Additional Questions for the Record
Modernizing the Telephone Consumer Protection Act
September 22, 2016

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The Honorable Greg Walden

1. *The FCC's July 2015 TCPA Declaratory Ruling and Order contains a provision allowing one call to a phone number where the caller believes they have consent, when the number may have been reassigned to someone who had not given previous consent. However, this "safe-harbor" has been questioned as the recipient isn't required to inform the caller of the reassigned number or even answer the call for the rule to take effect. Has the FCC's safe-harbor provision been helpful to your business operations?*

   The "one-call" safe-harbor provision is appreciated, but bewildering and ineffective. We strongly believe that adding meaningful safe-harbor provisions to the TCPA will be at the center of unraveling the cumbersome regulations that have stifled legitimate business communication to date. Chief among these difficulties is the particularly high standard to which businesses like Snapping Shoals EMC must operate with regard to reassigned phone numbers and the corresponding definition of "called party". Unfortunately, the "one-call" safe-harbor provisions granted within FCC Order 15-72 underestimate the complexity and real-world cost required to meet the "one-call" standard. The FCC asserts[1] that prudent best practices and existing technology in the marketplace should be enough to protect genuine small-business callers. We at least agree in principal that best practices and technology will play a major role in limiting business callers' risk, while also protecting consumers from unwanted phone calls. Yet, the FCC fails to acknowledge the very real probability that a legitimate business caller who places millions of automated phone calls will most likely place an errant phone call even with the most comprehensive business practices and best available technology that money can buy. That is to say nothing of the many small businesses trying to offer competing services with much more constrained budgets. Even worse, by not acknowledging some basic responsibility on the part of the consumer, the FCC fails to acknowledge that a consumer acting in bad-faith could engineer an enormous windfall by simply ignoring one of these errant phone calls.

2. *In an August Reuters article, Alison Frankel discusses "'Professional' robocall plaintiffs and the 'zone of interest' defense", specifically pointing out "businesses" started by individuals to profit off of filing TCPA lawsuits. When the law was enacted, do you believe its intent was to encourage these plaintiffs and the businesses that benefit from them?*

   At its core, the basic premise of the TCPA is to protect the American consumer from receiving unwanted, burdensome communications from an unwanted third-party.

[1] FCC Order 15-72 para. 72

Additionally, Congress recognized that even the best legislation should have limits and acknowledged that the TCPA was not intended to prohibit legitimate business communications. I suspect that very few Americans' would disagree with these basic tenets of the original legislation of 1991. In absence of any provisions to the contrary, we can infer that the original TCPA legislation broadly assumed that only unscrupulous callers would be subject to its regulations. In today's reality even organizations with the best of intentions, who are seeking to provide critical consumer driven information, have gotten caught up in a web of unscrupulous plaintiff attorneys that have managed to take advantage of the strict liability provisions found within the statute. These increasingly outdated statutes do not allow for even basic affirmative defenses of good-faith and subsequent reasonable interpretation of the law. It is fair to assume that the original authors of the TCPA never imagined a world in which consumers would not only ask for, but demand constant communication from their service providers. It is also fair to assume that these original authors did not intend to line the pockets of those individuals or organizations that would inevitably seek to build an ill-gotten fortune from within the well intentioned TCPA legislation.

3. *The Do Not Call Section of the TCPA states: "It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent communications in violation of the regulations prescribed under this subsection." Do you believe this affirmative defense should also be applied to the Private Right of Action section? Why or why not?*

The addition of a common-sense, "good faith" defense to Private Rights of Action litigation would provide substantial protection and clarity for the American business community. In lieu of a common sense, "good-faith" affirmative defense many businesses realize that 100% compliance is not probable or realistic. As noted above, we believe that in *MOST* cases a strong system of compliance, coupled with further development and integration of emerging tech solutions should provide protection to both the American consumer and legitimate business communication. Unfortunately, even the best procedures and technology will not prove effective in ALL situations.

For example; my small utility could easily place two million low-balance notifications phone calls to our prepaid members in a year. These courtesy notifications were provided at member request based on a low balance threshold amount of their choosing. Hypothetically, let's assume that all best practices are implemented and no expense has been spared to ensure compliance. Even with world-class equipment and procedures, at best our automated phone calls reach the intended "called party" 99.9% of the time. That small one tenth of one percent uncertainty could generate 20,000 potential TCPA violations at $500 per phone call, or $10,000,000. In absence of a reasonable affirmative defense; such risks are unreasonable and the reason that Snapping Shoals EMC discontinued all automated phone notification programs in June 2014.

The Honorable Gus Bilirakis

1. *According to your testimony, your company had to discontinue what you deemed to be an important customer service because of the risks associated with litigation under the TCPA. Some businesses have opted to ensure compliance with TCPA by implementing rigorous monitoring of independent third parties with whom they contract. Unfortunately, with this oversight comes vicarious liability concerns and businesses must weigh the costs of TCPA driven oversight against the potential for litigation.*

   a. *If the TCPA were modified so an affirmative defense could be available for organizations who adopt a rigorous compliance program, would you be more likely to invest in these types of programs?*

Businesses like Snapping Shoals EMC have no desire to place unnecessary or unwanted phone calls to our members. Our programs are designed to bring value and convenience to those members that we serve. We agree that the business community should do our part in taking reasonable steps to insure that consumer privacy is protected and communication lines remain open. The FCC has outlined numerous best practices[2] that it believes should protect consumers and offset any business liability concerns. These suggestions could be a great first step towards compliance and would likely greatly reduce any unwanted, errant phone calls. However, even combining this patch-work of best practices cannot and will not result in 100% compliance. As mentioned in earlier testimony, even a success rate of 99.9% could leave my small utility exposed to 20,000 potential TCPA violations annually. That is 20,000 violations at $500 per violation regardless of the time and money that we invested to prevent unwanted phone calls. For most small businesses, the risks do not out weight the reward.

In my opinion, providing an affirmative defense, which acknowledges the good-faith efforts of legitimate business callers, would be the single most effective measure to reducing undue liability and protecting consumer interest. TCPA compliance is a large, complicated affair to which no single silver bullet solution exists. Even a combination of best practices and technology will leave large gapping sources of potential liability. For example, third-party "scrubbing" services are frequently cited as a means for business callers to ensure compliance. However, even these "scrubbers" acknowledge that their databases will never be 100% accurate. One such service boasts that it contains over 80% of all mobile records. 80% compliance is a great starting point, but for my utility that still leaves potentially hundreds of thousands of potential violations on the table. Further, these scrubbing serves are far from the panacea that some have described. Even phone numbers contained within their databases leave much ambiguity to be resolved, often through expensive, manual processes. Most services provide a confidence score that indicates their ability to match a phone number against a confirmed active user. Inconclusive matches are common place and must be manually resolved. Again, no silver bullet exists so that simply writing a check will ever erase all liability concerns.

[2] FCC Declaratory Ruling and Order 15-72, para. 86

Attachment 2-Member Requests for the Record

During the hearing, Members asked you to provide additional information for the record, and you indicated that you would provide that information. For your convenience, descriptions of the requested information are provided below.

The Honorable Marsha Blackburn

1. In your opinion, what are three things Congress make certain we change in the TCPA when updating the Act?

Encourage the Use of Technology: Technology could one day be developed that would prove many of our more nuanced disagreements over jargon and lexicon irrelevant and outdated. True meaningful improvement to a problem as large and complex as stopping unwanted phone calls, and by extension updating any TCPA legislation, should acknowledge that technology will always evolve outside the original scope of any updated legislation. The TCPA should enable and encourage big solutions to such a big problem. Proactive solutions aimed at thwarting unscrupulous callers at the origin of the phone call, coupled with more robust do-not-call technology built into our smart phones and networks will be a critical element in our campaign to protect consumer interest, while encouraging legitimate business communication.

Improve Number Reassignments: Number reassignments can be difficult to identify after the fact which is confounded further by varying procedures between phone carriers. Some carriers will reassign a phone number in as few as 30 days, while others wait 60 or even 90 days. Although, new technologies are far from perfect and expensive, they will have to be part of the solution. One small step that could be implemented in the near term would be to extend and standardize the holding period between reassigning phone numbers. The benefits would be twofold: 1) Additional time would allow phone carriers the opportunity to establish a reassigned phone registry. This registry should require a number to be held at least 90 days before reassignment. 2) Additional time would allow business callers time to implement additional quality control processes aimed at detecting number reassignments without fear of inadvertently flagging active accounts.

Affirmative Defense: It is simply not reasonable to ask American businesses to invest millions into new technology and processes without some assurance that they will be given an opportunity to defend themselves against the inevitable errant phone call. Put simply, the risk does not out weight the reward; all the while many American consumers that have grown to depend on timely phone notifications are left quite literally in the dark regarding their business affairs. The FCC has repeatedly suggested that various best practices should protect consumers and limit liability, yet offer no relief to those companies that follow their guidelines and still find themselves confronted with litigation.

In considering language for any potential "safe-harbor" provisions; Congress should avoid codifying specific best practices given the ever changing nature of telecommunications. Broad

language that speaks to a caller's culture of compliance and willingness to respond to consumer wishes would prove more meaningful in the future. Additionally, Congress should consider providing language that would seek to balance compliance with over burdensome, expensive solutions that American small businesses cannot afford.