to the cell phone owner. Further, because of the ubiquitous use of cell phones, allowing this clarification would impinge seriously on the privacy of consumers. Finally, allowing this clarification would undermine the goal and effectiveness of the Lifeline program for low-income cell phone customers.

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[1] The **National Consumer Law Center (NCLC)** is a non-profit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace. NCLC has expertise in protecting low-income customer access to telecommunications, energy and water services in proceedings at the FCC and state utility commission and publishes *Access to Utility Service* (5th edition, 2011) as well as NCLC's *Guide to the Rights of Utility Consumers* and *Guide to Surviving Debt*. For questions about these comments, please contact NCLC attorney Margot Saunders, msaunders@nclc.org.

[2] The National Association of Consumer Advocates (NACA) is a non-profit association of consumer advocates and attorney members who represent hundreds of thousands of consumers victimized by fraudulent, abusive and predatory business practices. As an organization fully committed to promoting justice for consumers, NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means.

[3] ^*See,* http://www.fcc.gov/document/cgb-seeks-comment-petition-expedited-rulemaking-pace.

1. A Primary Purpose of the TCPA is to Protect Consumers from Unwanted Calls

The TCPA was passed as a direct response to the explosion of abuses of telephone and facsimile technology in the 1980s and 90s. These abuses included the use of autodialers to clog telephone lines with unwanted calls, "robocalls" that leave unsolicited or unwanted, prerecorded messages, and "junk faxes" that consume the recipients' paper and ink and interfere with the transmission of legitimate messages. As the 7th Circuit court explained it: "[v]oluminous consumer complaints about abuses of telephone technology – for example, computerized calls dispatched to private homes – prompted Congress to pass the TCPA."[4]

Statutory text, and legislative and regulatory history show that the TCPA's purpose is to promote privacy by providing consumers with informed choice as to what types of calls they receive. In enacting the TCPA, Congress intended to give consumers a choice as to how creditors and telemarketers may call them, and made specific findings that "[t]echnologies that might allow consumers to avoid receiving such calls are not universally available, are costly and unlikely to be enforced, or place an inordinate burden on the consumer."[5] Congress had found that –

> the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call….[6]

In regards to the use of automated dialers to cellphones, Judge Easterbrook of the Seventh Circuit stated it this way:

> The Telephone Consumer Protection Act … curtails the use of automated dialers and prerecorded messages to cell phones, whose subscribers often are billed by the minute as soon as the call is answered—and routing a call to voicemail counts as answering the call. An automated call to a landline phone can be an annoyance; an automated call to a cell phone adds expense to annoyance.[7]

FCC Commissioners have also explicitly explained the deliberate interplay between the TCPA and protection from these invasions of privacy:

> Few rights are so fundamental as the right to privacy in our daily lives, yet few are under such frontal assault. Our dinners are disrupted by unwanted phone calls. Our computer accounts are besieged with bothersome spam. Our mailboxes are swollen with advertisements for products, goods and services. We conduct our whole lives against the white noise of commercial solicitation. These intrusions exhaust us, irritate us and threaten our cherished right to be left alone.
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> ****

[4] *Mims v. Arrow Financial Services, LLC*, 132 S.Ct. 740, 744 (2012).
[5] TCPA, Pub.L. No. 102–243, § 11.
[6] *Id.* at §§ 12-13.
[7] *Soppet v. Enhanced Recovery Co.*, LLC, 679 F.3d 637, 638 (7th Cir.2012).

> The TCPA is about tools. It gives consumers the tools they need to build a high and strong fence around their homes to protect them from unsolicited telephone calls and faxes. It also allows other consumers to have a lower fence or no fence at all, if they wish to take advantage of these commercial messages.[8]

2. The Commission's Definition of "Capacity" Furthers the Purposes of the TCPA.

PACE's arguments that the legal landscape is unclear regarding what constitutes an ATDS are disingenuous. Yes, smart phones and all phones with speed dial functionality have the capacity to initiate a call with a single touch of a finger (or a verbal instruction into the phone). But phones that can initiate a speed dial call cannot initiate *multiple calls* at once like ATDS can. The capacity of the system is relevant because it indicates the automated nature of the system initiating the call. A smart phone is not a predictive dialer. It only has one telephone line. So although it can initiate a telephone call with a touch of a button, it can only initiate one telephone call at a time. Moreover, the inquiry is not really necessary – smart phones themselves are not being used to make multiple calls for commercial purposes so their actual capacity is largely irrelevant.

The line that has repeatedly been drawn is to ensure that the original purposes of the TCPA are accomplished – to protect consumers from automated calls. The TCPA was passed and signed into law more than twenty years ago, and contained the same language concerning "capacity" that it does today. The Ninth Circuit in *Satterfield v. Simon & Schuster, Inc.*,[9] analyzed "capacity" within the context of this statutory language, and held that under the "plain meaning" of the statute "a system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it."[10]

The Ninth Circuit's reading of the statute was consistent with the Commission's 2003 order, which determined that predictive dialers constitute ATDS. That ruling considered arguments similar to those raised in the PACE petition, and was unequivocal in its rejection of the exclusion. The Commission dictated that the analysis of whether a particular system should be considered an ATDS is based on both actual hardware along with software which could be added to the hardware:

> The hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers.
>
> ***
>
> It is clear from the statutory language and the legislative history that Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies. In the past, telemarketers may have used dialing equipment to create and dial 10-digit telephone numbers arbitrarily. As one commenter points out, the evolution of the teleservices industry has progressed to the point where using lists of numbers is far more cost effective.

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[8] Separate statements of: *Commissioner Michael Copps and Chairman Michael K. Powell, Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278 18 FCC Rcd. 14,014, 14,176; 14,174 (July 3, 2003).
[9] 569 F.3d 946, 951 (9th Cir. 2009).
[10] *Id.*

> The basic function of such equipment, however, has not changed–the capacity to dial numbers without human intervention. We fully expect automated dialing technology to continue to develop.[11]

This ruling makes sense: the purpose of the TCPA is to provide consumers with choices about what kind of automated telephone calls and messages they receive. If companies wish to use devices that have the capacity to dial numbers without human intervention, they may permissibly do so if they obtain the prior express consent of the parties they call. Similarly, the TCPA contains no prohibition at all against making fully manual non-telemarketing informational calls to any phone number at all. It is the automated nature of these calls that Congress intended to curb. Relaxation of the definition of ATDS, as suggested in this petition, would permit automated calls to consumers regardless of consent.

Upon a nearly identical petition for reconsideration and clarification by ACA International in 2005, noting that no new arguments were raised, the Commission again ruled for consumers on the issue of whether a predictive dialer is an ATDS:

> The TCPA does not ban the use of automated dialing technology. *It merely prohibits such technologies from dialing* emergency numbers, health care facilities, telephone numbers assigned to wireless services, and *any other numbers for which the consumer is charged for the call*. Such practices were determined by Congress to threaten public safety and inappropriately shift costs to consumers. (Emphasis added).[12]

Most importantly, the Commission said that, to find that calls to emergency numbers, health care facilities, and wireless numbers are permissible when the dialing equipment is paired with predictive dialing software and a database of numbers, but prohibited when the equipment operates independently of such lists, would be inconsistent with the avowed purpose of the TCPA and the intent of Congress in protecting consumers from such calls.[13]

Nothing has happened since 2003 (or 2008 for that matter) that might suggest that the Commission's sound reasoning is now invalid, or that the policies behind the TCPA have changed. If anything, technology is advancing and companies are using more advanced dialing systems such as Internet based dialers that exponentially increase a company's ability to make a staggering number of calls.

Indeed, all information of which we are aware suggests that any relaxation of the definition of ATDS would frustrate consumers' privacy interests. In September 2011, HR 3035 was introduced into the House of Representatives. The legislation was referred to the House Committee on Energy and Commerce, which held a hearing on November 4, 2011. The bill, which was supported by the ACA International, as well as the United States Chamber of Commerce, sought to redefine ATDS in the language of the statute, in order to circumvent consumer choice and the requirement that

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[11] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, 18 FCC Rcd. 14,014, 14,091, 14,092; ¶¶ 131, 132 (July 3, 2003).
[12] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, 23 FCC Rcd. 559, 566; ¶ 14 (Jan. 4, 2008).
[13] *Id.*

businesses obtain the "prior express consent" of recipients before using mass-calling equipment. The bill was fiercely opposed by state attorneys general, consumers and consumer groups such as NCLC (on behalf of our low-income clients) and NACA. (*See* Exhibit 1, attached). Fifty attorneys general submitted a letter (*see* Exhibit 2, attached), opposing industry efforts to revise the definition of 'automatic telephone dialing system' to include only equipment that uses random or sequential number generators. Ultimately, the bill's sponsors withdrew the bill (*see* Exhibit 3), explaining that their constituents were "concerned about what they believe will happen should this legislation become law."

As most modern automatic dialers already use preprogrammed lists H.R. 3035 would have effectively allowed businesses to robo-dial consumers just by avoiding already antiquated technology. The public opposition was so overwhelming[14] against any relaxation of the TCPA that the bill was withdrawn in to as the sponsors saw no way to improve the TCPA that would address the concerns of the public. It appears that the industry is still asking the FCC to do what Congress refused to do when Congress learned of the massive opposition to relaxing the TCPA.

Some commenters have suggested that Congress did not intend to curtail business' use of ATDS technology for "informational purposes." On behalf of our low-income clients, NCLC disagrees. Congress dealt with the problem of automated calls with a tiered and thoughtful approach. Calls to cellular telephones are protected by broad prohibitions against use of ATDS and prerecorded voice technology.[15] By providing the Commission with rulemaking and final order authority only as to calls where the recipient is *not* charged for the call, Congress made it clear that such restrictions not be altered in other ways. The only exceptions to this general rule are (1) calls for emergency purposes, and (2) calls made with the "prior express consent" of the called party.

Recognizing that automated calls to cellular telephones are particularly invasive of privacy, insidious and expensive, Congress created more relaxed rules for calls to residential lines. 47 U.S.C. §227(b)(1)(B), which governs calls to residential lines, contains no restrictions on use of ATDS at all, and prohibits only prerecorded calls to residential lines. And although it contains a similar "prior express consent" exception, the Commission has used the broad rulemaking power conferred by 47 U.S.C. § 227(b)(2)(B) to issue regulations exempting certain "classes or categories of calls."[16]

This comparison makes clear what the FCC has known all along: Congress specifically intended that the categories of phones listed in section 227(b)(1)(A)(iii), including cellular telephones, are entitled to the TCPA's protections "regardless of the content of the call."[17] In its 2008 Order, the Commission also noted that "Congress found that automated or prerecorded telephone calls [to wireless numbers] were a greater nuisance and invasion of privacy than live solicitation calls, and that such calls can be costly and inconvenient…."[18]

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[14] *See* the letter opposing the bill (Exhibit 1) sent by a consumer & privacy coalition consisting of the undersigned and the Americans for Financial Reform; Center for Media and Democracy; Citizens for Civil Discourse (The National Political Do Not Contact Registry); Consumer Action Consumer Federation of America; Consumer Watchdog; Privacy Activism Privacy Rights Now Coalition; Evan Hendricks, Publisher, PrivacyTimes; and the U.S. Public Interest Research Group.

[15] 47 U.S.C. §227(b)(1)(A)(iii).

[16] *See* 47 C.F.R. § 64.1200(a)(ii), (iii), (iv).

[17] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, 23 FCC Rcd. 559, 565; ¶ 11 (Jan. 4, 2008); also 2003 TCPA Order, 18 FCC Rcd at 14,115, para. 165.

[18] 2008 TCPA Order, 23 F.C.C.R. at 559; ¶ 7.

In sum, the current legal landscape is clear: no person may use equipment that has the capacity to call numbers without human intervention to call cellular telephone numbers, unless the caller has the "prior express consent" to receive such calls. This definition has been the law of the land for more than twenty years, and there is no reason to change it now.

3. Allowing Automated Calls to Cell Phones Would Frustrate the Lifeline Program and Harm Low-Income Consumers

Many residential wireless products, especially those used by payment troubled and poor households, still employ the "per minute of use" billing structure. Wireless consumers are often billed for incoming calls in addition to outgoing calls. As a result, these consumers are extremely sensitive to all incoming call – especially calls that they do not want.

Wireless bill shock to consumers is caused by unexpected increase in their phone bill.[19] In a recent examination of the problem, the Commission found that one of the causes of bill shock is when the limits on their voice, text or data plans have been exceeded, which in turn causes higher charges at a per-minute rate. Lower-income wireless consumers are especially sensitive to bill shock – as one extra-large cell phone bill can wreck their monthly budget. One monthly budget exceeded in a low-income household can cause negative repercussions for many subsequent months.

Most wireless consumers have a type of post-paid cell usage plan in which the minutes are paid for after they are used. However, the pre-paid wireless plans have been growing in popularity.[20] The wireless marketplace targets prepaid, low-end phone service products to low-income consumers and consumers with poor credit profiles.[21] The low-end prepaid wireless products provide a set number of minutes, and often texts, for a set price. Consumers must purchase a package of new minutes periodically to maintain their service.

Over 16 million low-income households maintain essential telephone service through the federal Lifeline Assistance program.[22] The low-end prepaid wireless plans are a popular product for the majority of these assisted consumers. Over three-quarters of Lifeline participants choose prepaid wireless Lifeline program, which most commonly consists of 250 minutes a month for the entire household.[23]

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[19] See FCC Consumer and Governmental Affairs Bureau, White Paper on Bill Shock (Oct.13, 2013); see also GAO,
[20] *See* Sixteenth Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, WT Docket No. 11-186 (Rel. Mar.21, 2013), FCC 13-34 at para.98. ; *See* Fifteenth Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, WT Docket No. 11-186 (Rel. June 27, 2011), FCC 11-103 at para.167.
[21] *See* Sixteenth Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, WT Docket No. 11-186 (Rel. Mar.21, 2013), FCC 13-34 at para.159.
[22] *See* 2012 Annual Report, Universal Services Administrative Company at 9.
[23] *See* http://www.fcc.gov/guides/lifeline-and-link-affordable-telephone-service-income-eligible-consumers; *see also Low Income Support Mechanism Wireless Disbursement as a Percentage of Total Disbursements 3Q2013*, Universal Service Administrative Company.

Consumer advocates have argued that 250 minutes a month is not sufficient to meet the basic monthly communication needs of a household. However, any policy or practice that would open the door to depletion of these scarce subsidized minutes allowing the receipt of unwanted calls which were not consented to by the consumer, will further deplete the scared minutes available for the entire Lifeline household.[24] Lifeline households use their Lifeline phones to find work or a doctor or access necessary services. Loss of subsidized minutes will also jeopardize health and safety, for example the ability to talk to a nurse or doctor or for a school to call a parent if his/her child is sick.

Conclusion

For the reasons explained above, we respectfully request that PACE's petition be denied.

[24] Lifeline is limited to one-per-household. See 47 C.F.R. § 54.409(c).

EXHIBIT 1

November 3, 2011

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

Re: H.R. 3035 (Terry), Mobile Informational Call Act of 2011 (oppose)

Dear Chairman Upton and Ranking Minority Member Waxman:

The undersigned consumer, civil rights, poverty and privacy organizations write to express our strong opposition to H.R. 3035, the Mobile Informational Call Act of 2011. The bill purports to make common sense updates to the Telephone Consumer Protection Act (TCPA) to ensure that consumers know about data breaches, fraud alerts, flight and service appointment cancellations, drug recalls and late payments. But the bill is a wolf in sheep's clothing.

The real purpose of H.R. 3035 is to open up *everyone's* cell phones, land lines, and business phone numbers, without their consent, to a flood of commercial, marketing and debt collection calls (to not only the debtor but everyone else). The bill would effectively gut the TCPA, a widely popular statute that protects Americans from the proliferation of intrusive, nuisance calls from telemarketers and others whose use of technology "may be abusive or harassment."[1] In 1991 Congress found that unwanted automated calls were a "nuisance and an invasion of privacy, regardless of the type of call" and that banning such calls was "the only effective means of protecting telephone consumers from this nuisance and privacy invasion."[2]

Automated predictive dialers would be exempt from the TCPA, permitting repetitive "phantom" calls to cell phones, doctor's offices, hospital rooms and pagers. Predictive dialers use a computer to call telephones based on predictions of when someone will answer and when a human caller will be available. They are the source of calls that begin with a long pause and of calls with no one on the other end (if the prediction of the human caller's availability is wrong.) Since the purpose of predictive dialers is to get someone to answer, computers often call a number repeatedly throughout the day. The TCPA currently prohibits the use of automatic telephone dialing systems to make calls, with certain exceptions, to (1) any emergency telephone line (including 911, hospitals, medical offices, health care facilities, poison control centers, fire protection or law enforcement agencies), (2)

[1] 47 U.S.C. § 227 note.
[2] Pub. L. No. 102-243, §§ 2(10-13), (Dec. 20, 1991), *codified at* 47 U.S.C. § 227.

guest or patient room of hospital, health care facility, elderly home, (3) pagers or (4) cell phones. H.R. 3035 would revise the definition of "automatic telephone dialing system" so that modern predictive dialers, which do not use random or sequential number generators, would be outside of the TCPA's protections. Calls could even be made for solicitation purposes unless the telephone number is a residential one on the Do Not Call list.

Businesses could make prerecorded robo-calls to anyone's personal or business cell phone for any commercial purpose that is not a solicitation, including debt collection, surveys, "how did you like your recent shopping experience," and "we've enhanced our service" – even if you are on the Do-Not-Call list. TCPA currently prohibits robo-calls to cell phones unless the consumer has provided prior express consent. H.R. 3035 would add a new exception permitting robo-calls to cell phones for any commercial call that is not a solicitation. The possibilities are endless. The Do Not Call list protects people only from telemarketing calls, not these other calls. Debt collection calls would be made to the cell phones of friends, family, neighbors, employers, or strangers with similar names or numbers. Families struggling in the current economy will be hounded on their cell phones, even if they have a landline that the collector could call, and even if the call uses up precious cell phone minutes or incurs per-minute charges for those with prepay phones. Commercial calls for debt collection or other commercial purposes could be made even if the consumer never gave out his or her cell phone number—the business could call if it found the consumer's cell phone number on Google or by purchasing a list from entities that collect that information.

The bill redefines "prior express consent" to make that requirement meaningless. The TCPA's restrictions on robo-calls have an exemption for calls made with the consumer's "prior express consent." The bill would define that phrase to find "prior express consent" any time a person provides a telephone number "as a means of contact" at time of purchase or "any other point." Thus, even if the telephone number was provided for a limited, one-time purpose, the business or consumer would be deemed to have consented to robo-calls into the future.

Consumers can already receive cell phone calls (and landline calls) for emergency or informational purposes. The TCPA has existing exceptions from its prohibitions for emergency calls and for calls made with the consumer's prior express consent. Any consumer who wants to get cell phone or landline calls about public service announcements, flight cancellations, or anything else is welcome to give their consent. But consumers often prefer to receive such information other ways, such as through email. The purpose of H.R. 3035 is to permit calls to cell phones without the consumer's consent.

Nuisance calls and collection calls on cell phones endanger public safety. Unlike land lines, people carry cell phones with them. They have them while driving and operating machinery. Many people use their cell phones primarily for emergency purposes and rush to answer them when they ring. Opening the floodgates to robo-calls to cell phones endangers public safety. Driving while distracted is always dangerous, but is especially so if the driver

becomes agitated by fears that their child is in trouble or by a debt collector calling to harass them.

H.R. 3035 is not only unnecessary, it will effectively gut the Telephone Consumer Protection Act's essential protections against invasion of privacy, nuisance and harassing calls. We urge you to withdraw the bill. For further information please contact Delicia Reynolds at the National Association of Consumer Advocates, 202 452-1989, extension 103, Delicia@naca.net or Margot Saunders at the National Consumer Law Center, 202 452 6252, extension 104, msaunders@nclc.org.

Sincerely,

Americans for Financial Reform

Center for Media and Democracy

Citizens for Civil Discourse (The National Political Do Not Contact Registry)

Consumer Action

Consumer Federation of America

Consumer Watchdog

National Association of Consumer Advocates

National Consumer Law Center (on behalf of its low income clients)

Privacy Activism

Privacy Rights Now Coalition

Evan Hendricks, Publisher, Privacy Times

U.S. Public Interest Research Group

cc: Members of the House Committee on Energy and Commerce

EXHIBIT 2

National Association of Attorneys General

PRESIDENT
Rob McKenna
Washington Attorney General

PRESIDENT-ELECT
Doug Gansler
Maryland Attorney General

VICE PRESIDENT
J.B. Van Hollen
Wisconsin Attorney General

IMMEDIATE PAST PRESIDENT
Roy Cooper
North Carolina Attorney General

EXECUTIVE DIRECTOR
James McPherson

2030 M Street, NW
Eighth Floor
Washington, DC 20036
Phone: (202) 326-6000
http://www.naag.org/

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 instrusive 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

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.

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[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.

Lisa Madigan
Attorney General of Illinois

Greg Zoeller
Attorney General of Indiana

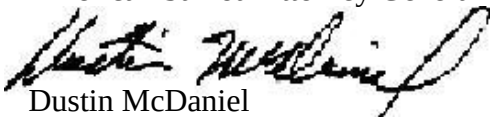
Wayne Stenehjem
North Dakota Attorney General

Luther Strange
Alabama Attorney General

John J. Burns
Alaska Attorney General

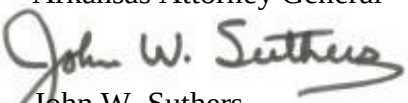
Arthur Ripley, Jr.
American Samoa Attorney General

Tom Horne
Arizona Attorney General



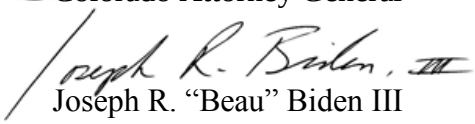
Dustin McDaniel
Arkansas Attorney General

Kamala Harris
California Attorney General

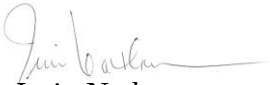


John W. Suthers
Colorado Attorney General

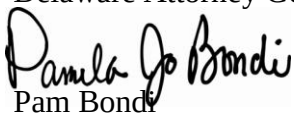
George Jepsen
Connecticut Attorney General



Joseph R. "Beau" Biden III
Delaware Attorney General

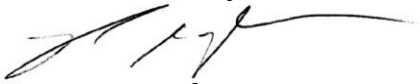


Irvin Nathan
Washington DC Attorney General

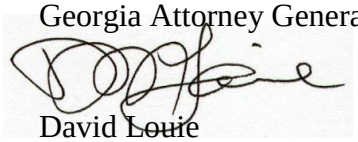


Pam Bondi
Florida Attorney General

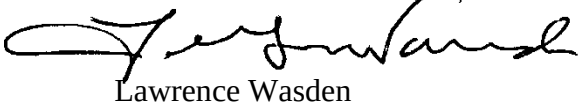
Sam Olens
Georgia Attorney General



Lenny Rapadas
Guam Attorney General



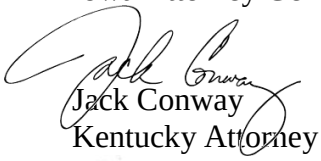
David Louie
Hawaii Attorney General



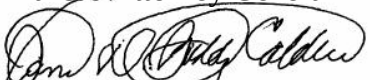
Lawrence Wasden
Idaho Attorney General

Tom Miller
Iowa Attorney General

Derek Schmidt
Kansas Attorney General

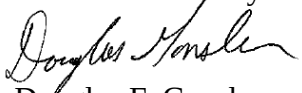


Jack Conway
Kentucky Attorney General

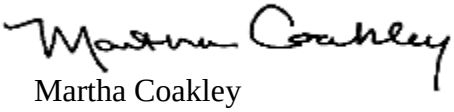


James "Buddy" Caldwell
Louisiana Attorney General

William J. Schneider
Maine Attorney General

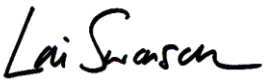


Douglas F. Gansler
Maryland Attorney General

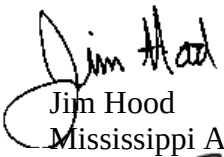


Martha Coakley
Massachusetts Attorney General

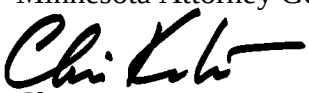
Bill Schuette
Michigan Attorney General



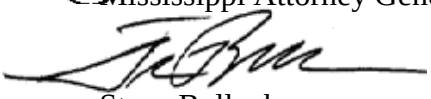
Lori Swanson
Minnesota Attorney General



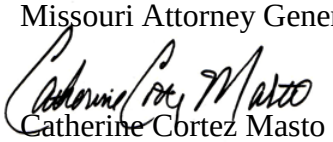
Jim Hood
Mississippi Attorney General



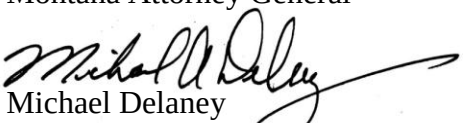
Chris Koster
Missouri Attorney General



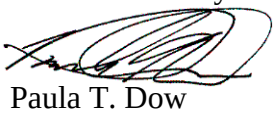
Steve Bullock
Montana Attorney General



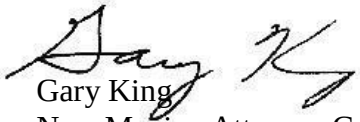
Catherine Cortez Masto
Nevada Attorney General



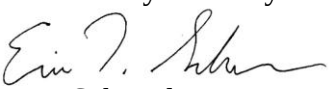
Michael Delaney
New Hampshire Attorney General



Paula T. Dow
New Jersey Attorney General

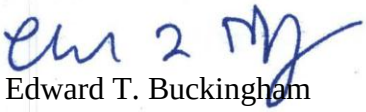


Gary King
New Mexico Attorney General



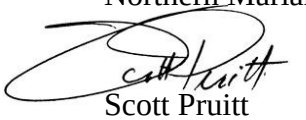
Eric Schneiderman
New York Attorney General

Roy Cooper
North Carolina Attorney General

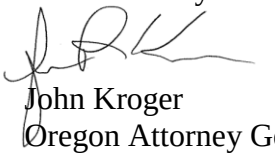


Edward T. Buckingham
Northern Mariana Islands Attorney General

Mike Dewine
Ohio Attorney General



Scott Pruitt
Oklahoma Attorney General



John Kroger
Oregon Attorney General

Linda L. Kelly
Pennsylvania Attorney General

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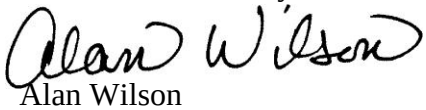
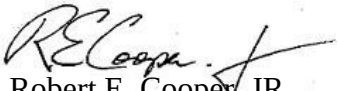
Guillermo Somoza-Colombani
Puerto Rico Attorney General

Peter Kilmartin
Rhode Island Attorney General



Alan Wilson
South Carolina Attorney General

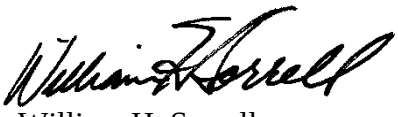
Marty J. Jackley
South Dakota Attorney General



Robert E. Cooper, JR.
Tennessee Attorney General

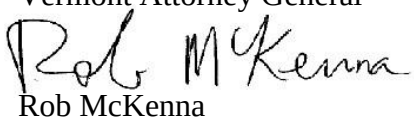
Greg Abbott
Texas Attorney General

Mark Shurtleff
Utah Attorney General

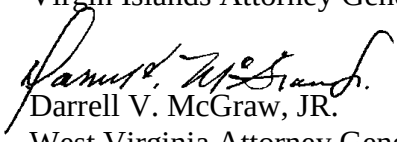


William H. Sorrell
Vermont Attorney General

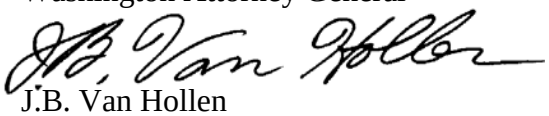
Vincent Frazer
Virgin Islands Attorney General



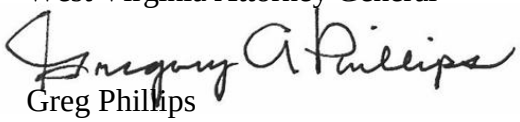
Rob McKenna
Washington Attorney General



Darrell V. McGraw, JR.
West Virginia Attorney General



J.B. Van Hollen
Wisconsin Attorney General



Greg Phillips
Wyoming Attorney General

EXHIBIT 3

Congress of the United States
House of Representatives
Washington, DC 20515

December 12, 2011

Hon. Fred Upton, Chairman
House Energy and Commerce Committee
Washington, DC 20515

Dear Chairman Upton:

We would like to take this opportunity to thank you and Chairman Walden, for allowing the hearing to occur on the merits of HR 3035. The hearing really helped to bring to our attention the issue of out of date telecommunications policy and how we need to begin to modernize current law.

However, what he have learned is that there is no hope for this legislation. We have heard from our constituents. They are concerned about what they believe will happen should this legislation become law. We have convened meetings with numerous consumer groups, as well as other organizations who have an interest in this legislation, but we have been unable to reach any kind of consensus on language that bans unwanted cell phone calls, while allowing calls that are consented to.

In an attempt to thread the needle and address the issues that have been brought before us, it is clear that this bill cannot be improved in a manner that will address the concerns of those involved. Therefore, we ask that HR 3035 not be advanced by the committee.

Thank you in advance for your consideration.

Sincerely,

Lee Terry
Member of Congress

Edolphus "Ed" Towns
Member of Congress

Cc: Hon. Greg Walden, Chairman,
Subcommittee on Communications and Technology