

September 21, 2016

The Honorable Greg Walden, Chairman
The Honorable Anna Eshoo, Ranking Member
U.S. House of Representatives Committee on Energy and Commerce
Subcommittee on Communications and Technology
2125 Rayburn House Office Building
Washington, DC 20515

RE: Hearing on “Modernizing the Telephone Consumer Protection Act”

Dear Chairman Walden and Ranking Member Eshoo:

We write to you regarding the upcoming hearing on “Modernizing the Telephone Consumer Protection Act.”

The Electronic Privacy Information Center (“EPIC”) is a public interest research center established more than 20 years ago to focus public attention on emerging privacy and civil liberties issues. EPIC played a leading role in the creation of the TCPA and continues to defend the Act,¹ one of the most important privacy laws in the United States.² We have provided numerous comments to both the Federal Communications Commission (“FCC”) and the Federal Trade Commission (“FTC”), and maintain online resources for consumers who seek to protect their rights under the TCPA.³ Nonetheless, we recognize the significant changes in technology and business practices over the past 25 years and agree with the Chairman and others that the TCPA needs to be updated for the 21st century. We offer these initial thoughts on how that can best be accomplished in a way that fulfills the purpose of the Act and continues to protect consumer privacy. We would be pleased to provide the Subcommittee with more detailed suggestions.

¹ See, e.g., Telephone Advertising and Consumer Rights Act, H.R. 1304, Before the Subcomm. on Telecomms. And Fin. of the H. Comm. on Energy and Commerce, 102d Cong., 1st Sess. 43 (April 24, 1991) (testimony of CPSR Washington Office director Marc Rotenberg), <https://www.c-span.org/video/?18726-1/telephone-solicitation>; Brief of *Amici Curiae* Electronic Privacy Information Center (EPIC) and Six Consumer Privacy Organizations in Support of Respondents, *ACA Int’l v. FCC*, No. 15-1211 (D.C. Cir. Jan. 22, 2016), <https://epic.org/amicus/acaintl/EPIC-Amicus.pdf>; National Consumer Law Center et al., Petition for Reconsideration of Declaratory Ruling and Request for Stay Pending Reconsideration In the Matter of Broadnet Teleservices LLC Petition for Declaratory Ruling, CG Docket No. 02-278 (2016).

² Justice Brandeis described privacy as “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.” *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

³ See, e.g., EPIC, EPIC Administrative Procedure Act (APA) Comments, <https://epic.org/apa/comments/>; EPIC, Telemarketing and the Telephone Consumer Protection Act (TCPA), <https://epic.org/privacy/telemarketing/>.

The TCPA

In the late 1980s, the United States faced a growing problem: American consumers were inundated with unwanted telephone calls and junk faxes, imposing costs and causing a substantial nuisance and invasion of privacy. Calls from telemarketers arrived at the home as families were sitting down for dinner. Rolls of fax paper were printing out ads for pizza delivery and home loans that the fax owner had no interest in receiving. With autodialers and robotic messages, telemarketers were interrupting millions of Americans each day with unsolicited messages. After several hearings, Congress concluded that the “only effective means of protecting telephone consumers from this nuisance and privacy invasion” was to bar most automated or prerecorded telephone communications unless “the receiving party consents to receiving the call” or there is some emergency circumstance.⁴ The Act also provided for the creation of what would become the National Do Not Call Registry.⁵

Although it took many years to fully implement the Do Not Call Registry mandated by the TCPA, the law has been an enormous success. By at least one measure, the TCPA is one of the most popular laws ever enacted by Congress. As of September 30, 2015, the Do Not Call Registry contained 222 million active numbers—more than the number of people who voted in the 2008 Presidential election for all the candidates combined.⁶ The popularity is due in large part to the Registry’s opt-out mechanism, which permits consumers to exercise their rights in a clear, stable and legally enforceable manner. Other attempts at opt-out, such as the Do Not Track experiment or self-regulation, have failed where the Do Not Call Registry succeeded.⁷

Despite the success of the TCPA, consumers continue to be plagued by unwanted robocalls and text messages. The transition from land lines to mobile phones⁸ has only made the problem worse. Unsolicited calls and texts facilitate fraud, drain battery life, eat into data plans and phone memory space, and demand attention when the user would rather not be interrupted. For low-income consumers who often rely on pay-as-you-go, limited-minute prepaid wireless

⁴ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(12), 105 Stat. 2394, 2394 (codified at 47 U.S.C. § 227).

⁵ See *id.* § 3(a) (codified at 47 U.S.C. § 227(c)(3)); Do-Not-Call Implementation Act, Pub. L. 108-10, 117 Stat. 57 (codified at 15 U.S.C. §§ 6151–6155).

⁶ See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES t.406 (2012), <http://www.census.gov/library/publications/2011/compendia/statab/131ed/elections.html> (reporting that 131 million total votes in the 2008 election).

⁷ See “Do Not Track Legislation: Is Now the Right Time?”, Before the Subcomm. on Telecomms. And Fin. of the H. Comm. on Energy and Commerce, 111th Cong., 2nd Sess. 1–3 (Dec. 2, 2010) (testimony of EPIC Executive Director Marc Rotenberg), https://epic.org/privacy/consumer/EPIC_Do_Not_Track_Statement_120910.pdf (Discussing the history of the TCPA and the eventual success of the Do Not Call Registry).

⁸ More than 92% of American adults own at least one cell phone and 79% own smartphones. Monica Anderson, *Technology Device Ownership: 2015*, Pew Research Ctr. (Oct. 29, 2015) <http://www.pewinternet.org/2015/10/29/technology-device-ownership-2015/>; *comScore Reports November 2015 U.S. Smartphone Subscriber Market Share*, comScore (Jan. 7, 2016) (reporting 92% cell phone ownership), <https://www.comscore.com/Insights/Market-Rankings/comScore-Reports-November-2015-US-Smartphone-Subscriber-Market-Share> (reporting 79% smartphone share). Nearly half of American households do not have a land line. Stephen J. Blumberg & Julian V. Luke, Ctrs. for Disease Control & Prevention, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January–June 2015*, at 5 (Dec. 1, 2015), <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201512.pdf>.

plans,⁹ these unwanted calls and texts are particularly harmful. Because we carry our phones with us everywhere,¹⁰ unwanted calls and texts interrupt sleep, disturb meetings and meals, and disrupt concentration wherever we go. We no longer have to eat at home to be interrupted by an unwanted telemarketing call at dinner.

Preserving the Protections of the TCPA

EPIC agrees with the Subcommittee on the need to update the TCPA for the 21st century. But the updates must ensure that the original goals of the legislation continue to be served. Central to the TCPA are the following: (1) consumers should be free of unwanted commercial intrusions into their private lives; (2) commercial firms must bear the burden for the communications they initiate, not impose costs on consumers to protect their privacy; and (3) legal rights should be robust, enforceable and minimally burdensome for consumers.

EPIC supports preserving a private right of action in the TCPA. Although we acknowledge that class actions settlements often fail to provide benefits to the consumers on whose behalf these cases are brought,¹¹ TCPA cases are among the most effective privacy class actions because they typically require companies to change their business practices to comply with the law.

The Subcommittee notes the fact that FCC enforcement actions have sharply decreased in recent years. This trend further highlights the importance and efficiency of the TCPA's private enforcement action. Because consumers are able to use private actions to enforce their own rights under the Act, fewer government resources are needed for administrative enforcement.

Improving the TCPA

EPIC agrees that some of the text of the TCPA should be reconsidered. Provisions regarding fax machines, for example, target a specific technology that is much less commonly used today than it was in 1991. The TCPA's focus on specific technologies also leaves holes in its coverage that will only widen over time. The solution is to ensure that the TCPA is a technology-neutral law that protects consumers from unwanted incoming commercial communications, the central purpose of the Act.

A technology-neutral regulatory framework would permit, for example, extending TCPA coverage to include commercial communications through messaging apps. Many smartphone users today are as dependent on Skype, WhatsApp, Snapchat, Allo, and other messaging apps as consumers 25 years ago were dependent on phone networks. Absent technology-neutral regulation, unwanted commercial solicitations will follow consumers to these apps. Marketing

⁹ Federal Communications Commission, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Eighteenth Report, WT Docket No. 15-125, ¶¶ 44, 73, 95-96 (Dec. 23, 2015).

¹⁰ More than 70% of smartphone users keep their phones within five feet a majority of the time. Harris Interactive, 2013 Mobile Consumer Habits Study (June 2013), <http://pages.jumio.com/rs/jumio/images/Jumio%20-%20Mobile%20Consumer%20Habits%20Study-2.pdf>.

¹¹ See Marc Rotenberg & David Jacobs, *Enforcing Privacy Rights: Class Action Litigation and the Challenge of cy pres*, in ENFORCING PRIVACY: REGULATORY, LEGAL AND TECHNOLOGICAL APPROACHES 307, 317-23 (David Wright & Paul De Hert, eds., 2016).

companies are already looking at the popular WhatsApp service for commercial solicitations.¹² WhatsApp, which had promised its users that it would avoid commercial texting, recently announced plans to allow businesses to send marketing messages to users via the app.¹³ Extending TCPA coverage to include these apps would extend the protections of the TCPA to new communications services.

An updated TCPA should also require that any automated calls reveal (1) the actual identity of the caller and (2) the purpose of the call. Digital networks now make it easier for commercial firms to make known the source and purpose of the call, and this information can then help consumers determine how best to prioritize incoming messages. It is also possible that Congress could resolve the emerging use of emergency texts through appropriate updates to the TCPA.

Some smartphones allow consumers to block certain phone numbers, but carriers and app developers are in the best position to block unwanted commercial messages at the source. Consumers should be able to block incoming numbers without paying an additional fee to carriers or apps.

The TCPA is in need of updating. Those updates should strengthen its protections for consumer privacy. We look forward to working with you to develop rules to provide meaningful and much-needed protections for consumer privacy.

Sincerely,

Marc Rotenberg
EPIC President

Claire Gartland
Director, EPIC Consumer Privacy Project

James Graves
EPIC Law and Technology Fellow

cc: The Honorable Fred Upton, Chairman, House Energy and Commerce Committee
The Honorable Frank Pallone, Jr., Ranking Member, House Energy and Commerce Committee

¹² Gulveen Aulakh, *Telemarketers Take WhatsApp Route for Bulk SMSes*, ECONOMIC TIMES, May 24, 2014, http://articles.economictimes.indiatimes.com/2014-05-24/news/50070188_1_chief-executive-jan-koum-whatsapp-users-messages.

¹³ WhatsApp Blog, *Looking Ahead for WhatsApp* (Aug. 25, 2016), <https://blog.whatsapp.com/10000627/Looking-ahead-for-WhatsApp>.