

**Testimony before the
U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY**

regarding

“HR 3035, The Mobile Informational Call Act of 2011”

November 4, 2011

Testimony submitted by:

Delicia Reynolds Hand (delicia@naca.net)

Legislative Director

National Association of Consumer Advocates (NACA) and

also on behalf of:

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



1730 Rhode Island Avenue

Suite 710

Washington, D.C. 20036

(202) 452-1989

www.naca.net

**Testimony of Delicia Reynolds Hand for the
U.S. House of Representatives Committee on Energy and Commerce
Subcommittee on Communications and Technology
Regarding,
“HR 3035, the Mobile Informational Call Act of 2011”
November 4, 2011**

Chairman Walden, Ranking Member Eshoo, and members of the Subcommittee, thank you for inviting me to testify before you today on the subject of “HR 3035, the Mobile Informational Call Act of 2011.

I am the Legislative Director of the National Association of Consumer Advocates (NACA) 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. My testimony today is offered on behalf of and expresses the sentiments of the twelve national consumer protection, civil rights and privacy organizations – such as the Center for Media and Democracy, Consumer Federation of America, National Consumer Law Center, Consumer Action and Americans for Financial Reform – who are among the organizations that recently submitted a letter opposing HR 3035 to this committee.¹ I have included this coalition letter as an attachment to my written testimony. These organizations oppose HR 3035 and urge Congress to oppose this legislation.

Mr. Chairman and Ranking Member, I am here today because HR 3035 will allow entities to use automatic telephone dialing systems, un-affectionately known as “robo-calls” and automated messages on consumer cell phones under the guise of “consent,” even though the consumer could never have envisioned such. Under this new bill, *any* transaction or relationship will constitute consent to repeatedly call the consumer’s cell phone even if the consumer does not give out her cell phone number, in perpetuity, and regardless of whether the consumer asks that she not be called.

Imagine if, after you leave today’s hearing, you stop by the local pharmacy on your way home. While at the counter making your payment, absentmindedly you hand over your cell phone number. This transaction alone would now suffice as consent to receive a robo-call on your cell phone under HR 3035. You’ve forgotten about this transaction but a few days later

¹ A copy of this letter may be found at:

<http://www.naca.net/sites/default/files/HR%203035%20opposition%20letter%2010-27-11.pdf>

while you are out at dinner with your family, you receive a call on your cellular telephone with a robotic voice at the other end, thanking you for your recent purchase and verifying the prescription you picked up is the one you actually wanted. You hang up the call. Two minutes later, from a different number, the same robotic voice is on the line. You hang up. Two minutes later, from a different number, the same robotic voice is on the line. Hang up. Two minutes later, same thing. Two minutes after that, same thing again.

This is the reality of thousands of Americans whose cell phone numbers have been entered into the smart dialer technology that knows when you are likely to answer the phone due to estimating when you are most available.² Harassing robo-calls on consumer cell phones will become the new norm if HR 3035 becomes law in its present form. In the wake of an unprecedented cycle of unaffordable debt triggered by predatory lending and the recession, consumers need increased protection not additional exposure to robo-calls and harassment from debt collectors. Consumers need protection from merchants bombarding their cellular telephones with auto dialed robotic telephone calls.

We respectfully suggest that the committee members be wary of the bill proponents' motives. Debt collection agencies, creditors, airlines and other businesses may already robodial any telephone number, including cellular phones, if the number was provided to them by the consumer. Robo-calling is also permitted in case of emergencies, such as hurricanes and other natural disasters. The proponents want to completely "gut" the TCPA by (1) stripping consumers of any choice as to what phone numbers companies with which they do business may contact them, (2) removing all prohibitions against using robocalls by redefining "automatic telephone dialing system" to include only antiquated technology that does not exist in the real world today (3) preventing consumers from enforcing demands that unwanted robo-calls stop, and (4) prevent state laws, and attorneys general, from further restricting and enforcing laws regarding these robotic calls. These changes are unnecessary, and are designed to permit these robotic voices to invade our lives, wherever we are, no matter how closely we guard our privacy.

The need to modernize the Telephone Consumer Protection Act has been greatly exaggerated; current law already addresses the concerns raised by the supporters of HR 3035. Thus, the primary points that I would like to make today are that HR 3035 is not necessary because:

1. The Telephone Consumer Protection Act already allows businesses to contact consumers for emergency purposes; and,

² For an example of a robo- debt collection call made to the wrong consumer on their cell phone in violation of the



REDACTED
Tape.mp3

TCPA see:

2. with consumer consent, companies can already contact consumers for any purpose and on any phone number provided by the consumer.
3. The modifications proposed under HR 3035 will only equip and benefit the debt collection industry, one of the most abusive and frequent violators of our consumer protection laws.

Cell phones and today's consumer.

Cellular telephones are uniquely personal devices. They permit others to reach us regardless of where we are, or what we are doing. Cell phones permit us to talk to our children, spouses and grandparents when we are running between meetings; they help us coordinate meetings and check our email. Some of us closely guard our cellular telephone numbers. We give our office or home phone number out to strangers, and keep our cellular number secret, so that only family and close acquaintances are allowed such intimate and immediate access. No phone number would be safe from these calls: creditors and debt collection agencies use sophisticated "skip trace" methodologies to obtain even those cellular telephone numbers that we save for those closest to us. Incessant, unwanted calls at inopportune times are stressful and infringe on our efficiency; a landline will never interrupt you during a job interview, at the theater, during an important presentation at work, or dinner at a restaurant. Robocalls do not know (or care) if they have reached the wrong person, and will continue to ring the phone numbers they are programmed to call until their owner tells them to stop. Under this new bill there is no incentive for owners to do so.

Not only is our time and solitude valuable, most of us pay for our cell phone usage. If we do not prepay at a rate of \$.10 - \$.15 per minute, our cell phone plans include a finite "bucket" of minutes that are depleted as we use airtime. Consumers in today's economy can hardly afford to waste valuable minutes on their cell phones to field robocalls and even text messages from the wave of different companies that will surely seize the opportunity to robocall consumers if HR 3035 is passed.

Given the personal nature of the cell phone and the rising prominence and use of smart phones, today's cell phone is no longer just a device for voice communication. Today's cell phones are highly complex mobile personal computing devices. Consumers use cellular service to: obtain email, search for jobs on the internet, watch movies, read books, play music, talk to business associates and family members, as stopwatches and calculators, to record meetings, take and edit photographs, engage in video conferencing, use Global Positioning Systems (GPS), watch television, even prevent crime with instant abilities to report suspicious activities to law enforcement personnel. The list of potential uses increases every day.

The cellular telephone provisions of the Telephone Consumer Protection Act, as it exists now, are designed to safeguard this personal use and solitude by prohibiting use of robotic automatic dialing equipment and voice messages to consensual and emergency calls. Appreciating the deeply personal nature of the cell phone and anticipating its growing importance in society, Congress specifically prohibited robo-calling on consumer cell phones;

*Delicia Reynolds Hand
National Association of Consumer Advocates*

the legislative history on this is clear, and the Congress' foresight in protecting these privacy rights should not be undone.

HR 3035 will effectively reward industries, like debt collectors, who frequently violate the Telephone Consumer Protection Act with more access to consumers, not less. In 2010, of all the consumer complaints received by the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC), consumer complained most about robocalls and abuses by debt collectors. In the context of highly sophisticated technologies which enable users to locate the exact location of cell phone users and monitor data usage and web browsing patterns, consumer privacy, time and well-guarded solitude are too valuable to allow *carte blanche* access to cell phones.

While it is true that cellular telephone use is expanding, the death of the landline is greatly exaggerated by the bill's proponents. 76.1% of homes still have land lines.³ In the United States, cellular service is still in its infancy compared to countries like Japan and the United Kingdom and it is simply untrue to state that people are not using land lines anymore. Under the current TCPA regulations, debt collectors may (and do) robo-call landline phones as much as they like. The truth is we cannot effectively imagine today how cellular service will be used tomorrow. Though we can certainly be sure cell phones will become even more important for consumers, given the present economic climate many Americans are frequently making choices about where and what to cut and expensive cellular telephone plans are often part of the calculus. Therefore we want to encourage cellular telephone use by allowing consumers full control over how and from whom they receive these calls.

The law currently permits emergency calls to cell phones and consumers can already consent to any other type of calls on their cell phones. HR 3035 is simply unnecessary and potentially harmful.

HR 3035 is unnecessary. It is already permissible to do mass robocalls to any telephone for emergency purposes, regardless of consent. And it is currently legal for businesses to robo-call consumers' landline phones regardless of consent, and to call consumers' cellular telephones if the consumer voluntarily provides that number to the business. There are no prohibitions in the TCPA against human beings calling another human being's cellular telephone. This means that robodialing is allowed when it matters most: when there is a natural disaster or other dire

³ See recent survey by the Centers for Disease Control and Prevention's National Center for Health Statistics. April 20, 2011.

emergency.⁴ And the law also currently permits debt collection calls, too: creditors and debt collectors may already robodial landlines and cellular telephones, as long as the consumer has provided his cellular number to that business. What the law does not currently permit, the FCC has the authority to do. Thus, if something is not currently deemed ‘time sensitive’ or ‘emergency purpose’, the FCC can easily rule to expand what is included as ‘time sensitive’ or ‘emergency purpose.’

Current law facilitates the delivery of time-sensitive information

The suggestion that this bill is necessary in order to facilitate delivery of time-sensitive information is disingenuous. The TCPA already permits use of robocalls to make emergency notifications. Thus, in the case of a true emergency, municipalities, grammar schools, universities, condominium homeowner associations, and anti-terrorism agencies may all permissibly use this powerful technology to call both cellular and landline phones under the “emergency purposes” exception.⁵ For example, in late August of 2011 as Hurricane Irene barreled directly towards the east coast of the United States, states and many local municipalities like Hartford County, Maryland were able to utilize smart dial technologies to notify residents of emergency preparedness measures through mass notifications systems. In a robo-call to local residents announcing the state of emergency, county Emergency Managers were able to provide timely and important information to local residents about emergency shelter and other important information.⁶ This technology is presently in use in many other states.⁷

Similarly, flight changes, notifications about data security breaches, debt collection and other types of calls – for any purpose whatsoever – are permitted under the “prior express consent” exception.⁸ Credit card providers, airlines, doctors, banks, and anyone else can, pursuant to existing law, use automatic telephone dialing systems to deliver prerecorded voice

⁴ The TCPA already explicitly allows emergency calls. Section 227(b)(1)(a) of the Telephone Consumer Protection Act provides:

b) Restrictions on use of automated telephone equipment.

(1) Prohibitions. It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States--

*(A) to make any call (**other than a call made for emergency purposes or made with the prior express consent of the called party**) using any automatic telephone dialing system or an artificial or prerecorded voice--*

⁵ 47 U.S.C. §227(b)(1)(A) making an exception for calls that were “made for emergency purposes..”

⁶ <http://www.daggerpress.com/2011/08/26/hartford-county-declares-state-of-emergency-as-hurricane-irene-looms-patterson-mill-middlehigh-school-to-open-as-shelter-saturday-at-noon/>

⁷ New York State - <http://www.capitalnewyork.com/article/culture/2011/09/3212810/no-seinfeldian-glee-temporary-storm-shelter-john-jay?page=all>; Connecticut - http://articles.courant.com/2011-09-03/news/hc-ed-disasters-congress-20110903_1_relief-funds-tropical-storm-irene-joplin-tornado;

⁸ 47 U.S.C. §227(b)(1)(A) excepting all calls made “made ... with the prior express consent of the called party...”

messages, if they have the consumer's prior express consent. My own financial institution, Wells Fargo Bank, for example, provides clear opportunities for me to enroll in various fraud notification services, as evidenced by its recent announcement.⁹ If I so consent, Wells Fargo will send me emails, text messages, and, yes, even autodialed phone calls. And, even though wading through the different robo-prompts can at times be trying, I have chosen to receive these notifications. The supporters of this bill want to deprive consumers of this choice; they want *carte blanche* to use this equipment to call anyone, for any reason, regardless of consent. Again, there are no prohibitions in the TCPA regarding calls dialed and attended by human beings.

Current law protects consumers because it allows consumers to expressly opt out of receiving information that they deem unnecessary to receive.

Proponents of the bill also suggest that the prior express consent requirement is unclear. This, again, is disingenuous, as evidenced by cross industry comments recently submitted to the FCC in response to a Notice of Proposed Rule Making on the Telephone Consumer Protection Act.¹⁰ The "prior express consent" exception in the TCPA permits consumers to make their own

⁹ https://www.wellsfargo.com/press/2011/20110208_FraudTips

¹⁰ **Comments of Wells Fargo in response to FCC's Notice of Proposed Rule Making on the Telephone Consumer Protection Act, CG Docket No. 02-278; FCC Number 10-18 (May 21, 2010, page 8-9)**

"Over the years since the TCPA was enacted, Wells Fargo has reduced the negative impact of the autodialer restriction by integrating compliance into our day-to-day business practices. For example, to comply with the existing prior express consent requirement, we have been guided by the FCC's consistent findings that: (1) prior express consent to receive an autodialed or prerecorded voice call at a cell number may be given either orally or in writing; and (2) a business may contact a customer at a cell number provided to that business by the customer. Accordingly, we have developed and use application forms that expressly include the customer's consent to be contacted using autodialers or other available technology at any numbers they have provided. Wells Fargo also uses calling scripts during our telephone conversations with prospective and existing customers that request the customers' consent to be called at contact numbers, including mobile numbers that the customers provide. This compliance effort has resulted in Wells Fargo obtaining the consent of many of its customers in accordance with the FCC's guidance over the past several years."

Reply Comments of Cross-Industry Groups - including the U.S. Chamber of Commerce - in response to FCC's Notice of Proposed Rule Making on the Telephone Consumer Protection Act, CG Docket No. 02-278; FCC Number 10-18 (June 21, 2010, page 3)

"Accordingly, the associations oppose extending the written consent requirement to autodialed or prerecorded calls to wireless services. The associations ask the Commission to reaffirm its position that "prior express consent" obtained orally or in writing is sufficient to make autodialed and/or prerecorded non-marketing calls to wireless services."

Comments of The Financial Services Roundtable, The American Bankers Association, and the Consumer Bankers Association, in response to FCC's Notice of Proposed Rule Making on the Telephone Consumer Protection Act, CG Docket No. 02-278; FCC Number 10-18 (May 21, 2010, page 13)

"In complying with the prior express consent requirement, in particular, financial institutions have been guided by the FCC's consistent findings that: (1) prior express consent to receive an autodialed or prerecorded voice call at a mobile number may be given orally or in writing; and (2) a business may contact a customer at a mobile telephone

*Delicia Reynolds Hand
National Association of Consumer Advocates*

determination as to what circumstances they wish to receive these intrusive phone calls on their cell phones and consumers may consent in writing or orally to receive a communication. If HR 3035 is enacted, consumers' ability to expressly consent would be taken away and the caller would unilaterally decide what qualifies as "emergency" or urgent or non-solicitous and will constantly barrage consumers with phone calls – even if the consumer has indicated that she does not want such calls and even if the consumer is charged for the calls.

The current state of the law also permits a consumer that is "fed up" with incessant calls to demand that the calls stop. HR 3035 removes this protection. Thus, if enacted, robocalls may permissibly continue, regardless of the instructions, and wishes, of consumers.

Furthermore, HR 3035 would reduce the express prior consent requirement to an implied consent by broadening the "prior business relationship exemption" to cellular telephones, which the current TCPA does not allow. Adding the exemption of "prior business relationship" would effectively gut the law. Businesses use sophisticated technologies such as customer databases, "skip trace" and caller identification technologies to harvest cellular telephone numbers. Under this bill, once there is any relationship at all between a consumer and a business, the business could call any cellular number, obtained from any source that it believes to be associated with a consumer, to call that consumer for any purpose. It would say, in effect, all cellular telephone numbers are available to be called without permission, and without limits.

If HR 3035 passes and consumer cell phones are flooded with robo-calls, consumers will stop answering their phones. Consumers will find ways to effectively evade these calls and important emergency notifications which can already be made will never be heard.

Consumers do not expect to be inundated with cellular telephone calls as they talk with friends, engage in meetings, attend movies, travel on public transportation, or engage in any the many day-to-day activities we have come to expect, simply because they made the mistake of innocently giving a business their cellular telephone number. If a consumer purchases an item at their local grocer, pharmacy or major retailer, and provides contact information at the point of purchase, this should not be used to manifest consent to receive robocalls from the merchant. It is absurd to think that any consumer would willingly hand over personal cell phone numbers with this expectation and when more consumers learn that Congress is considering a bill that will allow this, consumers will make their feelings known.

number provided to that business by the customer. Accordingly, some financial institutions have created and use application forms that ask customers to designate the numbers at which they wish to be contacted. Some financial institutions also use calling scripts in their telephone conversations with prospective and existing customers that are written to request and obtain contact numbers, including mobile numbers, at which the institutions may contact those customers. These compliance efforts have resulted in an "installed base" of millions of customer consents obtained in accordance with this Commission's guidance over nearly two decades of TCPA implementation orders. There is no evidence, in the record of proceedings before this Commission or elsewhere, that these practices have deceived or abused consumers in any way."

Proponents are right about one thing. This bill will impact airlines, utilities, pharmacies, and municipalities but it will do so in a negative way. Given the high interest in guarding one's privacy, solitude and time, if the cellular telephones don't stop ringing, consumers will respond. For those whose sanity isn't completely tested by these annoying calls, they will change their telephone numbers or stop answering. The result will be that the urgent, emergency information will get lost in the mix – all the entities here today that would desire to communicate with consumers about data security breaches, natural disasters, etc., will end up in the new cell-phone 'spam-box' to which no one pays attention.

Current law is sufficiently modern, flexible and put in place for reasons that still exist and must be preserved.

Congress first passed the Telephone Consumer Protection Act (TCPA) in 1991 in response to consumer concerns about the growing number of robocalls to their homes and the increasing use of automated and prerecorded messages. Even when cellular telephones were in their infancy, Congress had the foresight to understand the personal nature of this technology, and its incongruence with the impersonal nature of robocall technology.

Congress delegated rulemaking authority to the FCC in its 1991 bill – and the FCC has been busy. Over the past twenty years, the FCC has issued several substantial regulations interpreting the TCPA as to robocalls in 1992, 2003 and 2008. This was after significant public comment and research. These rules were designed to modernize the TCPA to maintain its prohibitions, regardless of Industry attempts to circumvent the law. The FCC has kept the TCPA modern, by ensuring that telephone systems that perform the function of making mass amounts of telephone calls remains regulated. Passage of this bill would redefine “automatic telephone dialing system” in an antiquated way, such that any prohibitions will be completely meaningless because almost no telephone equipment used currently randomly or sequentially picks telephone numbers to dial, and then dials those numbers.

In passing the TCPA in 1991, Congress recognized that technology would change. In 2008, for example, the Association of Credit and Collection Professionals, ACA International, petitioned the FCC to exempt them from the TCPA in placing autodialed and/or prerecorded messages to consumer's cellular telephones. The FCC issued a ruling¹¹ and provided creditors, banks, and debt collectors means in which to place these automated calls, through the requirement of “prior express consent.” This ruling demonstrates that the FCC has continually worked with stakeholders to ensure that the TCPA is sufficiently modern and permits broad access to consumers as long as the consumer expressly consents to receive a phone call.

¹¹ FCC January 2008 ruling – “No person or entity may initiate **any telephone call** (other than a call made for emergency purposes or made with the **prior express consent** of the called party) using an automatic telephone dialing system . . . (iii) to any telephone number assigned to a paging service, **cellular telephone service**, specialized mobile radio service, or other radio common carrier service, **or any service for which the called party is charged for the call.**” 47 CFR 64.1200(a)(1)

HR 3035 would overwhelm consumer cellular phone with debt collection calls, market research calls and surveys among other kinds of unwanted calls.

Tellingly, the proponents list purported companies that this would impact as, “airlines, pharmacies, utility companies, banks, insurance companies, cable operators, and car dealerships.” However, the proponents make no mention of the real beneficiaries of the bill which are creditors and debt collectors hoping to coerce payment by interrupting the peaceful tranquility consumers have come to expect. Industry literature and even the title of HB 3035 state that the purpose and intent of the bill is to “modernize” the TCPA to permit “informational” telephone calls, and to “improve communication” between creditors and consumers. However, nothing is farther from the truth. Intent is different from impact and, in effect, HR 3035 would legalize automated calls to cellular telephones for all kinds of business purposes, without the consumer having actually agreed.

The current rules are fair and balanced and do not need to be changed. They permit robocalls to people who have provided consent to receive such calls on their cell phone, and permit such calls to any number, regardless of consent, at any time where there is an emergency situation and information needs to be disseminated to a large number of persons extremely quickly. Many robodialers are capable of making more than ten calls per *second* – *this equals 600 calls per minute, 36,000 calls an hour, 864,000 within a 24 hour day*. Companies that want to access consumers, already have sufficient access.

Rather than providing information, the high number of calls will disrupt constituents’ daily business, negatively impact the positive affect cellular technology has on the stream of commerce, and invade the privacy rights of Americans, quite literally in every corner of the world. Across industries, a number of the industries supporting HR 3035 have acknowledged the negative impact of autodialer technology and have refined their business practices as a result.¹² Another aspect of the insidious nature of this impersonal technology is that robodialers do not

¹² **Comments of Wells Fargo in response to FCC’s Notice of Proposed Rule Making on the Telephone Consumer Protection Act, CG Docket No. 02-278; FCC Number 10-18 (May 21, 2010, page 8-9)**

“Over the years since the TCPA was enacted, Wells Fargo has reduced the negative impact of the autodialer restriction by integrating compliance into our day-to-day business practices. For example, to comply with the existing prior express consent requirement, we have been guided by the FCC’s consistent findings that: (1) prior express consent to receive an autodialed or prerecorded voice call at a cell number may be given either orally or in writing; and (2) a business may contact a customer at a cell number provided to that business by the customer. Accordingly, we have developed and use application forms that expressly include the customer’s consent to be contacted using autodialers or other available technology at any numbers they have provided. Wells Fargo also uses calling scripts during our telephone conversations with prospective and existing customers that request the customers’ consent to be called at contact numbers, including mobile numbers that the customers provide. This compliance effort has resulted in Wells Fargo obtaining the consent of many of its customers in accordance with the FCC’s guidance over the past several years.”

have human judgment, and cannot interact with call-recipients. Thus, for example, if the robocall is dialing the wrong number, there is no mechanism for the recipient to demand that the calls stop.

Similarly, robodialers can (and often do) leave literally hundreds of voice mail messages on cell phone voice mails for “Mary”, even though the consumer’s outbound voice mail greeting says “you have reached Joe.” These consumers are forced to pay for additional minutes to retrieve voice mails, and many cellular telephone companies do not allow consumers to delete messages until they have been played completely, wasting further minutes. None of these situations happen if it is a human being dialing and calling instead of a robot.

HR 3035 is an attempt by the debt collection industry to obtain further access to consumers without properly obtaining their consent and by changing the definition of auto-dialers to an outdated definition that is currently not in use.

Supporters of the bill testifying here today will suggest that the changes proposed in HR 3035 are necessary to facilitate the timely provision of important information to consumers. However, the real purpose of HR 3035 is to allow debt collectors to flood consumer cell phones with robo-calls without expressly obtaining their consent. If there is any doubt that this is the number one priority of the debt collection industry, it is helpful to reference the Association of Credit and Collection Professionals’ Spring 2011’s report ‘Five Essential Strategies to Move the Industry Forward’¹³ where increased access to consumers this so called “modernization” of the Telephone Consumer Protection Act ranked first amongst the ACA International’s priorities. While NACA agrees that consumers should timely pay the debts that they owe, consumers should not have to give up the right to consent to the means and mode by which they are contacted.

In 2006, the Association of Credit and Collection Professionals, now known as “ACA International,” a strong supporter of this bill, sought “clarification” as to whether debt collection calls were “covered” by the TCPA, and whether the newest generation of predictive dialers fell within the statute’s definition of “automatic telephone dialing system.” After extensive public comment and briefing, on January 4, 2008, the FCC ruled against the debt collection industry. It specifically found that robocalls to cellular telephones invaded the cell phone carriers’ privacy, and that industry should not be permitted to evade the TCPA’s prohibitions by coming up with new technology that operates as an automatic telephone dialing system, but does not “randomly” or “sequentially” generate numbers to be called.

HR 3035 was designed to override the FCC’s learned decisions and put an end to any consumer control over who calls their cellular telephone; any solitude that those who carry cellular telephones may have. It would permit any person with any relationship at all with a consumer to call any number they believe to be associated with that consumer, perpetuity, at

¹³ <http://www.acainternational.org/files.aspx?p=/images/18898/finalblueprint-designedversion.pdf>

times when they knew the consumer would be likely to answer. In redefining the definition of an Automated Telephone Dialing system to only include an autodialer, they have purposefully exempted the technology that is the industry standard and that is currently being used by every company, bank, collection agency in order to facilitate collections through the use of a “predictive dialer.” Changing the definition would effectively make the TCPA meaningless. The problem is not random dialing but databases of millions of telephone numbers repeatedly called by a computer without the permission of consumers.

Despite the fact that the collection industry was not able to persuade the FCC – the rulemaking body that knows the technological and privacy issues best – to permit them to use predictive dialers, most collection agencies, and many creditors have continued to use robocalls to dial cell phones, regardless of whether they had consent. As such the debt collection industry now seeks to obtain from Congress what they have failed to obtain from the FCC as the FCC has continually sought to protect and preserve consumers’ privacy and right to choose what calls they would like to receive.

Consumers, consumer advocates, civil rights organizations and privacy advocates urge Members of Congress to oppose HR 3035.

In conclusion I urge Members of this Committee not to open Pandora’s box. Do not allow this bill to pass. Current law allows the FCC to respond to legitimate needs of consumers and businesses and it is sufficiently modern. No bill is necessary. If HR 3035 should pass, Congress will essentially write businesses a blank check to call consumers on their cellular telephones with no prior express consent and place the burden of rectifying this lack of privacy on the consumers who are being called and not the companies who are in the best position to obtain the requisite consent. Thank you for the opportunity to testify today. If you have any questions or comments regarding this testimony, please feel free to contact me.

APPENDIX I – Consumer Coalition Opposition Letter

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.”¹⁴ 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.”¹⁵

¹⁴ 47 U.S.C. § 227 note.

¹⁵ Pub. L. No. 102-243, §§ 2(10-13), (Dec. 20, 1991), *codified at* 47 U.S.C. § 227.

*Delicia Reynolds Hand
National Association of Consumer Advocates*

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) 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 | National Association of Consumer Advocates |
| Center for Media and Democracy | National Consumer Law Center (on behalf of its low income clients) |
| Citizens for Civil Discourse (The National Political Do Not Contact Registry) | Privacy Activism |
| Consumer Action | Privacy Rights Now Coalition |
| Consumer Federation of America | Evan Hendricks, Publisher, Privacy Times |
| Consumer Watchdog | U.S. Public Interest Research Group |

cc: Members of the House Committee on Energy and Commerce

*Delicia Reynolds Hand
National Association of Consumer Advocates*