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Committee on Energy and Commerce
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Chairman Walden, Ranking Member Eshoo, and other Members of the Subcommittee, I appreciate the opportunity to discuss with you today the important issues raised regarding the continued effectiveness of The Telephone Consumer Protection Act of 1991 (TCPA) and appropriate proposals for its reform.

I am the Interim Associate Dean and a Professor at Loyola University Chicago School of Law. I am also the Director of the Institute for Consumer Antitrust Studies at Loyola (Institute) which seeks to promote a more competitive consumer friendly economy. I have taught and published extensively on issues related to consumer protection, antitrust law, and related issues. I provide this testimony in my individual academic capacity.

My comments today are drawn from the published version of a 2014 comprehensive study of the TCPA published in *The Loyola Consumer Law Review*¹ and certain subsequent developments since the publication of that study.

This study of the TCPA was made possible through a cy pres distribution following the settlement of a class action in the United States District Court for the Northern District of Illinois which involved claims under the TCPA. Following the settlement of the litigation, Senior Judge Hart sought proposals for cy pres distributions. The Institute sought and received certain of the cy pres funds distributed from that case to undertake the first comprehensive study of the TCPA and the effect of new technology. I am not aware of any further published comprehensive studies of the TCPA since that time.

¹ Spencer Weber Waller, Daniel B. Heidtke & Jessica Stewart, *The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology*, 26 LOY. CONS. L. REV. 343 (2014).

I. Background

In the late 1980s, spurred by advances in technology, the telemarketing industry began aggressively seeking out consumers by the hundreds of thousands. Companies began using machines that automatically dialed consumers and delivered prerecorded messages (“robocalls”). Marketers also took advantage of another then new and increasingly available piece of technology known as the facsimile machine (“fax machine”). With the fax machine, marketers could send tens of thousands of unsolicited advertisements (“junk fax”) each week to consumers across the nation.

Consumers and businesses became overwhelmed with unsolicited telemarketing calls and fax advertisements. Calls for action grew louder. States enacted laws, but could not reach the interstate practices of telemarketers. After reviewing and debating ten different pieces of legislation, Congress enacted the TCPA.

II. The TCPA

The TCPA was born out of abusive telemarketing practices, made more intrusive by advances in technology. Originally, the TCPA imposed restrictions on the use of telephone lines for unsolicited advertising by telephone call and fax. The TCPA has since been expanded and adapted by administrative rule, judicial interpretation, and congressional amendment.

Since 1991, Congress has enacted other statutes relevant to the discussion of the TCPA. Despite common justifications and purposes, Congress determined that certain media would be regulated differently. For example, the TCPA originally banned the practice of sending “junk fax.” The justification for the ban was that the practice shifted the cost of advertising from the advertiser to the recipient. However, the practice of sending unsolicited commercial e-mail, which also shifts the cost of advertising from the advertiser to the recipient, was not banned but instead was regulated with certain “identification” requirements.

The original purpose of the TCPA was to regulate certain uses of technology that are abusive, invasive, and potentially dangerous. The TCPA effectively regulates these abuses by prohibiting certain technologies altogether, rather than focusing specifically on the content of the messages being delivered. The expansion of the TCPA into areas outside of telemarketing and new technologies over the years is consistent with its original purpose.

Private parties are largely responsible for the enforcement of the TCPA, and have done so primarily through the class action mechanism. This is in part because of the small statutory damages for any single plaintiff under the TCPA and the lack of statutory attorneys fees except through the class action mechanism. While this aspect of private enforcement has drawn some criticism because of the potential for large total damages faced by certain defendants, the threat of class actions has provided significant direct and indirect deterrence to violators and the only meaningful source of potential compensation to victims of TCPA violations. Historically the federal government has only enforced the TCPA to a limited extent, yet the statute has been relatively successful in reducing the conduct it was enacted to regulate.

Technology continues to rapidly change and a number of trends are emerging. The number of entities that are operating in intentional disregard of the TCPA are growing, and they are using more sophisticated technology to help evade detection and enforcement. According to the Federal Trade Commission (“FTC”), about 59% of phone spam cannot be traced or blocked because the phone calls are routed through “a web of automatic dialers, caller ID spoofing and voice-over-Internet protocols.” Although the traditional scheme of TCPA enforcement, with its strong reliance on the private right of action, has been successful in the past, two main issues are becoming clear. The private right of action is limited in both incentivizing lawsuits against, and deterring the actions of, intentional violators; and FCC enforcement is limited by its slow processes and limited remedies.

III. Recommendations for Keeping the TCPA Relevant and More Effective

In order for the TCPA to stay relevant after twenty-five years, certain modifications and improvements can be made. We recommend improving federal and state government enforcement efforts and increasing the uniformity of interpreting the statute. The FTC’s continuing work towards a technical solution to robocalls is commendable, and should be followed with respect to other types of media currently exposed to unsolicited commercial messages such as text messages and e-mail. FCC rule making procedures have in some way been helpful in applying the TCPA to new technologies and in other instances unnecessarily broadened exemptions to the application of the TCPA, particularly in the area of collection of student loan debt by government entities and their contractors.

In order for the TCPA to continue to remain relevant and effective going forward, the 2014 Institute report makes the following recommendations:

- Increase government enforcement of the TCPA by providing State Attorneys General with a larger incentive to bring TCPA cases and authorizing FTC enforcement actions under the TCPA;
 - Increase uniformity of application of the TCPA by encouraging more frequent and quicker FCC rulemaking procedures;
 - Continue to protect cell phones by requiring prior express consent for any communication (call or text) made to a cell phone;
 - Place a time limit on the Junk Fax Established Business Relationship;
 - Create incentives for fax broadcasting companies to determine whether the faxes they are sending on behalf of clients are in violation of the TCPA;
 - Rebuff efforts to remove or otherwise modify the private right of action;
- and
- Place additional restrictions on entities that enable caller ID manipulation.

These recommendations and other issues are discussed more fully in the Institute's 2014 Report as published in the Loyola Consumer Review which I would request be entered in the record for this hearing. Thank you for your time. I am happy to answer any questions.