



August 18, 2016

The Honorable Joyce Jay
Mayor
City of Wheat Ridge
7500 W 29th Ave.
1st Floor
Wheat Ridge, CO 80033

Dear Mayor Jay:

On behalf of CTIA, the trade association for the wireless communications industry, I write to outline the wireless industry's concerns with the application of the proposed Wheat Ridge secondhand dealers ordinance¹ to wireless providers and device manufacturers operating retail or agent locations in the city. Although we appreciate the need for the city to ensure that certain retailers are not trafficking in stolen merchandise, applying the proposed ordinance to wireless providers violates federal law and will have a negative impact on wireless provider and manufacturer take-back and recycling programs and the privacy of wireless customers in Wheat Ridge. It is important to note that when a wireless carrier takes-back a device for trade-in or recycling no cash – unlike in secondhand dealer and pawnbroker transactions - is provided for the device.

To mitigate any possible confusion on the part of local law enforcement, we respectfully request the following language be included in Article VII of Chapter 11, Section 11-170:

SECONDHAND DEALER: ... A SECONDHAND DEALER DOES NOT INCLUDE: ... PROVIDERS OF COMMERCIAL MOBILE SERVICES AS DEFINED IN 47 U.S.C. 332(D), AND SUCH PROVIDERS' AUTHORIZED AGENTS AND RETAILERS THAT HAVE CONTRACTUAL RELATIONSHIPS WITH THE PROVIDER TO SELL THE PROVIDERS' AUTHORIZED PRODUCTS AND SERVICES; OR ELECTRONIC DEVICE MANUFACTURERS.

¹ See Council Bill No. 14-2016 – Regarding Pawnbroker Requirements and Establishing Secondhand Dealer Requirements



It is important to note that similar language has recently been applied to other secondhand dealer ordinances in the U.S., including local ordinances in Colorado, Maryland, New York, and Pennsylvania, among others.

The wireless industry has worked collaboratively with federal, state, and local officials to help prevent smartphone thefts and to dry up the aftermarket for stolen phones. In 2015, the wireless industry met its “Smartphone Anti-Theft Voluntary Commitment” to provide anti-theft tools to consumers as smartphone manufacturers and operating system providers deployed these functionalities on new model smartphones.² The industry has also taken steps to combat smartphone theft through the use of a stolen phones database.³ In November 2013, the four national wireless providers completed a stolen phones database to report and track all lost and stolen 4G/LTE phones in the U.S. If a device has been reported lost or stolen, it will be denied service on provider networks. Through our efforts, the wireless industry remains steadfast in ensuring that wireless consumers and law enforcement have the tools to help deter smartphone theft.

A primary component of the wireless industry’s continued commitment to the environment is the education of consumers about the importance of recycling their devices and accessories. Responsibly trading-in or retiring wireless products has numerous benefits, such as consumers reclaiming the value of used devices, the industry reusing materials in the production of new devices, and helping preserve valuable natural resources.

As part of these efforts, wireless providers and manufacturers established take-back or trade-in programs. These programs have proven to be highly popular with consumers. When a consumer in the city trades-in a device to a

² See Smartphone Anti-Theft Voluntary Commitment, available at: <http://www.ctia.org/policy-initiatives/voluntary-guidelines/smartphone-anti-theft-voluntary-commitment> (last visited Aug 16, 2016).

³ See U.S. Wireless Industry Announces Steps to Help Deter Smartphone Thefts and Protect Consumer Data, available at: <http://www.ctia.org/resource-library/press-releases/archive/deter-smartphone-thefts-and-protect-consumer-data> (last visited Aug 16, 2016).



participating provider or its trade-in vendor, the provider and/or vendor checks the device's identifying information against the stolen phones database to ensure the device has not been reported lost or stolen. If the device has not been reported lost or stolen, the provider issues a noncash credit or a gift card that can be used by the consumer towards the purchase of another device or other products and services offered by the provider. No cash is provided as part of these programs. The provider will generally send the traded-in devices out-of-state to a third party for inspection, refurbishment, and repackaging. If a device no longer has value, it is disposed of in an environmentally responsible manner. In addition, older devices are accepted as part of these programs even though they may not be eligible for credit or a gift card.

Wireless provider and manufacturer trade-in programs are customer services that provide secure, trustworthy opportunities for consumers to recycle their devices or reclaim some value for their used devices. They are not programs that provide cash to consumers. Providers also have processes in place to identify stolen devices. Accordingly, the city's proposed secondhand dealers ordinance should not apply to wireless provider and manufacturer take-back programs. Such an application would negatively impact efforts to responsibly recycle and take-back used devices.

Application of Proposed Secondhand Dealers Ordinance to Wireless Providers would be Preempted by Federal Law

The city's proposed secondhand dealers ordinance requires dealers in secondhand goods to collect, among other things, the name, address, and driver's license number of the seller of the secondhand goods. That information must then be reported to the Wheat Ridge Police Department.

If the proposed secondhand dealers ordinance is applied to wireless providers, they would conflict directly with the federal Stored Communications Act (SCA). Congress enacted the SCA in 1986 as Title II of the Electronic Communications Privacy Act of 1986 (ECPA).⁴ Under the SCA, "a provider of ... electronic

⁴ Pub. L. No 99-508, 100 Stat. 1848 (1986).



communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service ... to any governmental entity," unless a statutory exception applies.⁵ Under the SCA, wireless providers may not disclose customer information, including information of trade-in customers, to the government, including local law enforcement in Wheat Ridge, absent legal process or satisfaction of an explicit exception. Consistent with the SCA's objective of protecting telephone service customers' privacy, the SCA specifically provides for limited exceptions. None of the exceptions enumerated by the SCA applies to the city's secondhand dealers ordinance.

Any law, including the city's proposed secondhand dealers ordinance, that reached telecommunications service providers would therefore violate the Supremacy Clause of the U.S. Constitution, be preempted by federal law, and be null and unenforceable.⁶ In fact, the First Circuit held in a decision published in May 2014 that "the SCA clearly prohibits communications providers from disclosing to the government basic subscriber information — including a customer's name, address, and telephone number — without a subpoena."⁷ In that case, the Commonwealth of Puerto Rico enacted a law requiring wireless providers to provide certain information about their customers to the Commonwealth without any legal process. Because this law required communications providers to disclose the names and other personal information of its customers "without a subpoena — or any process whatsoever — the two acts directly conflict." Ultimately, the First Circuit ruled that the Puerto Rico law was preempted under the Supremacy Clause and permanently enjoined its enforcement. This same reasoning applies with equal force here if the city's secondhand dealers ordinance is applied to wireless providers.

Any attempt to apply the city's secondhand dealers ordinance to wireless providers violates federal law. Therefore, we respectfully request the language

⁵ See 18 U.S.C. § 2702(a)(3),(c).

⁶ See *Telecommunications Regulatory Board of Puerto Rico v. CTIA – The Wireless Association*, No. 12-2427 (1st Cir. May 9, 2014).

⁷ *Id.*



provided in this letter be added to the proposed ordinance to ensure that it is clear the city's secondhand dealers ordinance does not apply to a wireless provider, a provider's authorized agents and retailers, and electronic device manufacturers.

Please do not hesitate to contact me at 202.736.3200 if you have questions or need more information. Thank you for your consideration.

Sincerely,

Gerard Keegan
Assistant Vice President
State Legislative Affairs

cc: Zachary Urban, City Council Member
Patrick Goff, City Manager
Gerald E. Dahl, City Attorney
Janelle Shaver, City Clerk