

Testimony of
Michael Altschul, General Counsel, CTIA – The Wireless Association®
before the House Subcommittee on Communications & Technology
regarding the Mobile Informational Call Act of 2011
November 4, 2011

Good morning Chairman Walden, Ranking Member Eshoo, and members of the Subcommittee. On behalf of CTIA – The Wireless Association®, thank you for the opportunity to participate in this morning’s hearing on the Mobile Informational Call Act.

CTIA was proud to support the original Telephone Consumer Protection Act, and we welcome the introduction of H.R. 3035 by Representatives Terry and Towns, as we believe it helps to illustrate just how profoundly the wireless industry has changed over the last twenty years. These changes have been momentous, as wireless has evolved from a niche voice service to the primary source of broadband communications for millions of Americans. The U.S. wireless industry now leads the world in delivering next generation wireless services, and America’s wireless consumers enjoy lower prices per minute of use than their counterparts in Europe, Canada, Japan, or South Korea. For purposes of today’s hearing, it is perhaps the first of these points, the adoption of wireless service as the primary source of communications for millions of Americans, and the changes that have flowed from innovative rate plans and the greater affordability of wireless service, that may justify a fresh look at the TCPA’s restrictions on the delivery of informational calls to mobile devices.

When the TCPA was enacted in late 1991, there were roughly seven million wireless subscribers in America, taking voice-only service from two “cellular” carriers in each market, and prices, on a per minute basis, were ten times higher than they are today.¹ In addition, because cellular calls originally were excluded from the prevailing system of intercarrier compensation, wireless customers were charged for all calls to and from their wireless phone. Almost twenty years

¹ The Federal Communications Commission’s 15th Annual Wireless Competition Report, at Table 20, shows that the average revenue per minute fell from approximately 44 cents per minute in 1993 to five cents per minute in 2009. This number continues to fall, as Bank of America Merrill Lynch recently published a figure of three cents as the average revenue per wireless minute in the US, down from their previously-published estimate of four cents as of year-end 2010. See Glen Campbell, Bank of America Merrill Lynch, 3Q Global Wireless Matrix, published September 28, 2011, at 2.

later, there are more than 300 million wireless subscribers, many of whom rely on their wireless phones not only for voice services but also for texting, Internet access, and an expanding range of wireless broadband services.

Because of the real reduction in the price of a wireless call, the popularity of rates plans that offer “buckets” of minutes and unlimited calling on nights and weekends, innovative devices and applications, and the added convenience that wireless offers to consumers who value personal and untethered communications, a substantial portion of the population has moved or is moving to “cut the cord” and rely completely on their wireless phones as their only means of communication. Recent data from the Centers for Disease Control finds more than one in four American households have gone wireless-only and in some locations these numbers are substantially higher. While the data suggests that “rural households appear to ascribe a higher economic valuation to wireless telephony,”² with the highest overall rates of wireless-substitution found in Arkansas, Mississippi, and Texas, three states that are significantly rural, the phenomenon is also true in many large urban centers such as Wayne County, Michigan and Dallas County, Texas, where wireless-only households now account for more than 40 percent of the population.³

This shift creates challenges for companies and government agencies that want to provide legitimate informational calls to individuals who are not reachable in any other way and who may value such calls to receive timely information such as notification about a data breach, fraud alert, change in flight time, or some other sort of time-sensitive account information. The TCPA’s disparate treatment of informational calls depending upon whether a company is calling a wireline or wireless phone number – something most entities will likely have no insight into –

² Jeffrey Macher and John Mayo, “Achieving Rural Universal Service in a Broadband Era: Emergent Evidence from the Evolution of Telephone Demand,” October 2011, at 6. See http://www.gcbpp.org/files/EPV/EPV_MayoMacher_RuralUniversal102011.pdf.

³ National Center for Health Statistics, Wireless Substitution: State-level Estimates from the National Health Interview Survey, January 2007-June 2010, at 9-10. See <http://www.cdc.gov/nchs/data/nhsr/nhsr039.pdf>.

is increasingly out of date given the shift in the way consumers think about their mobile devices.

Even consumer advocates acknowledge that some narrowly-crafted adjustments to the TCPA may be appropriate.⁴ I know you'll hear from others on the panel about these aspects of H.R. 3035 and thus I want to focus the balance of my testimony on a set of issues that may be unique to the wireless industry and which we urge you to consider as you contemplate modernizing the TCPA.

First, along with their customers, wireless carriers are victimized by violations of the TCPA by unscrupulous "boiler-room" operators seeking to sell extended car warranties and the like. In cases where they can locate and identify the source of these messages, wireless carriers have vigorously brought suit against the perpetrators, and the industry has cooperated with the Federal Trade Commission in its investigation and prosecution of TCPA cases. While wireless carriers are doing what they can to identify and shut down TCPA violations, the Federal Communications Commission catalogs consumers' TCPA reports as "wireless complaints."

At CTIA, we understand consumer annoyance over these calls and repeatedly have pledged to the Commission our full cooperation in efforts by the FCC and the Federal Trade Commission to bring enforcement action against these serial violators of the TCPA.⁵ However, we believe it is unfair to the industry for the Commission to continue to count these instances, which originate outside of the wireless network and have nothing to do with wireless carriers' behavior, as "wireless complaints." The FCC's refusal to properly characterize these consumer complaints significantly and misleadingly expands the apparent rate of consumer complaints about the

⁴ "Consumer Groups Attack Proposed Revisions to Telemarketing Rule," Communications Daily, November 1, 2011, at 4, quoting Consumers Union regulatory counsel Iona Rusu: "There may be some valid reasons to update the rules that protect consumers from unsolicited cell phone calls — safety recalls and data breach notices, for example."

⁵ See letters from Steve Largent to FCC Chairman Kevin Martin, July 18, 2008, letter from Steve Largent to Acting FCC Chairman Michael Copps, May 7, 2009, and CTIA statements available at <http://blog.ctia.org/2010/06/02/additional-thoughts-on-the-fccs-consumer-survey/> and <http://blog.ctia.org/2010/10/14/ctia-the-wireless-association%c2%ae-statement-on-the-fcc-meeting/>.

wireless industry. This is important since absent inclusion of TCPA-related complaints, the total number of complaints about wireless service received by the FCC have been declining since 2005, dropping roughly in half -- from 12/1000ths of one percent to slightly more than 6/1000ths of one percent of industry subscribership. CTIA urges the Subcommittee to use the Terry-Towns legislation or the opportunity presented by Chairman Walden's FCC process reform legislation to compel the FCC to disaggregate TCPA data from its quarterly and annual wireless complaint data.

Second, the Commission has an open proceeding (CG Docket No. 02-278) in which it has sought comment on proposed revisions to its TCPA rules for purposes of harmonizing those rules with the FTC's Telemarketing Sales Rule. CTIA filed comments in this proceeding that noted our concern that requiring parties to obtain the telephone subscribers' express written consent to receive autodialed or prerecorded calls, including consent to receive non-telemarketing calls, even in instances where there is an established billing relationship, could overturn Commission precedent permitting wireless carriers to send free-to-the-end-user autodialed calls or prerecorded messages to their customers without additional consent. Any such effort to restrict carriers' ability to contact their subscribers could imperil recent industry-driven efforts to deliver usage notification messages to consumers when they may be approaching plan thresholds that would otherwise result in overage or international roaming charges.

Third, industry efforts to protect consumer privacy and comply with the Mobile Marketing Association's Best Practices⁶ potentially conflict with obligations under the TCPA. In civil actions filed recently against Twitter, Facebook, Barclays Group, and American Express, trial lawyers have alleged that the act of sending a consumer a text message that simply confirms that a company received and processed that consumer's request to opt-out of a certain program or offering constitutes a violation of the TCPA. As with efforts to obtain express consent and protect user privacy through the use of double opt-in mechanisms, acknowledging receipt of a "STOP" message by sending the customer a text message is a reasonable business practice that

⁶ <http://www.mmaglobal.com/bestpractices.pdf>.

Altschul, November 4, 2011

provides consumers with confirmation that their request has been received, and those who employ it should not become targets for litigation. To the extent that there is an incongruity between the MMA guidelines and the TCPA, which was enacted before the availability of text-messaging services, we urge you to resolve it by clarifying the TCPA to protect consumers in a manner consistent with the MMA guidelines.

On behalf of CTIA, thank you for your consideration of these suggestions. We look forward to working with you to address these matters as the Subcommittee moves forward with its work on H.R. 3035.