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[redacted]

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Honorable Greg Walden
Chairman
Subcommittee on Communications and Technology
Committee on Energy and Commerce
House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

RE: *"Modernizing the Telephone Consumer Protection Act"*

Dear Chairman Walden:

Thank you once again for the honor and privilege of permitting me to testify before your subcommittee on Communications and Technology in the matter of Modernizing the Telephone Consumer Protection Act (TCPA) on September 22, 2016.

We are all aware of the problem of robocalls and Caller ID spoofing. It has certainly lead to what some of us in the technology industry have referred to as "security fatigue".[1] Our fellow citizens are simply frustrated that nothing has been done to stop the *illegal* robocalls and businesses are frustrated that they are being unfairly punished for initiating *legal* automated communications.

Mr. Chairman, the TCPA and the laws in general in this area are, in fact, out of date and do not reflect the clear intent of Congress to both protect the privacy of the American people while allowing reasonable automated communication necessary for the safeguard of public health, safety and property.

In my opinion, the problem needs to be addressed on both sides of the equation — both the problems of legal automated communications and the more vicious problem of clearly illegal automated communications.

I wish again to restate my belief that both the TCPA, as well as the Truth in Caller ID Act, need to be revisited *at the same time* if there is going to be progress in this matter. TCPA has gone

[1] https://www.nist.gov/news-events/news/2016/10/security-fatigue-can-cause-computer-users-feel-hopeless-and-act-recklessly

too far in punishing legitimate businesses and the Truth In Caller ID act has not done enough to dissuade illegal actors.

Tomorrow, October 26, 2016, should be a significant day in the evolution of solutions to these problems as the industry-led Strike Force will report to the FCC. I am very aware of some of the technical solutions that will be proposed and I support this effort.

Permit me then to answer some of the additional questions posed by you and the Honorable Marsha Blackburn.

If you have any questions or require any additional information relative to these issues and the Strike Force report, or if I may be of further service to your Committee, Congressional Staff or the American people in this matter, please do not hesitate to contact me.

Very truly yours,

Richard D. Shockey

Principal

Response to Questions for the Record
Questions from the Honorable Greg Walden

Question #1: In an August Reuters article Allison Frankel discusses "Professional robocall plaintiffs and the "zone of interest" defense specifically point 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?

Response: Obviously not. The clear intent of Congress has been subverted.

In addition, I have recently noted several other articles that may have relevance on your ongoing deliberations. Ms Frankel has also noted another recent case from the Supreme Court on the definition of "injury-in-fact" which has relevance to TCPA.[2] [3][4] It might be useful for potential plaintiff's to actually demonstrate actual harm before going before the Courts. The current state of affairs has created a bizarre form of regulatory entrapment.

Question #2: The Do Not Call section of the TCPA states: "It shall be an affirmative defense 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?

Response: Yes! I would go even further in looking at well understood legislative language surrounding "Safe Harbor" as well as "In Good Faith" provisions that better protect businesses that by accident or inadvertently contact consumers. The clear example of this is contact that occurs when the telephone number has been reassigned.

[2] http://blogs.reuters.com/alison-frankel/2016/05/20/early-spokeo-fallout-privacy-defendants-try-to-capitalize/

[3] http://www.jdsupra.com/legalnews/spokeo-inc-v-robins-and-the-tcpa-the-21119/

[4] https://www.mcguirewoods.com/Client-Resources/Alerts/2016/8/Court-Finds-Spokeo-Closes-Door-TCPA-Claim.aspx

Member Requests for the Record
Questions from the Honorable Martha Blackburn

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

Response: The problem of robocalls and the TCPA cannot be viewed in isolation. There are two basic problems. First is the issue of perfectly legitimate automatic communications by legitimate businesses with clear prior business relationships. This problem was highlighted by the other panelists in the health care, financial services and utility industries, and even public/private school officials, that need to get timely information of vital importance to consumers.

The second problem is the obvious illegitimate businesses that have no prior business relationships with consumers that are illegally targeting consumers with unsolicited robocalls and fraudulent solicitations.

My three suggestions are:

1. It is highly recommended that Congress revisit the Truth in Caller ID Act at the same time that it reviews TCPA. The Truth in Caller ID Act carried a fatal flaw in that it required "proof of intent to defraud" as the test for actions under the Act. Proof of intent is notoriously difficult to prove and the result of this seemingly innocent clause was to virtually legalize illegal robocalls and spoofing.

2. It is also clear that TCPA and the Truth in Caller ID act need to more formally incorporate different types of tests that the courts can apply in judging the activity in question. It is not clear that either Act carries sufficient "Safe Harbor", "In Good Faith" or "Proof of Injury-In-Fact" that would give businesses some protection from the clearly frivolous suits that are plaguing legitimate businesses.

3. I am not a lawyer, but it is clear that recent court decisions involving the FCC and other regulatory agencies have often centered on Authority to Act. In the absence of clear guidance from Congress, Courts will be forced to apply the "Chevron Deference" standard. What the American people and businesses need is clarity. "Yes you can do this.", "No you cannot do that." Ambiguity only breeds court cases; therefore it is imperative that legislative drafters need to be very specific in the language being proposed. As the robocall Strike Force reports, it may become necessary to revisit some Authority to Act provisions as it is essential to establish a new Telephone Number Trust Anchor as part of the ATIS-SIP Forum STIR/SHAKEN framework proposal that will be recommended by the Strike Force.