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October 24, 2016

Mr. Greg Watson
Legislative Clerk
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Re: Additional Questions for the Record, Hearing on Modernizing the Telephone Consumer Protection Act, September 22, 2016

Dear Mr. Watson:

Enclosed please find my responses to the Additional Questions for the Record and Member Request for the Record submitted by the Honorable Greg Walden and the Honorable Marsha Blackburn. As with my written statement and my testimony, I provide these responses in my individual capacity as a teacher and scholar in the area of consumer protection law. It was an honor to testify before the Subcommittee on Communications and Technology in this matter. Please contact me if the Subcommittee needs anything further regarding this important consumer protection issue.

[redacted]
Spencer Weber Waller
Interim Associate Dean for Academic Affairs
Professor and Director
Institute for Consumer Antitrust Studies
Loyola University Chicago School of Law

Attachment 1-Additional Questions for the Record

The Honorable Greg Walden

1. 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 business that benefit from them?

Although I have not extensively researched the zone of interest defense referred to in the Frankel article, the article appears to conflate three different issues. The first is the question of constitutional standing that was presented, but not resolved, in the Supreme Court's *Spokeo* decision. The second issue is statutory standing under the TCPA. The final issue is whether the statute was violated in a particular case and whether a particular plaintiff can be deemed to have consented to the communications in question. The cases referred to in the Frankel article seem to conflate these very different considerations and thus do not present a coherent zone of interest defense.

I have the further concern that such a zone of defense conflicts with the plain meaning of the TCPA and does not appear to have been contemplated by Congress in creating the TCPA and its dual system of public and private enforcement. The TCPA establishes a requirement of prior consent for robocalls and certain fax messages and sets out a system of public and private enforcement for violations.

The TCPA is designed as a deterrent to non-consensual telephone calls, and inevitably led to a system of primarily class action enforcement because damages are limited to $500 ($1500 for a willful violation) without the statutory availability of attorneys fees for successful plaintiffs as is the case in many other consumer protection statutes. Class actions inevitably arose in order to pool large numbers of small claims and to provide the possibility of seeking judicial approval as to what constitutes a reasonable attorney fees under Rule 23 of the Federal Rules of Civil Procedure. Thus I do not believe that a zone of interest defense was contemplated by Congress in passing the TCPA nor represents an appropriate reading of the TCPA as drafted.

The TCPA does not prohibit consensual telephone calls, texts, and faxs. It may be appropriate in an individual private action under the TCPA to consider whether the named plaintiff "consented" in word or deed to the robocalls in question and whether such a plaintiff would be an appropriate

named plaintiff in a particular class action. Aside from consent, I do not believe a zone of interest defense is appropriate, regardless of whether Congress did or did not consider how many non-consensual robocalls a particular person might receive and bring to the Courts.

2. 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 be applied to the Private Right of Action section? Why or why not?

I do not support creating such an affirmative defense in connection with the private right of action section of the TCPA. In creating the affirmative defense for public enforcement, Congress appeared to assume that there would be robust public enforcement by the Federal Communications Commission which typically has not been the case for a variety of reasons. In creating a separate private cause of action Congress created a strict liability cause of action, but limited statutory damages and did not include the right to attorneys fees. Another affirmative defense in private litigation would create unhealthy incentives for marketers to argue that systems that have failed to prevent unwanted robocalls should none the less relieve them of liability for violations of the law. It would also create unwelcome incentives for sellers to utilize third party service provider to violate the law for their pecuniary interest, and allow both the sellers and the third party service provider to argue that each had an appropriate system in place and that any violation was the responsibility of the other party.

Attachment 2-Member Requests for the Record

The Honorable Marsha Blackburn

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

The most important thing that Congress could do in updating the TCPA is to create a Do Not Contact system that operates across all devices and technologies to protect consumers from unwanted marketing contacts. Such a system should differ from the existing Do Not Call Registry, in that it would apply to informational as well as telemarketing calls.

As set forth in the 2014 published version of the report on the TCPA by the Institute for Consumer Antitrust Studies, I would also recommend increasing public enforcement by creating greater incentives for State Attorneys General to enforce the law (through the availability of

attorneys fees and increased penalties) and to empower the United States Federal Trade Commission to bring suit under the TCPA.

With respect to private enforcement, cellular telephone companies should be required to participate in a database that would keep track of recycled cell phone numbers. This would allow callers to utilize the database before they make robocalls, avoiding calling reassigned numbers, and the liability that comes with this situation. A revised TCPA also should clearly state that callers and sellers have an affirmative obligation to (a) obtain and document consent from the called party as to the subject matter of the call *before the call is made*, and (b) keep records of the calls they make.