



## Statement of U.S. Chamber Institute for Legal Reform

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**BY: Scott Delacourt, Partner, Wiley Rein LLP**  
**On Behalf of the U.S. Chamber Institute for Legal Reform**

**ON: “Abusive Robocalls and How We Can Stop Them”**

**TO: U.S. Senate Committee on Commerce, Science, &  
Transportation**

**DATE: April 18, 2018**

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On Behalf of the U.S. Chamber Institute for Legal Reform**

**I. INTRODUCTION.**

Chairman Thune, Ranking Member Nelson, and members of the Committee. My name is Scott Delacourt. I am a Partner in the Telecommunications, Media, and Technology Practice at Wiley Rein LLP, and I am here on behalf of the U.S. Chamber Institute for Legal Reform (“ILR”). The U.S. Chamber is the world’s largest business federation, representing the interests of more than three million businesses of all sizes and sectors, as well as state and local chambers and industry associations. ILR is an affiliate of the U.S. Chamber that promotes civil justice reform through regulatory, legislative, judicial, and educational activities at the global, national, state, and local levels. Thank you for the opportunity to testify today about abusive robocalls, and why legitimate businesses trying to communicate with their customers, who are not making these types of calls, desperately need the Telephone Consumer Protection Act (“TCPA”) reformed.

I would like to make three points today:

- First, TCPA class-action litigation has harmed consumers and legitimate businesses while doing little to reduce illegal and abusive robocalling.
- Second, the D.C. Circuit’s recent decision vacating portions of the FCC’s *2015 Omnibus TCPA Order* presents a sensible roadmap for interpreting the TCPA in a way that provides clear guidance to consumers and businesses.
- Third, the FCC should follow the court’s guidance, clarify the TCPA’s requirements, and focus on bad actors.

Illegal and abusive robocalls continue to be a menace and a top complaint of consumers across the U.S. These calls originate with bad actors, and ILR does not condone the conduct. The ILR’s members—a broad cross-section of American business—share consumers’ concern. Customers are the life-blood of commerce, and successful businesses avoid practices that customers revile. U.S. businesses have no interest in engaging in abusive practices. Indeed, businesses fear the brand and customer relationship damage of being cast as an illegal and abusive robocaller.

On the other hand, ILR is concerned about businesses being able to communicate with their customers through the use of modern technology, in an efficient and cost-effective manner, while consumers desire and expect timely, contemporary communications from the companies with whom they choose to do business. Unfortunately, the TCPA has become an obstacle, preventing legitimate and lawful communications between businesses—large and small—and their customers and has placed businesses in the crosshairs of potential litigation each time they pick up the phone or send a text message.

The TCPA prohibits making phone calls to wireless telephone numbers “using any automatic telephone dialing system” (“ATDS”) without the prior express consent of the called party. The Act focuses on technology, not bad conduct such as harassment or fraud. Ambiguity over the technology used or what constitutes an ATDS has become a source of unnecessary and sometimes abusive class-action litigation, burdening how businesses reach their customers, while doing little to stop truly abusive robocalls. Indeed, the number of TCPA case filings exploded to 4,860 in 2016, and TCPA litigation grew 31.8% between 2015 and 2016. Much of this litigation targets legitimate companies – many of which are well-known brands – that have committed marginal or unavoidable violations, instead of the true bad actors: scam telemarketers, offshore operations, and fraudsters who operate through thinly-capitalized and disappearing shell companies. These latter activities are of little interest to class-action lawyers.

Abusive litigation targeting legitimate companies has devastating effects, as the TCPA’s uncapped statutory damages can lead to multi-million-dollar judgments. Often consumers do not even collect from the judgment funds established to remediate harm, making class-action lawyers the only winners.<sup>1</sup> Ironically, such

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<sup>1</sup> For example, one survey of federal TCPA settlements found that in 2014, the average attorneys’ fees awarded in TCPA class action settlements was \$2.4 million, while the average class member’s award in these same actions was \$4.12. Wells Fargo Ex Parte Notice, filed January 16, 2015, in CG Docket No. 02-278, p. 19, available at <http://apps.fcc.gov/ecfs/document/view?id=60001016697>. One of the most recent examples of the lucrative success that plaintiffs’ attorneys continue to achieve in TCPA class actions includes an award of \$15.26 million in fees. Plaintiffs’ counsel originally petition for an award in amount equal to one-third of the final common fund total. *Aranda et al. v. Caribbean Cruise Line, Inc. et al.*, No. 12-04069, 2017 U.S. Dist. LEXIS 52645 (N.D. Ill., April 6, 2017),

litigation ultimately hurts the consumers it is intended to protect as the costs are passed along in the form of increased prices for goods and services.

The Federal Communications Commission’s (“FCC”) implementation of the TCPA, to some degree, has contributed to this problem. In its 2015 *Omnibus Order*, the FCC expanded the types of devices that are considered ATDS to include equipment with computing capability or to which computing capability might be added—an expansive reading that potentially sweeps in everyday devices like smart phones and tablets, creating major uncertainty for businesses. Indeed, the FCC’s *Omnibus Order* contributed to a 46% increase in TCPA litigation.

The D.C. Circuit’s decision last month in *ACA Int’l v. FCC*, in which the U.S. Chamber was a petitioner, overturned certain key provisions of the FCC’s *Omnibus Order*, including the agency’s definition of an automated telephone dialing system (“ATDS”), which the court described as “utterly unreasonable.”<sup>2</sup> The decision includes a sensible roadmap for how the FCC might interpret the TCPA in a manner that is clear and understandable, significantly reducing frivolous class-action litigation. This decision provides an opportunity for the FCC to revisit and clarify its approach to the TCPA. Following the D.C. Circuit’s approach would provide guidance and clarity to businesses, and allow regulators, law enforcement, and courts to focus on the bad actors who are the source of the robocalling problem.

## **II. UNCERTAINTY REGARDING THE REQUIREMENTS OF THE TCPA HAS LED TO UNNECESSARY LITIGATION THAT DOES LITTLE TO DETER ROBOCALLS.**

Congress enacted the TCPA in 1991 to stop abusive cold-call telemarketing and fax-blast spamming.<sup>3</sup> In promulgating its initial rules implementing the Act, the Commission acknowledged the TCPA’s goal of “restrict[ing] the most abusive

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<sup>2</sup> *ACA Int’l v. FCC*, No. 15-1211, slip op. at ¶ 15 (D.C. Cir., Mar. 16, 2018).

<sup>3</sup> See S. Rep. 102-178 at 1-2 (1991) (stating that the purpose of the TCPA is to “plac[e] restrictions on unsolicited, automated telephone calls to the home” and noting complaints regarding telemarketing calls); H.R. Rep. No. 102-317 at 6-7 (1991) (citing telemarketing abuse as the primary motivator for legislative action leading to the TCPA). See also Comments of the U.S. Chamber and ILR, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 2-3 (filed Mar. 10, 2017).

telemarketing practices.”<sup>4</sup> The Supreme Court recognized that “Congress determined that federal legislation was needed because *telemarketers*, by operating interstate, were escaping state-law prohibitions on *intrusive nuisance calls*.”<sup>5</sup> Unfortunately, the Commission’s implementation of the Act over many years has fostered a whirlwind of litigation. Interpretations by courts and the FCC have strayed far from the statute’s text, Congressional intent, and common sense, turning the TCPA into a breeding ground for frivolous lawsuits brought by serial plaintiffs and their lawyers, who have made lucrative businesses out of targeting U.S. companies.<sup>6</sup> The number of TCPA

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<sup>4</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752, n.24 (Oct. 16, 1992) (“1992 Report and Order”).

<sup>5</sup> *Mims v. Arrow Financial Services, LLC*, 565 U.S. 368, 370 (2012) (also citing the Preamble of the TCPA) (emphasis added); see also *Emanuel v. Los Angeles Lakers, Inc.*, 2013 WL 1719035, at \*3 (“Courts “broadly recognize that not every text message or call constitutes an actionable offense; rather, the TCPA targets and seeks to prevent the proliferation of intrusive, nuisance calls.”) (internal quotations omitted).

<sup>6</sup> See Letter from ACA International et al to the Members of the U.S. House of Representatives, (Mar. 8, 2017), [http://www.instituteforlegalreform.com/uploads/sites/1/TCPA\\_Coalition\\_Letter\\_FICALA\\_to\\_House.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Coalition_Letter_FICALA_to_House.pdf). For examples, Craig Cunningham of Nashville, according to news reports, has filed approximately 83 TCPA lawsuits since 2014—including 19 in 2017. He has three cell phones he uses to compile TCPA claims. John O’Brien, *Phony Lawsuits: Man Has Filed 80 Lawsuits And Uses Sleuthing Skills To Track Down Defendants*, Forbes, Nov. 1, 2017, <https://www.forbes.com/sites/legalnewsline/2017/11/01/phoney-lawsuits-man-has-filed-80-lawsuits-and-uses-sleuthing-skills-to-track-down-defendants/#456cd2a76be7>; A U.S. Magistrate judge found Jan Konopca, a serial plaintiff who has filed 31 lawsuits in New Jersey federal court, was actively seeking the calls. Mr. Konopca earned approximately \$800,000 for his endeavors and has even claimed that he is no longer eligible for Social Security Disability benefits because of his TCPA litigation. John O’Brien, *Phony Lawsuits: Comcast Fighting For Access to ‘Professional’ Plaintiff’s Prior Testimony*, Forbes, May 31, 2017, <https://www.forbes.com/sites/legalnewsline/2017/05/31/phoney-lawsuits-comcast-fighting-for-access-to-professional-plaintiffs-prior-testimony/#18a02fba727c>; see also John O’Brien, *Phony Lawsuits: How a Polish immigrant apparently sued his way to \$800K*, Forbes, Mar. 15, 2017, <https://legalnewsline.com/stories/511092959-phoney-lawsuits-how-a-polish-immigrant-apparently-sued-his-way-to-800k>; Melody Stoops began her TCPA “business” by collecting at least 35 cellphones that she stored in a shoebox. Though she lived in a small town in Central Pennsylvania, she used Florida area codes when she registered for a new phone number for each. By admitting her scheme, Stoops lost her standing to sue, a Pennsylvania judge ruled in 2015. If the calls were the goal, then she experienced no harm when she received them, it was determined. John O’Brien, *Phony Lawsuits: A Federal Law is Giving Litigious People A New Income Stream*, Forbes, Mar. 14, 2017, <https://www.forbes.com/sites/legalnewsline/2017/03/14/phoney-lawsuits-a-federal-law-is-giving-litigious-people-a-new-income-stream/#6312998a68ee>; see also John O’Brien, *Phony Lawsuits: A ‘Most Profitable’ Scheme Has TCPA Plaintiff On Track For One Last Payday*, Forbes, Nov. 27, 2017,

case filings exploded to 4,860 in 2016, and TCPA litigation grew 31.8% between 2015 and 2016.<sup>7</sup> The focus of these lawsuits is often legitimate companies and well-known brands who have committed accidental or unavoidable violations. As then-Commissioner Ajit Pai highlighted, the Los Angeles Lakers were hit with a class-action lawsuit from fans who received text messages confirming receipt of fan-originated texts.<sup>8</sup> Similarly, a ride-sharing service was sued for texts confirming receipt of ride requests.<sup>9</sup> And Mammoth Mountain Ski Area was sued for calling a group of litigants who had previously provided consent.<sup>10</sup>

TCPA litigation has even gone so far as to subject nonprofit organizations to frivolous lawsuits. A blood bank, a state chapter of the Special Olympics, and the Breast Cancer Society have all faced TCPA suits.<sup>11</sup> Recently, the American Heart Association was handed a “victory” when a court in Louisiana found the plaintiff consented to the text messages she received and that the content of the messages was informational, not promotional.<sup>12</sup> As a result, the TCPA is forcing such organizations to utilize and waste precious staff and monetary resources to handle needless litigation rather than devoting those resources to life-saving research.

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<https://www.forbes.com/sites/legalnewsline/2017/11/27/phoney-lawsuits-a-most-probable-scheme-has-tcpa-plaintiff-on-track-for-one-last-payday/#7787c5823ba1>.

<sup>7</sup> See *2016 Year in Review: FDCA Down, FCRA & TCPA Up*, WebRecon LLC (2018), <https://webrecon.com/2016-year-in-reviewfdcpa-down-fcra-tcpa-up/>.

<sup>8</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 Declaratory Ruling and Order*, 30 FCC Rcd 7961, 8073 (2015) (“*Omnibus Order*”) (dissenting statement of Commissioner Ajit Pai).

<sup>9</sup> *Id.*

<sup>10</sup> *Scaling the 'Mountain' of TCPA Lawsuit Abuse*, U.S. Chamber Institute for Legal Reform (Apr. 8, 2015), <http://www.instituteforlegalreform.com/resource/scaling-the-mountain-of-tcpa-lawsuit-abuse> (explaining that the plaintiffs provided consent before a new FCC rule clarifying the prior express consent requirement took effect).

<sup>11</sup> See *Murphy v. DCI Biologicals Orlando, LLC, et. al*, 797 F.3d 1302, 1308 (11th Cir. 2015); see also *Wengel v. DialAmerica Marketing, Inc.*, 132 F.Supp.3d 910 (E.D. Mich. Sep. 22, 2015); see also *Spiegel v. Reynolds et al.*, No. 17-3344 (7th Cir. Nov. 14, 2017).

<sup>12</sup> *Reese v. Anthem Inc., et al.*, No. 2:17-cv-07940 (E.D. La Mar. 12, 2018).

Because the TCPA provides for uncapped statutory damages, defendants in these lawsuits face multi-million-dollar judgments.<sup>13</sup> Earlier this month, Outcome Health agreed to a \$2.9 million settlement to end a class-action lawsuit over daily automated nutrition tips it texted to recipients who had signed up to receive such information. In another case, Lake City Industrial Products, Inc., a small, family-owned company from Michigan, faced over \$5 million in statutory damages for faxes it sent believing they were legal.<sup>14</sup> Other well-known companies, like Capital One Bank, AT&T, MetLife, Papa John’s Pizza and Walgreen’s Pharmacy, have faced settlements of over ten million dollars, the largest of which was \$75 million.<sup>15</sup> TCPA lawsuits filed in the 17-month period after the 2015 FCC Omnibus Declaratory Ruling reached approximately 40 different industries.<sup>16</sup>

Compliance with the TCPA has been frustrated by uncertain and shifting standards as the FCC’s interpretations have evolved over decades, leaving a tangled web of obligations. Businesses making good-faith efforts to comply may nevertheless be subject to crippling litigation. Regulatory uncertainty and enormous settlements enriching class-action lawyers benefit neither consumers nor the economy. As FCC Commissioner Michael O’Rielly has observed, needless “enforcement actions or lawsuits” chill efforts by “good actors and innovators” to develop “new consumer-friendly communications services.”<sup>17</sup>

The FCC’s *Omnibus Order* added to the uncertainty. The TCPA prohibits making a call “using any automatic telephone dialing system” without the prior

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<sup>13</sup> See *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages*, U.S. Chamber Institute for Legal Reform at 12 (October 2013), [http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit\\_WEB.PDF](http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit_WEB.PDF) (“What is clear is that the TCPA’s uncapped statutory damages pose a real threat to large and small well-intentioned American companies who have potentially millions of customers and who often need to communicate with those consumers.”).

<sup>14</sup> *Id.* at 10.

<sup>15</sup> *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits*, U.S. Chamber Institute for Legal Reform at 10 (Aug. 2017), [http://www.instituteforlegalreform.com/uploads/sites/1/TCPA\\_Paper\\_Final.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf).

<sup>16</sup> *Id.* at 3. In total 3,121 cases were examined. Over 1,000 of those cases—more than one-third of the total lawsuits reviewed—were brought as nationwide class actions. *Id.*

<sup>17</sup> Commissioner O’Rielly, *TCPA: It is Time to Provide Clarity*, FCC Blog (Mar. 25, 2014, 2:10 PM), <https://www.fcc.gov/news-events/blog/2014/03/25/tcpa-it-time-provide-clarity>

express consent of the called party.<sup>18</sup> The Act defines “automatic telephone dialing system” as “equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers.”<sup>19</sup> Uncertainty over the meaning of “capacity” led the FCC to adopt an order construing the term. Rather than providing clarity, however, the FCC adopted a sweeping interpretation including devices that have both the present and *potential* capacity to store or produce telephone numbers to be called, while also including devices that can generate random or sequential numbers and those that cannot.<sup>20</sup> This baffling interpretation raised the prospect that everyday devices like smart phones and tablets could be ATDS subject to the TCPA’s prohibitions because of their potential capacity to store or produce telephone numbers to be called. This construction conflicted with the text, history, and purpose of the TCPA, and contributed to a 46% increase in TCPA litigation, with class actions comprising approximately one-third of those filings.<sup>21</sup>

### **III. THE D.C. CIRCUIT VACATED THE FCC’S OMNIBUS ORDER AND PROVIDED A SENSIBLE ROADMAP FOR MOVING FORWARD.**

Numerous petitioners, including the U.S. Chamber of Commerce, sought judicial review of the *Omnibus Order*’s unjustifiable expansion of the TCPA, arguing that the regime was unreasonable, impractical, and inconsistent with the statute’s text. The D.C. Circuit largely agreed and vacated portions of the *Omnibus Order* in *ACA Int’l v. FCC*. Significantly, the court unanimously set aside the Commission’s interpretation of ATDS, holding that the interpretation of capacity was “utterly unreasonable,”<sup>22</sup> “incompatible with” the statute’s goals, and “impermissibly” expansive.<sup>23</sup> The interpretation was so unreasonable, it was “considerably beyond the agency’s zone of delegated authority.”<sup>24</sup> The court also found unanimously that the

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<sup>18</sup> 47 U.S.C. § 227(b)(1)(A).

<sup>19</sup> *Id.* § 227(a)(1)(A)-(B).

<sup>20</sup> *Omnibus Order*, ¶¶ 10-15.

<sup>21</sup> *See TCPA Litigation Sprawl* at 2, 4.

<sup>22</sup> *ACA Int’l v. FCC*, No. 15-1211, slip op. at 19 (D.C. Cir., Mar. 16, 2018).

<sup>23</sup> Slip op. at 23.

<sup>24</sup> Slip op. at 19.

Commission had offered an inconsistent and “inadequa[te]” explanation of what features constitute an [ATDS],<sup>25</sup> “fall[ing] short of reasoned decision making.”<sup>26</sup>

The opinion also provided a roadmap for how the FCC should proceed. The court pointed to the interpretation of “make any call . . . using” offered by Commissioner Michael O’Rielly in his *Omnibus Order* dissent, which would require that dialing equipment “*be used as an [ATDS]* to make the calls.”<sup>27</sup> In other words, the calling equipment must actually use ATDS capabilities to make the call. Although the court did not explicitly endorse this approach, as the issue was not raised in the appeal, it noted that this construction would “substantially diminish the practical significance of the Commission’s expansive understanding of ‘capacity’ in the [ATDS] definition.”<sup>28</sup> This is a significant signal to the FCC and the courts about the best reading of the TCPA.

#### **IV. THE FCC SHOULD ADOPT A NEW APPROACH TO THE TCPA THAT PROTECTS LEGITIMATE BUSINESS CALLS AND FOCUSES ON BAD ACTORS.**

The D.C. Circuit’s decision provides an opportunity for the FCC to rethink its approach to the TCPA. Confusing regulations and interpretations of the statutory text have contributed to a rise in TCPA litigation while doing little to reduce illegal and abusive robocalling. At the same time, increased liability exposure and compliance costs have deterred businesses from reaching out to their customers. A renewed focus on the TCPA’s statutory text offers a path forward to better protect consumers *and* businesses that operate in good faith.

Adopting the D.C. Circuit’s suggested approach on what constitutes an ATDS would realign the interpretation of the TCPA to its text and purpose. This straightforward reading will ensure that liability attaches only when ATDS capabilities are used to make a call, rather than sweeping in calls made using smartphones, tablets, and other devices that conceivably *could* be modified to support autodialing at some point in the future. Significantly, it would provide businesses with clear guidance on the type of equipment they can use to contact their customers. A device’s theoretical or potential capabilities would not be relevant to determining whether it is an ATDS. Instead, the inquiry should focus only on the functions used to make the call or calls in question. This clarification will help businesses avoid unnecessary litigation over

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<sup>25</sup> Slip op. at 29.

<sup>26</sup> Slip op. at 25.

<sup>27</sup> *Omnibus Order* (statement of Commissioner O’Rielly) (emphasis in original).

<sup>28</sup> Slip op. at 30.

whether they used an ATDS and help consumers differentiate whether they are targets of an illegal robocall campaign or receiving a routine business communication. Reducing the amount of TCPA litigation will also free up resources to focus on the actual bad actors who are the source of abusive robocalls. With fewer complaints, enforcement resources will not be wasted on investigating legitimate business communications and can be used to find and punish illegal robocallers.

The TCPA was never intended to make all mass calling illegal. The legislative history reflects that the Act was intended to achieve a balance between the need for legitimate businesses to lawfully communicate with their customers and protecting consumers from certain abusive uses of the telephone system. There are bad actors who abuse the openness of our communications infrastructure, including through Caller ID spoofing and other illegal activities. The TCPA sought to prevent the use of specific equipment to engage in illegal and abusive conduct—random or sequential cold calling that tied up telephone networks, including emergency lines, and harassed consumers. The construction of ATDS suggested by the D.C. Circuit and supported by this testimony would categorically prohibit those abuses. At the same time, it would provide clear guidance to businesses on how they may lawfully communicate with their customers.

The fact that the D.C. Circuit's preferred definition of ATDS does not cover as much equipment as the definition the court struck down in no way means that consumers are unprotected, or even less protected. The TCPA contains within itself the means of protection: the Do Not Call list. Any consumer lawfully contacted by a business using equipment that is not an ATDS and who does not desire to be called may ask the caller to be placed on the caller's company-specific Do Not Call list. Those consumers who proactively decide they do not want to receive calls—whether from an ATDS or not—may subscribe to the National Do Not Call List. Tens of millions of Americans already have.

## **V. CONCLUSION AND RECOMMENDATIONS.**

As Congress and the FCC look for ways to reduce abusive robocalls, reforming the TCPA is an important step. Reducing the amount of unnecessary litigation plaguing legitimate businesses will shift the focus of enforcement to the actual bad actors who are the root cause of illegal robocalls. In this regard, ILR commends the FCC for taking action to give telephone companies the authority to use innovative solutions to block illegal robocalls. The D.C. Circuit has provided both an opportunity and a roadmap to further the FCC's work of focusing resources at the root of the robocalling problem. Following that guidance will help businesses avoid burdensome litigation, restore the TCPA to its original purpose, and redirect resources and attention towards reducing abusive robocalls.

As previously proposed by ILR, the following updates to the TCPA should be taken under consideration.

Statute of Limitations: The TCPA contains no statute of limitations, and so has fallen into the four-year default, which makes no sense for calls/faxes that are supposedly invasions of privacy that the consumer knows about at the moment they are placed. Class actions reach staggering amounts of damages because class plaintiffs seek four years' worth of calling data and liability. The TCPA's time to bring suit should be reasonably limited, as is the case with the other federal statutes providing private rights of action for statutory damages.<sup>29</sup>

Capping Statutory Damages and Adding Provisions for Reasonable Attorneys' Fees: Similar to every other federal statute providing statutory damages and a private right of action to consumers to seek those damages, the TCPA should have a cap on the amount of individual and class action damages that can be sought.<sup>30</sup> There is no better way to curb litigation abuse, bring the TCPA in line with its sister statutes, and avoid unconstitutional and excessive fines for technical violations causing no actual harm.

Affirmative Defenses: As businesses are targeted for calls under Section 227(b), as well as for the 227(c) calls that Congress knew could be made in error by a business acting in good faith to follow the appropriate policies and procedures, the affirmative defenses available in Section 227(c) should also be imported into Section 227(b) to provide protection to businesses working in good faith to comply with the TCPA.

Capacity: The "capacity" of an ATDS should be interpreted for past calls as written in the text of the statute, meaning only those devices that have the actual ability to randomly/sequentially dial telephone calls would be actionable. And if Congress wishes to limit some other sort of calling technologies or text messages, new and more precise language should be drafted, vetted, and implemented after a notice period to companies so that they can comply with statutory requirements.

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<sup>29</sup> See, e.g., Electronic Funds Transfer Act (15 U.S.C. § 1693), Section 1693(m) (statute of limitations - 1 year); Fair Debt Collection Practices Act (15 U.S.C. §1692), Section 1692(k) (statute of limitations -- 1 year).

<sup>30</sup> See, e.g., Electronic Funds Transfer Act (15 U.S.C. § 1693), Section 1693(m); Fair Debt Collection Practices Act (15 U.S.C. §1692), Section 1692(k); Truth in Lending Act (15 U.S.C. § 1631 et. al), Section 1640; Fair Credit Reporting Act (15 U.S.C. § 1681 et. al.), Section 1681(o). (Several of these statutes also permit defendants to recover costs/fees when actions are shown to have been brought in bad faith.)

Reassigned or Wrongly-Provided Number: Businesses should not be punished via TCPA lawsuits when they, in good faith, call a customer-provided phone number that now belongs to a new party unless and until the recipient informs the caller that the number is wrong and the business has a reasonable time to implement that change in its records. (If, after that notice and reasonable time the company continues to call, then lack of prior consent would be established for future calls.)

Vicarious Liability: The FCC has interpreted the TCPA to allow “on behalf of” liability for prerecorded/autodialed calls, something not specifically provided for in the statute. Among other things, the TCPA should be revised to define any such vicarious liability so that it would exist only against the appropriate entities—those persons who place the calls, or who retain a telemarketer to place calls, or who authorize an agent to place calls on their behalf.

Bad Actors: The TCPA should be reformed to focus on the actual bad actors (i.e., fraudulent calls from “Rachel from Cardmember Services,” with spoofed numbers in Caller ID fields to hide the identity of caller), instead of companies trying to contact their consumers for a legitimate business purposes.

Address New Technologies, Such As Text Messaging: A text message is not the same as a call, and courts are wrong in treating them equally. Should Congress wish to set rules on text messaging within the TCPA, it should do so through the regular channels of drafting, vetting, and implementing new statutory language.

Revocation: If a consumer that has provided a telephone number to a company no longer wishes to receive communications at that number, there should be a set process (as in the Fair Debt Collection Practices Act) on how the business should be told of the revocation, and a reasonable time for the company to implement that change.

The changes discussed above—which would help to protect American companies from expensive and damaging litigation abuse—would not risk any of these repercussions. Thus, we urge this Committee to revisit the TCPA to bring this 20<sup>th</sup> Century statute in line with 21<sup>st</sup> Century challenges. Twenty-five years have passed, and it is evident that the TCPA has had a negative impact on businesses that Congress never intended when first enacting this law in 1991. We appreciate the Committee’s calling of today’s hearing and stand ready to work with you on this important issue.

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Thank you for the opportunity to testify. I look forward to answering your questions.