

March 15, 2023



Representative Jason Petrie
Chair, House Appropriations & Revenue
702 Capital Ave
Annex Room 392
Frankfort, KY 40601

Senator Christian McDaniel
Chair, Senate Appropriations & Revenue
702 Capital Ave
Annex Room 203
Frankfort, KY 40601

RE: HB 360 – Expanding the Definition of “telemarketing services”

Dear Chair Petrie and Chair McDaniel,

We would like to first thank you for your efforts to bring Kentuckians needed income tax relief and your previous work achieving that relief without harming advertising and marketing which benefits the Kentucky economy and creates jobs. However, while we understand and appreciate your intention may be to combat spam messages, we have strong concerns about proposed changes to be made to the definition of “telemarketing” in HB 360. As currently written, this sweeping legislation will pose an unintended threat to advertisers, businesses, and consumers. We ask that you remove references to “text messages” and “various forms of social media” from HB 360.

The bill’s expanded definition of “telemarketing services” would be a new tax on Main Street businesses particularly hurting small businesses and individuals. The bill’s proposed expansion of telemarketing services to cover text messages and social media is ambiguous. It could be read broadly to amount to a tax on virtually all advertisements from Kentucky businesses that generate a purchase. This result would impose significant and potentially enterprise-threatening challenges for Kentucky small businesses by diminishing their ability to make revenue. The bill’s expansion of telemarketing services would likely force small businesses to pull back on marketing and acquiring new customers making them less competitive in marketplace. For those small businesses able to market under this new tax, it would result in raised prices, at a time when inflation is already soaring, and effectively pass the tax along to Kentucky consumers in order to remain afloat. Kentucky should not enact a tax that targets the profits of its own small businesses at a time of significant economic uncertainty, and raise prices for Kentucky consumers.

HB 360’s expansion of the definition of “telemarketing services” to online advertising provided through “various forms of social media” reinstates most of the proposed imposition of tax on advertising services stricken from HB 8. Many of these communications contribute significantly to Kentucky’s economy, not to mention that of other states and the country as a whole. As you know, a comprehensive tax bill (HB 8) passed last year only after an amendment removed legislative language that Rep. Petrie described as subjecting “the entire category of advertising” to sales and use taxation.” He referenced competition problems that could arise between states if definitions relating to advertising services were not removed from that legislation.

Because a number of terms are not defined (“text messages,” “various forms of social media,” and “unsolicited” services or communications), the scope of the amended law is unclear, and businesses will be confused and uncertain about their tax responsibility. Specifically subjecting

text messages to the sales tax creates an implication that other messaging sources not based on wireless provider networks may not be covered; this is obviously unfair and creates unwarranted anti-competitive effects. Also, making this change would eliminate or reduce many common and convenient communication methods. For instance, many service-based businesses (doctor's offices or home repair technicians) use text messages to remind customers of appointments or to tell them the provider is en route; it is not clear from the bill whether these contacts would be considered "unsolicited" communications, but they surely "provide information or assistance" regarding the service and therefore appear to give rise to tax liability. The breadth of these changes will inevitably lead to reduced use, with stunning economic implications. Additionally, HB 360 also could have safety and security implications, as texting is often used to send "red flag" notifications to alert employees, parents or other individuals of safety hazards (school lock-downs, hazardous materials incidents). Since there is no exception for these uses, it seems they would be subject to sales taxes, threatening their continued use for salutary purposes.

Kentuckians would be confused and disadvantaged by these modifications. Consumers would almost certainly receive fewer promotional communications telling them about sales, on-site purchasing opportunities, coupons, information about products and services, etc., and repeated studies indicate that consumers value receiving such information. The proposed changes will impose undue logistical burdens and expense on providers, advertisers and consumers as a result of the extensive bookkeeping/tracking functions that will be required to comply with this new tax. The cost of doing business will rise, and consumers will suffer higher prices for products and services. Further, because additional charges will result from the amended law, the "free" or reduced-cost Internet that customers expect will be jeopardized, undermining data and information flow. In addition, non-profits would be harmed by this bill, as soliciting contributions via text message or social media would be subject to the sales tax.

As written, HB 360 runs counter to existing federal law. The Internet Tax Freedom Act (ITFA) prohibits states from imposing "discriminatory taxes on electronic commerce," and a tax is a "discriminatory tax" if it targets the Internet. HB 360's proposed tax on "telemarketing advertising" provided through "social media" on its face targets Internet advertising but would not apply to advertising in newspapers, magazines, television, radio, or billboards. Obviously, this is a classic example of a tax that discriminates against Internet advertising, rendering it barred by ITFA and not enforceable.

Finally, this tax could well encroach on free speech rights guaranteed by the First Amendment. Those attempting to provide products and services will encounter heightened costs and undue regulatory requirements, which will unreasonably limit (and in some cases could prevent) them from being able to communicate with consumers about their products and services. These are impermissible restrictions on commercial speech.

As you can see, there are many reasons to remove HB 360's expansion of "telemarketing services" in its present form. We encourage you to modify the bill to avoid costs and unnecessary burdens on both businesses and consumers, ensure the free flow of information desired by consumers, avoid conflicts with existing federal law, and ensure the free speech rights of advertisers and other businesses.

Thank you for your consideration of our views on this legislation.