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Chairman Bob Latta & Ranking Member Jan Schakowsky
Subcommittee on Digital Commerce and Consumer Protection
House Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, D.C. 20515

Re: Hearing on Robocalls and Caller ID Spoofing

Dear Chairman Latta and Ranking Member Schakowsky:

I write on behalf of the U.S. Chamber Institute for Legal Reform¹ (“ILR”) to discuss the obstacles abusive robocalls have caused businesses seeking to communicate with their customers. I recently testified on behalf of ILR before the Senate Commerce Committee regarding the Telephone Consumer Protection Act (“TCPA”) and robocalls, and this letter contains a number of salient points from that testimony for your consideration during the Digital Commerce and Consumer Protection Subcommittee’s hearing on robocalls.

Illegal and abusive robocalls continue to be a menace and a top complaint of consumers across the U.S. These calls originate with bad actors, and ILR does not condone the conduct. ILR’s members—a broad cross-section of American business—share consumers’ concern. Customers are the life-blood of commerce, and successful businesses avoid practices that customers revile. U.S. businesses have no interest in engaging in abusive practices. Indeed, businesses fear the brand and customer relationship damage of being cast as an illegal and abusive robocaller.

On the other hand, businesses need to be able to communicate with their customers through the use of modern technology, in an efficient and cost-effective manner, while consumers desire and expect timely, contemporary communications from the companies with whom they choose to do business. Unfortunately, the TCPA has become an obstacle, preventing legitimate and lawful communications between

¹ The U.S. Chamber is the world’s largest business federation, representing the interests of more than three million businesses of all sizes and sectors, as well as state and local chambers and industry associations. ILR is an affiliate of the U.S. Chamber that promotes civil justice reform through regulatory, legislative, judicial, and educational activities at the global, national, state, and local levels.

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businesses—large and small—and their customers and has placed businesses in the crosshairs of potential litigation each time they pick up the phone or send a text message.

The TCPA prohibits making phone calls to wireless telephone numbers “using any automatic telephone dialing system” (“ATDS”) without the prior express consent of the called party.² The Act focuses on technology, not bad conduct such as harassment or fraud. Ambiguity over the technology used or what constitutes an ATDS has become a source of unnecessary and sometimes abusive class-action litigation, burdening how businesses reach their customers while doing little to stop truly abusive robocalls. Indeed, the number of TCPA case filings exploded to 4,860 in 2016, and TCPA litigation grew 31.8% between 2015 and 2016.³ Much of this litigation targets legitimate companies—many of which are well-known brands—that have committed marginal or unavoidable violations as they seek to contact their customers,⁴ instead of the true bad actors: scam telemarketers, offshore operations, and fraudsters who operate through thinly-capitalized and disappearing shell companies. These latter activities are of little interest to class-action lawyers.

The Federal Communications Commission’s (“FCC”) implementation of the TCPA, to some degree, has contributed to this problem. In its 2015 *Omnibus Order*, the FCC expanded the types of devices that are considered to be an automated telephone dialing system (“ATDS”) to include equipment with computing capability or to which computing capability might be added—an expansive reading that potentially sweeps in everyday devices like smartphones and tablets, creating

² 47 U.S.C. § 227(b)(1)(A).

³ See *2016 Year in Review: FDCPA Down, FCRA & TCPA Up*, WebRecon LLC (2018), <https://webrecon.com/2016-year-in-reviewfdcpa-down-fcra-tcpa-up/>.

⁴ See, e.g., *Story v. Mammoth Mountain Ski Area, LLC*, No. 2:14-cv-02422-JAM, 2015 WL 2339437 (E.D. Cal. May 13, 2015); *Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189, 1193 (W.D. Wash. 2014); *Emanuel v. Los Angeles Lakers, Inc.*, 2013 WL 1719035 (C.D. Cal. Apr. 18, 2013).

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major uncertainty for businesses. Indeed, the FCC's *Omnibus Order* contributed to a 46% increase in TCPA litigation.⁵

The D.C. Circuit's decision last month in *ACA Int'l v. FCC*, in which the U.S. Chamber was a petitioner, overturned certain key provisions of the FCC's *Omnibus Order*, including the agency's definition of an ATDS, which the court described as "utterly unreasonable."⁶ The decision includes a sensible roadmap for how the FCC might interpret the TCPA in a manner that is clear and understandable, significantly reducing frivolous class-action litigation. This decision provides an opportunity for the FCC to revisit and clarify its approach to the TCPA. Following the D.C. Circuit's approach would provide guidance and clarity to businesses, and allow regulators, law enforcement, and courts to focus on the bad actors who are the source of the robocalling problem.

As Congress and the FCC look for ways to reduce abusive robocalls, reforming the TCPA is an important step. The TCPA was never intended to make all mass calling illegal. The legislative history reflects that the Act was intended to achieve a balance between the need for legitimate businesses to lawfully communicate with their customers and protecting consumers from certain abusive uses of the telephone system. There are bad actors who abuse the openness of our communications infrastructure, including through Caller ID spoofing and other illegal activities. The TCPA sought to prevent the use of specific equipment to engage in illegal and abusive conduct—random or sequential cold calling that tied up telephone networks, including emergency lines, and harassed consumers. The construction of ATDS suggested by the D.C. Circuit would categorically prohibit those abuses. At the same time, it would provide clear guidance to businesses on how they may lawfully communicate with their customers and shift the focus of enforcement to the actual bad actors who are the root cause of illegal robocalls.

⁵ *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits*, U.S. Chamber Institute for Legal Reform at 2, 4 (Aug. 2017), http://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf.

⁶ *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687, 699 (D.C. Cir. 2018).



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Thank you for your consideration and for holding a hearing on this important issue.

Sincerely,

/s/ Scott Delacourt

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Legal Reform*