



Written Testimony of
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Before the Senate Committee on Commerce, Science and Transportation

On
S. 1963, the "Wireless 411 Privacy Act"

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Chairman McCain, Ranking Member Hollings, and other distinguished members of this committee, thank you for the opportunity to submit this testimony. I am Susanna Montezemolo, Legislative Representative with Consumers Union,¹ the independent, non-profit publisher of *Consumer Reports* magazine. Consumers Union, through our publications and online service, has been active in educating consumers about how to protect their personal and financial privacy. Through our popular campaign, www.escapecellhell.org, Consumers Union has triggered over 15,000 grassroots activists to e-mail their Senators and Representative about the importance of protecting consumer privacy that could be jeopardized by a wireless 411 directory.

Since they came on the market some two decades ago, cell phones have become an incredibly convenient tool for consumers. Whether used for personal reasons or for business, the cell phone has obviously enabled consumers to become more mobile, which is important in today's fast-paced society. But consumers also view cell phones as more private than landline phones. Many consumers have come to expect that if their cell phone rings, the person on the other end will be someone to whom they personally gave out their phone number. Because most cell phone customers pay for their incoming calls, consumer control over their number should be viewed through the lens of both privacy and out-of-pocket costs.

We believe that legislation is necessary to ensure that the more than 168 million cell phone customers in the U.S. have control over how and when – or even if – their cell phone numbers are included in any directory of cell phone numbers. Given that the Cellular Telecommunications and Internet Association (CTIA) has announced that it will come out with such a directory by the end of this year or early next year, **Consumers Union believes it is imperative that Congress act now to codify privacy protections for cell phone consumers** so that all consumers, in particular those who wish to remain unlisted, will be protected. It is not adequate to merely rely on industry promises to protect privacy, since such voluntary protections could easily disappear in the future.

Consumers Union supports S. 1963, the “Wireless 411 Privacy Act,” because the provisions of the bill as filed are better for consumers than privacy protections based merely on industry promises. However, we believe that the legislation should be strengthened through an amendment to require that all customers affirmatively “opt-in” to the directory in writing. Consumers Union also strongly supports the prohibition on cell phone companies charging new fees to consumers who wish to remain unlisted and the prohibition on publishing a directory in electronic or paper form.²

¹ Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* and *Consumer Reports Online* (with approximately 5 million paid circulation) regularly carry articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions that affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

² Some have suggested a possible amendment to the legislation could be to eliminate the call forwarding provision. Consumers Union takes no position on the call forwarding provision of the legislation, except that if this provision is removed, it becomes even more important to ensure that both new and current customers have affirmatively opted into the directory and have easy mechanisms for withdrawing their consent, should they choose to do so. If the call forwarding model remains in the bill, there must be guarantees in law to ensure that the numbers are not revealed in any way, such as through billing practices.

Consumers Union is neutral with respect to the creation of a directory assistance (“411”) service for cell phone numbers. The directory could benefit some consumers, while harming others. For example, such a directory could be beneficial for consumers who use their cell phone as their primary phone and those whose business requires them to be constantly reachable, even when they are out of the office. Other consumers, however, such as those who give their cell phone numbers out selectively, could be harmed by such a system. As a result, we simply want to ensure that if a directory is created – and, at the moment, it certainly appears as if it will be – consumers’ privacy and financial interests are protected.

Support an Amendment to Require Opt-In for New Customers

As filed, the legislation creates a dual system of obtaining consumers’ permission to have their cell phone numbers listed in the directory. The legislation would require current cell phone customers to give prior authorization before their number is included in a directory. The Act would require cell phone companies and their agents to send a conspicuous, separate notice to current customers (as of the date of the directory launch) informing them of the right not to be listed in the directory. The service providers then would have to obtain express prior authorization, separate from other authorizations (such as those contained in cell phone contracts), before the consumer’s cell phone number could be listed in the directory.

New customers, however, would not receive such a high level of privacy protection. The bill would require that cell phone companies give consumers the opportunity to opt-out of inclusion in the directory; a customer who did not want to be included in the directory but did not expressly tell a cell phone company that this was the case would still be included in the directory. By putting consumers’ cell phone numbers into the directory by default, such an approach would jeopardize privacy and subject consumers to additional cell phone charges based on unwanted calls. The process of signing up for a cell phone calling plan is confusing and complex as it is; the customer is focused on finding the best rate – not protecting his or her privacy. Privacy rights of all customers, existing and new, are paramount and should be protected through a universal opt-in approach.

The dual approach – opt in for existing customers and opt-out for new customers – engenders several problems as well. First, existing cell phone users who choose to switch cell phone companies may assume that the opt-in provision, under which they were originally covered, applies to their new contract as well. These consumers would have previously received an opt-in notice from their existing cell phone carrier, and it would be reasonable for them to assume that the same would apply to a new cell phone company. This potentially could adversely affect the existing 168 million cell phone subscribers.

In addition, the definition of “new subscriber” leaves open to interpretation whether a renewing customer is a “new” customer. A renewing customer who has already declined to “opt-in” is not likely to understand that he or she must now “opt-out” to keep the number unlisted.

A simple fix to the problems associated with the dual opt out/opt in approach is to amend the bill to have an opt-in for new customers as well as existing ones. The opt-out process is unnecessarily subject to mistakes and misunderstandings that could result in loss of consumer privacy and consumer payment of additional cell phone charges. A consistent process of obtaining consumer consent would best ensure that the law will provide the consumer protection it intends. We urge you to support such an amendment.

Cell Phone Industry's Planned Directory Makes This Legislation Imperative

Today, most cell phone numbers are not listed in a directory.³ However, CTIA is planning to launch a 411 directory assistance database of cell phone numbers that would enable callers to dial cellular directory assistance for a fee. The directory is expected to generate as much as \$2 billion per year through directory assistance charges and additional usage minutes by 2008, according to one consultant.⁴

CTIA has said cell phone companies will obtain customers' permission for inclusion in the directory and promises to respect consumers' privacy.⁵ However, several carriers began getting this "permission" months ago by inserting language in wireless phone contracts allowing the carrier to include the cell phone number in a directory. When this practice became public, the industry responded with yet another promise—that it would give consumers a second chance to decline to opt-into a directory. Yet the industry has failed to provide details on how consumer consent would be implemented. Even Verizon Wireless, a company that has publicly opposed the directory, continues to include directory "opt-in" language in its Customer Agreement.⁶

The bottom line is that neither consumers nor Congress should rely on the shifting promises of the cell phone industry when it comes to guaranteeing important privacy and consumer rights. The "Wireless Privacy Act" enables the cell phone industry to move forward with the proposed directory, while ensuring consumers that their rights are protected in law and not subject to change at a moment's notice.

Consumers Want and Need Control of Their Cell Phone Numbers

The issue before the Committee is not whether to endorse a cell phone number directory; the directory will be created whether or not this legislation is adopted. Rather, the Committee must decide whether to guarantee in law that consumers will have clear, enforceable rights concerning whether their cell phone numbers are included in such a directory. The proposed directory has been in the news for months. While some consumers welcome a directory and others oppose it, there is overwhelming support for legislation that keeps the consumer in control.

As of last week, more than 15,000 consumers had visited Consumers Union's website, www.EscapeCellHell.org and sent a message to their congressional representatives in support of the "Wireless Privacy Act". This is one of Consumers Union's most successful campaigns yet, topping even the number of consumers who visited our site and wrote to Congress in support of cell phone number portability, another popular, pro-consumer issue. Survey data also point to consumer support for privacy protections; in a recent survey, only 11 percent of respondents would list their cell phone number absent privacy protections, while 52 percent would do so with privacy

³ Some consumers pay to have their cell phone numbers listed in traditional "White Pages" directories, and many businesses list cell numbers in the "Yellow Pages."

⁴ "Cellphone directory gets hoots, hollers," USA Today, July 28, 2004, p. 3B.

⁵ "Wireless Directory Assistance" (news release), CTIA, August 25, 2004, www.ctia.org/news_media.

⁶ www.verizonwireless.com; "Customer Agreement" accessed on September 7, 2004.

protections in place.⁷ Consumer support is also clear from the quick response of the California Legislature in adopting A.B. 1733, legislation that is similar in many respects to the “Wireless Privacy Act,” but goes beyond it in requiring an affirmative, written opt-in consent for both current and new customers.⁸ Indeed, we also recommend the Committee include a provision ensuring that where states have taken their own action, such as in California, the stronger state law will prevail over the federal law. The federal law should set a minimum standard for privacy protections that states can expand upon.

Consumers are concerned not only about the privacy effects of the proposed wireless 411 directory, but also about how the directory would affect their pocketbooks. Despite protections offered by the “Do-Not-Call” List and federal telemarketing laws, the new directory will subject consumers to other unwanted cell phone calls and text messages from people they would rather not hear from. Most cell phone plans charge consumers for incoming calls and text messages. The industry expects to reap billions of dollars in new revenue from consumers, including revenue based on additional usage charges. We want to make sure that consumers are willing to pay for the additional usage charges they will incur by taking calls from those who receive their number through the proposed directory. Many consumers may choose not to opt-in for financial reasons, even if privacy protections are upheld. Both reasons should be respected, and both would be protected under this legislation.

Conclusion

The “Wireless 411 Privacy Act” is a common-sense solution that allows the wireless industry to develop a new business while still respecting the privacy wireless consumers have expected for more than 20 years. It provides consumers a means to control their cell phone bills by remaining unlisted, thereby limiting exposure to uninvited calls. Our proposed amendment will reduce the potential for consumer confusion under a dual opt-in/opt-out approach. Finally, the legislation puts into law the promises made by cell phone carriers today.

Given that CTIA has said that it plans to have a directory in place by the end of this year or early next year, we believe that it is absolutely essential that Congress act on this legislation now. There are only a few more weeks left before this Congress adjourns. If Congress does pass this legislation now, CTIA may come out with the wireless directory before Congress is able to act, and consumers may be harmed. For example, by then, some consumers may already have lost the privacy they so cherish or incurred fees to ensure their privacy that they should not have to pay.

We urge your speedy adoption of the “Wireless 411 Privacy Act” with the amendment we proposed. Thank you again for providing us the opportunity to submit testimony.

⁷ “Up to 52% of U.S. Mobile Subscribers Will Opt-In to Wireless 411 Directory Today, with Privacy Protection, According to the Pierz Group,” PR Newswire, August 31, 2004. The full text of the survey has not been released, therefore we do not know which privacy protections respondents were asked about.

⁸ AB 1733, which is awaiting action by the governor, provides:

- Express written consent from a customer is required to list a cell phone number in the directory
- The consent form can’t be hidden as part of a cell phone contract
- Consumers who agree to have their number listed can change their mind at any time and revoke permission
- Cell phone companies aren’t allowed to charge consumers who want to remain unlisted