Credit Union National Association
CUNA

Jim Nussle
President & CEO

Phone: 202-508-6745
jnussle@cuna.coop

601 Pennsylvania Avenue NW
South Building, Suite 600
Washington, D.C. 20004-2601

June 13, 2017

Representative Steve King
U.S. House of Representatives
2210 Rayburn Office Building
Washington, DC 20515.

Representative Steve Cohen
U.S. House of Representatives
2404 Rayburn HOB
Washington, DC 20515

Dear Chairman King and Ranking Member Cohen:

On behalf of America's credit unions, thank you for holding today's hearing "Lawsuit Abuse and the Telephone Consumer Protection Act (TCPA)," in the House Judiciary Committee Subcommittee on the Constitution and Civil Justice. The Credit Union National Association (CUNA) represents America's credit unions and their 110 million members. We respectfully request that you accept this letter for the record.

As not-for-profit financial cooperatives, credit unions have a long tradition of protecting their members' interests. Among the many consumer protections associated with the mission of credit unions is the high-quality service they provide to their members; this has prompted a successful system for quickly and amicably resolving disputes in the limited instances where they arise. This outstanding customer service recently earned credit unions some of the highest ratings possible in *Consumer Reports*.[1] They have succeeded as consumer protectors without the intervention of class action lawyers, who do not and could not know the needs and concerns of credit union members nearly as well as credit unions do.

In recent years, credit unions have been victims of lawsuit abuse stemming from technical violations of the TCPA. With statutory damages of $500 per call and up to $1,500 for willful violations, TCPA litigation continues to attract professional plaintiffs and attorneys seeking to capitalize on the sizable statutory damages and class action settlements that often reach into the tens of millions of dollars. Credit unions are typically smaller financial institutions, which means they may be more likely to settle litigation even if they did not purposefully violate the TCPA. In other words, the cost of defending a TCPA lawsuit coupled with the risk of crippling mandatory damage awards may be too great for many credit unions to bear, causing them to settle meritless suits. Not only does the risk of TCPA liability cause credit unions to settle meritless lawsuits, it also causes credit unions to stop certain important informational communications to consumers, and that hurts members. Moreover, since the TCPA has no cap on statutory damages, a small, medium, or even large credit union defending a lawsuit for a technical violation of the TCPA could face a substantial resource burden, which ultimately would fall on each of the credit union's member-owners.

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[1] Blyskal, Jeff, "Choose the Best Bank for You." ConsumerReports (Dec. 4. 2015), *available at* http://www.consumerreports.org/banks-credit-unions/choose-the-best-bank-for-you/.

The Structure of Credit Unions Makes TCPA Class Action Litigation Nonsensical

Credit unions are democratic organizations owned and controlled by their members, with a structure of one member, one vote, with equal opportunity for participation in setting policies and making decisions. It is difficult to imagine a case in which class action litigation against a credit union would be a reasonable course of action for credit union members since it would put them in a position of essentially having to sue themselves as owners. Furthermore, as a result of the unique structure of a credit union, in the rare situation that a group of credit union members feels a credit union is in the wrong, the group—as member-owners—already have direct recourse. Simply put, there would be no reason for a credit union to send offensive or annoying communications to their members on their cell phones, and if they did, a credit union is set-up to address this behavior internally. Furthermore, it is also worth noting that when credit unions face class action litigation, their board of directors and other volunteers, who may be there to fulfill a commitment to the mission of credit unions rather than for any kind of pecuniary gain, could be directly threatened with liability.

The July 2015 TCPA Order Has Created Litigation Traps for Credit Unions

The July 2015 TCPA Omnibus Ruling and Order (Order) immediately went into effect after being approved on a party-line vote at an FCC meeting, and without being published as a proposed rulemaking with a notice and comment period.[2] As soon as it was released, credit unions were sent into a state of disarray about how they could instantaneously comply with a document that is well over 100 pages and filled with onerous language and unclear nuances. While the Order purported to recognize the importance of communications between financial institutions and consumers and provided certain exemptions, the ruling in practicality creates obstacles to credit unions' ability to communicate with their members. Furthermore, it disregards consumers' preferences to use new technologies and modern forms of communication.

Surely when passing the TCPA decades ago, Congress did not intend to arbitrarily scrutinize and limit communications between credit unions—which are not-for-profit, member-owned financial cooperatives—and their members. This Order has not only restricted important communications, but has attracted the attention of law firms seeking to profit from rampant class action litigation and the exorbitant attorneys' fees and statutory damages associated with TCPA lawsuits. CUNA has outlined these concerns in detail in letters to the FCC.[3] Confusing and conflicting compliance requirements coupled with draconian liability under the TCPA creates an unfair environment for credit unions seeking to communicate with their members.

Conflicting Regulatory Guidance Increases Liability for Credit Unions

Other federal regulators have encouraged communications with consumers that conflict with FCC interpretations, which makes the operating environment even more difficult for financial institutions. This puts credit unions in the position of having to either risk aggravating financial regulators or risk facing liability for TCPA violations. Below are a few examples of conflicting guidance:

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[2] *In re Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, CG Docket No. 02-278, WC Docket No. 07-135, FCC 15-72 (July 10, 2015).

[3] Letter to Federal Communications Commission In the Matter of Rules and Regulations Implementing the TCPA, available at https://www.cuna.org/uploadedFiles/[illegible]ve_And_Regulatory_Advocacy/Track_Regulatory_Issues/Pending_Regulatory_Changes/2016/CUNA%20Comment[illegible]%20Budget%20Act%20Implementation.pdf (June 3, 2016).

- The Consumer Financial Protection Bureau's "Early Intervention Rule," which requires institutions to establish live contact or make a good faith effort to establish live contact with customers within 36 days after a mortgage loan becomes delinquent;
- Fannie Mae's "Quality Right Party Contact," which is a standard that establishes a code of conduct for interactions with customers with delinquent debt that includes a requirement to establish a rapport with those customers and open an ongoing dialogue to attempt to resolve the delinquency in a positive manner. Fannie Mae also requires sending the consumer a foreclosure prevention package and then making follow-up calls to the consumer at least every 3 days until resolution of the issue; and
- The Home Affordable Modification Program, which requires that institutions "proactively solicit" customers for inclusion in the program by making a minimum of four telephone calls to the customer at different times of day.[4]

Additionally, during a CFPB field hearing in 2016, Director Richard Cordray urged both banks and credit unions to contact consumers on their cell phones. During the hearing, he stated,

> "Let me also take a moment to acknowledge another positive development, which is the decision some banks and credit unions have made to provide consumers with real-time information about the funds in their accounts available to be spent. They are doing this through various means, including online banking and text and e-mail alerts, which can reduce the risks that consumers inadvertently overspend their accounts."

Credit unions that have over $10 billion in assets are supervised and examined by the CFPB, and the Bureau has rulemaking and enforcement authority over numerous consumer protection laws to which all credit unions are subject. When the CFPB is urging credit unions to use automated communications to contact consumers to protect their financial stability, while the FCC is creating policies subjecting them to liability for doing this, it creates extremely problematic, conflicting guidance about how credit unions should be communicating with their members. Unfortunately, it also creates the possibility that consumers may not be able to receive the important updates they need about their financial situation if the liability is too great of a risk for credit unions.

The CFPB Notice of Proposed Rulemaking on Arbitration Recognizes Small Financial Institutions Could be Harmed by Class Action Litigation

Additionally, the CFPB acknowledged the problems TCPA class actions could cause for small financial institutions, such as credit unions, in its Notice of Proposed Rulemaking concerning Arbitration Agreements. The proposed rule highlights that Small Entity Representatives (SERs) on the Arbitration Small Business Regulatory Enforcement Fairness Act panel noted they could not absorb the costs of TCPA-related class action lawsuits or settlements since there is no limit on the amount of statutory damages. The CFPB stated, "While the Bureau recognizes the concern expressed by SERs, among others, that particular statutes may create the possibility of disproportionate damages and awards, the Bureau believes that Congress and the courts are the appropriate institutions to address such issues."[5] Small credit unions have expressed similar concerns with the fear that even one class action, based on

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[4] Wells Fargo Ex Parte CG Docket No. 02-278, January 26, 2015, exhibit 3.

[5] Consumer Financial Protection Bureau, Proposed Rule on Arbitration Agreements, Docket No. CFPB-2016-0020, available at http://files.consumerfinance.gov/f/documents/Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf (May 2016).

some alleged technical violation, could put the livelihood of the credit union and its members in jeopardy.

As the Subcommittee continues to analyze the issues surrounding TCPA related lawsuit abuse, we ask that you consider the concerns of credit unions and other small financial institutions. When credit unions are forced to curtail communications with their member-owners because the risk of liability is too great, consumers suffer when they cannot receive the information that they want and need to stay informed about their financial information. We would be happy to provide the Subcommittee with additional details about our concerns. Thank you for your time and attention to this important matter.

Sincerely,

Jim Nussle
President & CEO

epic.org

Electronic Privacy Information Center
1718 Connecticut Avenue NW, Suite 200
Washington, DC 20009, USA

+1 202 483 1140
+1 202 483 1248
@EPICPrivacy
https://epic.org

June 12, 2017

The Honorable Steve King, Chair
The Honorable Steve Cohen, Ranking Member
House Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice
2138 Rayburn House Office Building
Washington, DC 20515

RE: Hearing on "Lawsuit Abuse and the Telephone Consumer Protection Act"

Dear Chairman King and Ranking Member Cohen:

We write to you regarding the upcoming hearing on "Lawsuit Abuse and the Telephone Consumer Protection Act."[1]

The Electronic Privacy Information Center ("EPIC") is a public interest research center established more than 20 years ago to focus public attention on emerging privacy and civil liberties issues. EPIC played a leading role in the creation of the TCPA and continues to defend the Act,[2] one of the most important and popular privacy laws in the history of the United States.[3] EPIC provided numerous comments to both the Federal Communications Commission ("FCC") and the Federal Trade Commission ("FTC") on the implementation of the TCPA, and maintains online resources for consumers who seek to protect their rights under the TCPA.[4] Nonetheless, we recognize the significant changes in technology and business practices over the past 25 years

[1] *Lawsuit Abuse and the Telephone Consumer Protection Act*, 115th Cong. (2017), H. Comm. the Judiciary, Subcomm. on the Constitution and Civil Justice, https://judiciary.house.gov/hearing/lawsuit-abuse-telephone-consumer-protection-act/ (June 13, 2017).

[2] *See, e.g.*, Telephone Advertising and Consumer Rights Act, H.R. 1304, Before the Subcomm. on Telecomms. And Fin. of the H. Comm. on Energy and Commerce, 102d Cong., 1st Sess. 43 (April 24, 1991) (testimony of CPSR Washington Office director Marc Rotenberg), https://www.c-span.org/video/?18726-1/telephone-solicitation; Brief of *Amici Curiae* Electronic Privacy Information Center (EPIC) and Six Consumer Privacy Organizations in Support of Respondents, *ACA Int'l v. FCC*, No. 15-1211 (D.C. Cir. Jan. 22, 2016), https://epic.org/amicus/acaintl/EPIC- Amicus.pdf; National Consumer Law Center et al., Petition for Reconsideration of Declaratory Ruling and Request for Stay Pending Reconsideration In the Matter of Broadnet Teleservices LLC Petition for Declaratory Ruling, CG Docket No. 02-278 (2016).

[3] Justice Brandeis described privacy as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[4] *See, e.g*, EPIC, EPIC Administrative Procedure Act (APA) Comments, https://epic.org/apa/comments/; EPIC, Telemarketing and the Telephone Consumer Protection Act (TCPA), https://epic.org/privacy/telemarketing/.

and agree with the Subcommittee and others that the TCPA needs to be updated. We offer these initial thoughts on how that can best be accomplished in a way that fulfills the purpose of the Act and continues to protect consumer privacy. We would be pleased to provide the Subcommittee with more detailed suggestions.

The TCPA

In the late 1980s, the United States faced a growing problem: American consumers were inundated with unwanted telephone calls and junk faxes, imposing costs and causing a substantial nuisance and invasion of privacy. Calls from telemarketers arrived at the home as families were sitting down for dinner. Rolls of fax paper were printing out ads for pizza delivery and home loans that the fax owner had no interest in receiving. With autodialers and robotic messages, telemarketers were interrupting millions of Americans each day with unsolicited messages. After several hearings, Congress concluded that the "only effective means of protecting telephone consumers from this nuisance and privacy invasion" was to bar most automated or prerecorded telephone communications unless "the receiving party consents to receiving the call" or there is some emergency circumstance.[5] The Act also provided for the creation of what would become the National Do Not Call Registry.[6]

Although it took many years to fully implement the Do Not Call Registry mandated by the TCPA, the law has been an enormous success. By at least one measure, the TCPA is one of the most popular laws ever enacted by Congress. As of September 30, 2015, the Do Not Call Registry contained 222 million active numbers—more than the number of people who voted in the 2008 Presidential election for all the candidates combined.[7] The popularity is due in large part to the Registry's opt-out mechanism, which permits consumers to exercise their rights in a clear, stable and legally enforceable manner. Other attempts at opt-out, such as the Do Not Track experiment or self-regulation, have failed where the Do Not Call Registry succeeded.[8]

Despite the success of the TCPA, consumers continue to be plagued by unwanted robocalls and text messages. The transition from land lines to mobile phones[9] has only made the

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[5] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(12), 105 Stat. 2394, 2394 (codified at 47 U.S.C. § 227).

[6] *See id.* § 3(a) (codified at 47 U.S.C. § 227(c)(3)); Do-Not-Call Implementation Act, Pub. L. 108-10, 117 Stat. 57 (codified at 15 U.S.C. §§ 6151–6155).

[7] *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES t.406 (2012), http://www.census.gov/library/publications/2011/compendia/statab/131ed/elections.html (reporting that 131 million total votes in the 2008 election).

[8] See "Do Not Track Legislation: Is Now the Right Time?", Before the Subcomm. on Telecomms. And Fin. of the H. Comm. on Energy and Commerce, 111th Cong., 2nd Sess. 1–3 (Dec. 2, 2010) (testimony of EPIC Executive Director Marc Rotenberg), https://epic.org/privacy/consumer/EPIC_Do_Not_Track_Statement_120910.pdf (Discussing the history of the TCPA and the eventual success of the Do Not Call Registry).

[9] 95% of American adults own at least one cell phone and 77% own smartphones. *Mobile Fact Sheet*, Pew Research Ctr. (Jan. 12, 2017) http://www.pewinternet.org/fact-sheet/mobile/; Over half of American households do not have a land line. Stephen J. Blumberg & Julian V. Luke, Ctrs. for Disease Control & Prevention, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey,*

problem worse. Unsolicited calls and texts facilitate fraud, drain battery life, eat into data plans and phone memory space, and demand attention when the user would rather not be interrupted. For low-income consumers who often rely on pay-as-you-go, limited-minute prepaid wireless plans,[10] these unwanted calls and texts are particularly harmful. Because we carry our phones with us everywhere,[11] unwanted calls and texts interrupt sleep, disturb meetings and meals, and disrupt concentration wherever we go. We no longer have to eat at home to be interrupted by an unwanted telemarketing call at dinner.

Preserving the Protections of the TCPA

EPIC agrees with the Subcommittee on the need to update the TCPA. But the updates must ensure that the original goals of the legislation continue to be served. Central to the TCPA are the following: (1) consumers should be free of unwanted commercial intrusions into their private lives; (2) commercial firms must bear the burden for the communications they initiate, not impose costs on consumers to protect their privacy; and (3) legal rights should be robust, enforceable and minimally burdensome for consumers.

EPIC supports preserving a private right of action in the TCPA. Although we acknowledge that class actions settlements often fail to provide benefits to the consumers on whose behalf these cases are brought.[12] Nonetheless, TCPA cases are among the most effective privacy class actions because they typically require companies to change their business practices to comply with the law.

FCC enforcement actions have sharply decreased in recent years. This trend further highlights the importance and efficiency of the TCPA's private enforcement action. Because consumers can use private actions to enforce their own rights under the Act, fewer government resources are needed for administrative enforcement.

Improving the TCPA

EPIC agrees that some of the text of the TCPA should be reconsidered. Provisions regarding fax machines, for example, target a specific technology that is much less commonly used today than it was in 1991. The TCPA's focus on specific technologies also leaves holes in its coverage that will only widen over time. The solution is to ensure that the TCPA is a

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July–December 2016, at 2 (May 2017), https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf.

[10] Federal Communications Commission, *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless*, Eighteenth Report, WT Docket No. 15-125, ¶¶ 44, 73, 95-96 (Dec. 23, 2015).

[11] More than 70% of smartphone users keep their phones within five feet a majority of the time. Harris Interactive, 2013 Mobile Consumer Habits Study (June 2013), http://pages.jumio.com/rs/jumio/images/Jumio%20- %20Mobile%20Consumer %20Habits%20Study-2.pdf.

[12] *See* Marc Rotenberg & David Jacobs, *Enforcing Privacy Rights: Class Action Litigation and the Challenge of* cy pres, in ENFORCING PRIVACY: REGULATORY, LEGAL AND TECHNOLOGICAL APPROACHES 307, 317–23 (David Wright & Paul De Hert, eds., 2016).

technology-neutral law that protects consumers from unwanted incoming commercial communications, the central purpose of the Act.

A technology-neutral regulatory framework would permit, for example, extending TCPA coverage to include commercial communications through messaging apps. Many smartphone users today are as dependent on Skype, WhatsApp, Snapchat, Allo, and other messaging apps as consumers 25 years ago were dependent on phone networks. Absent technology-neutral regulation, unwanted commercial solicitations will follow consumers to these apps. Marketing companies are already looking at the popular WhatsApp service for commercial solicitations.[13] WhatsApp, which had promised its users that it would avoid commercial texting, recently announced plans to allow businesses to send marketing messages to users via the app.[14] Extending TCPA coverage to include these apps would extend the protections of the TCPA to new communications services.

An updated TCPA should also require that any automated calls reveal (1) the actual identity of the caller and (2) the purpose of the call. Digital networks now make it easier for commercial firms to make known the source and purpose of the call, and this information can then help consumers determine how best to prioritize incoming commercial messages. It is also possible that Congress could resolve the emerging use of emergency texts through appropriate updates to the TCPA.

Some smartphones allow consumers to block certain phone numbers, but carriers and app developers are in the best position to block unwanted commercial messages at the source. Consumers should be able to block incoming numbers without paying an additional fee to carriers or apps.

The TCPA needs updating. Those updates should strengthen its protections for consumer privacy. We look forward to working with you to develop rules to provide meaningful and much-needed protections for consumer privacy.

Sincerely,

/s/ Marc Rotenberg
Marc Rotenberg
EPIC President

/s/ Caitriona Fitzgerald
Caitriona Fitzgerald
EPIC Policy Director

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[13] Gulveen Aulakh, *Telemarketers Take WhatsApp Route for Bulk SMSes*, ECONOMIC TIMES, May 24, 2014, http://articles.economictimes.indiatimes.com/2014-05-24/news/50070188_1_chief-executive-jan-koum-whatsapp- users-messages.

[14] WhatsApp Blog, *Looking Ahead for WhatsApp* (Aug. 25, 2016), https://blog.whatsapp.com/10000627/Looking- ahead-for-WhatsApp.

June 12, 2017

The Honorable Steve King
Chairman
Subcommittee on the Constitution and
Civil Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Steve Cohen
Ranking Member
Subcommittee on the Constitution and
Civil Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman King and Ranking Member Cohen:

The undersigned trade associations and business groups, representing hundreds of thousands of U.S. companies and organizations from across the U.S. economy, commend the Subcommittee on the Constitution and Civil Justice for holding the "Lawsuit Abuse and the Telephone Consumer Protection Act" hearing.

The Telephone Consumer Protection Act (TCPA) plagues businesses and other organizations in every sector of the economy that need to contact their customers or employees. While the TCPA serves an important purpose of protecting consumers' privacy, this 26-year-old law is outdated and being manipulated by the plaintiffs' bar and serial plaintiffs to leverage settlements benefiting trial attorneys. In fact, as of 2014, the average TCPA plaintiff was awarded $4.12, while the average attorney payout was $2.4 million.

These large paydays have only escalated litigation filings year-after-year. Between 2010 and 2016, there was a 1,272% increase in case filings.

At the time the TCPA was created, its sponsor, Senator Ernest "Fritz" Hollings (D-SC), explained the law was intended to facilitate actions in state small claims courts, which involve smaller sums and often do not require (or even allow) the participation of attorneys. Today, law firms create apps, such as Block Calls Get Cash, to specifically file TCPA cases, and some individuals purchase over 30 cell phones ensuring the phone numbers are from economically depressed areas for the sole purpose of creating an at-home TCPA "business." It is evident a well-intentioned law is being stretched beyond its means for unscrupulous gain.

Businesses need clarification and reasonable standards on how to reach their consumers, not the threat of a million or billion dollar class action lawsuit each time they pick up the phone or send a text message. We greatly appreciate your leadership in looking at the TCPA and the abusive litigation this outdated statute is causing and look forward to working with the Committee to pursue much needed reform.

Sincerely,

ACA International
AFSA Education Foundation
American Association of Healthcare Administrative Management
American Bankers Association
Arizona Chamber of Commerce
Business Council of Alabama
Colorado Civil Justice League
Consumer Bankers Association
Consumer Mortgage Coalition
Cruise Lines International Association
Education Finance Council
Electronic Transactions Association
Financial Services Roundtable
Florida Justice Reform Institute
Illinois Chamber of Commerce
Illinois Civil Justice League
Indiana Chamber of Commerce
Insights Association
Internet Association
Kentucky Chamber of Commerce
Lawsuit Reform Alliance of New York
Mortgage Bankers Association
National Association of Chain Drug Stores
National Association of Mutual Insurance Companies
National Council of Higher Education Resources
National Retail Federation
News Media Alliance
NJ Civil Justice Institute
Ohio Chamber of Commerce
Pennsylvania Chamber of Business and Industry
Professional Association for Customer Engagement
Property Casualty Insurers Association of America
Retail Industry Leaders Association
Satellite Broadcast and Communication Association
SLSA Private Loan Committee (SLSA PLC)
South Carolina Chamber of Commerce
South Carolina Civil Justice Coalition
State Chamber of Oklahoma
Student Loan Servicing Alliance (SLSA)
U.S. Chamber Institute for Legal Reform
U.S. Chamber of Commerce
Washington Liability Reform Coalition
West Virginia Chamber of Commerce

cc: Members of the Subcommittee on the Constitution and Civil Justice

MSR GROUP

Insights Revealed

June 13, 2017

The Honorable Steve King (R-IA)
Chairman
The Honorable Steve Cohen (D-TN)
Ranking Member
House Judiciary Subcommittee on the Constitution and Civil Justice

RE: Hearing on Lawsuit Abuse and TCPA

Chairman King and Ranking Member Cohen, thank you for allowing me to submit written testimony for this important hearing on lawsuit abuse and the Telephone Consumer Protection Act (TCPA), as my company has been victimized by abusive TCPA lawsuits on several occasions.

1121 N. 102nd Ct.
Suite 100
Omaha, NE 68114

tel:
1.402.392.0755
1.800.737.0755

fax:
1.402.392.1068

I am the President/CEO and sole owner of The MSR Group, a full-service market research firm headquartered in Omaha, NE. For more than 60 years we have helped companies throughout the U.S. improve on their existing products and services and develop new ones when gaps in the marketplace are identified.

Over 65% of our firm's revenue comes from our research with financial institutions across America. Our banking clients depend on us to help them measure the level of satisfaction among customers with their existing service delivery processes and provide them with direction on improvement when needed. Many of our clients have been recognized for providing the "best" customer experience in the nation and we are proud of the fact that our research plays a major role.

Our firm employs over 200 full and part time individuals and maintains a 150-seat call center from which we conduct much of this research for our clients. To deliver accurate and representative feedback to our clients, telephone survey methodology is crucial to our work. With now nearly two-thirds of all households in America reachable only on a cell phone, calling cell phones is imperative.[1]

In July of 2013, we were sued by a Class Action attorney in the state of California for "violating the Telephone Consumer Protection Act" by calling an individual's cell phone. In fact, the

[1] More than half of American homes (50.8%) had cell phones and no landline phones in the 2nd half of 2016; a sixth of American homes (15%, 41 million adults) still had a landline, but received all or almost all calls on their cell phones. Together, that is 65.8% of American households only reachable on a wireless device. Data provided by: Blumberg SJ, Luke JV. Wireless substitution: Early release of estimates from the National Health Interview Survey, July to December 2016. National Center for Health Statistics. May 2017. Available online: https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf

individual was a customer of one of our banking clients and had provided her cell phone number when opening her account as the number that the bank, "and their agents" have permission to contact.

Moreover, this individual never actually answered her phone. Instead, upon seeing our company's name on her caller ID, she simply submitted it to a law firm that aggressively advertises the ability to get the public money for receiving unwanted phone calls on their cell phones. If she would have answered her phone, she would have known that we were calling on behalf of her bank to acquire her feedback on how well her bank performed, with the sole purpose of helping her bank provide the best service possible to their customers.

After providing several pieces of documentation that indisputably proved we were acting in not only a professional manner but completely within the law, the legal battle continued and the legal fees began to build. Long story short, after receiving advice from our counsel that proving our innocence could cost upwards of $150,000 to $200,000, I chose to settle out of court.

Even more distasteful than paying money out for doing nothing wrong, is the fact that about one year later, the same law firm sued us again and we had to go through the whole process a second time. Believe it or not, our attorney has recommended that until the TCPA is changed, we probably should budget for this type of expense on an annual basis.

In closing, I personally receive approximately three to four illicit telemarketing calls on my cell phone daily. All of these calls originate from outside the country, so current law and regulation has ***no*** impact on their activity. On the other hand, what the TCPA is doing is creating an environment for extortion of law-abiding American businesses. It also is creating a heightened level of concern among our clients for the risk from using the telephone to gain important insights from consumers.

The current TCPA is ineffective, outdated and bad for business. This law is in dire need of reform...immediately.

Sincerely,

Richard R. Worick, PRC
President/CEO The MSR Group
1121 N. 102nd Court, Ste. 100
Omaha, NE 68114

AAHAM
American Association of Healthcare Administrative Management

STATEMENT FOR THE RECORD

OF THE

AMERICAN ASSOCIATION OF HEALTHCARE ADMINISTRATIVE MANAGEMENT (AAHAM)

BEFORE

THE HOUSE OF REPRESENTATIVES

HOUSE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

TUESDAY, JUNE 13, 2017

11240 Waples Mill Road • Suite 200 • Fairfax, VA 22030 • (703) 281-4043 • www.aaham.org

Chairman King, Ranking Member Cohen, and members of the Committee, thank you for the opportunity to submit this testimony for the record.

My name is Richard Lovich and I serve as National Legal Counsel for the American Association of Healthcare Administrative Management (AAHAM), which is a national organization actively representing the interests of healthcare administrative management professionals through a comprehensive program of legislative and regulatory monitoring and its participation in industry groups such as ANSI, DISA, WEDI and NUBC. AAHAM is a major force in shaping the future of healthcare administrative management.

I appreciate your holding this hearing today. As you know, the Federal Communications Commission recently ruled on over 22 petitions seeking changes to the current rules governing the Telephone Consumer Protection Act (TCPA). AAHAM was one of those groups that submitted a petition seeking clarification of how the FCC defines consent. "Consent" by definition may seem like something simple to answer, but we have found that consent does not mean the same thing to everyone and thus has caused our members to be sued over this issue. Healthcare providers cannot do their job effectively, efficiently, or in a cost effective manner without using technology today.

The TCPA was signed into law in 1991 and already is out of date, yet, the FCC seems unwilling to consider real modernization. Technology has advanced so rapidly since 1991 and continues to develop at a pace the government cannot keep up with, yet agencies like the FCC, are unwilling to keep pace with these changes.

The TCPA was designed to protect consumers from receiving unsolicited telemarketing calls in their homes at all hours of the day and night. To prevent these intrusive calls, Congress restricted the use of "automatic telephone dialing systems", broadly limited the use of pre-recorded voice messages and prohibited outreach to mobile phones without "prior express consent" from the call recipient. Mr. Chairman, AAHAM supports that goal and mission of the TCPA. Nothing we, or others have proposed would change that.

Twenty three years since its passage, the TCPA has become outdated. It restricts Americans from receiving customer service messages they want, including healthcare appointment reminders, credit card fraud alerts, notifications of travel changes, power outage restoration, UPS delivery information and more. Further, it prevents them from receiving these communications on the device they prefer, their mobile phones.

- At the time the TCPA legislation was passed, over 90% of U.S. households relied on their home or landline phone. Only 3% of Americans had a mobile phone, they were truly the province of the elite. So much has changed since then.

- Today, the trend is away from landline phones, in fact nearly 2 in 5 American homes no longer maintain a landline and rely exclusively on wireless or cell technology.

- Since the enactment of the TCPA, a new form of communication, text messaging, has emerged. In 2012, more than 2.19 trillion text messages were sent and received. In 1991, legislators had no way of predicting the growth of the mobile market or the rapid adoption of text messaging as a critical form of communication.

To make matters worse, new laws and regulations have been passed that make compliance with the TCPA even more difficult. The Affordable Care Act (ACA) as well as new IRS regulations dealing with charitable hospitals, place unfunded mandates on hospital providers, the fulfillment of which, is made difficult, if not impossible by the current language and interpretation of the TCPA.

The ACA was passed in 2011, requires hospitals and outpatient clinics to perform post-discharge follow-up with patients to reduce the rate of readmission, a big contributor to the cost of healthcare. We know the reminders, surveys, and education that have proven to lower readmission rates, can be successfully and cost effectively conducted by phone. Under the TCPA, these calls place the hospital at high risk of violating the statute and facing penalties and defense fees and costs when the patient's primary contact number is a mobile number and the patient didn't expressly provide the mobile phone number for that purpose. The FCC's recent ruling helps by making some slight changes to the TCPA for healthcare related calls, but it just touches the surface and does not get to the root of the problem.

The IRS's 501(r) regulations create another federal government unfunded mandate. These regulations require hospitals to call patients and verbally inform them they may be eligible for financial assistance. A laudable endeavor and one hospitals are fully in favor of conducting. However, this is a process that could be more effectively, efficiently, and economically performed through the use of technology. The chilling effect of the ambiguity of the TCPA has required hospitals to refrain from the use of auto dialers and contacting patients through the use of mobile technology. By requiring the use of more labor intensive methods to comply with the regulations, the TCPA adds unnecessary expense which requires diverting resources that could otherwise be dedicated to patient care.

President Obama has proposed "clarifying that the use of automatic dialing systems and pre-recorded messages is allowed when contacting wireless phones in the collection of debt owed to or granted by the United States. In this time of fiscal constraint, the Administration believes that the Federal Government should ensure that all debt owed to the United States is collected as quickly and efficiently as possible and this provision could result in millions of defaulted debt being collected..."

The practical impact on the care provider community is devastating. It is a significant financial strain on a hospital of any size, let alone a physician's office to determine if the phone number a patient provided is a cell number or landline number. Then if it is a wireless number, determining if the provision of the number constituted express consent to call them and for what purpose? In addition, when can a hospital vendor rely upon the level of consent provided to the hospital to gauge if their work on behalf of the hospital is protected at least to the limited extent that the hospital is protected?

The bottom line is that healthcare providers must be able to effectively, efficiently and economically communicate with their patients. The TCPA robs our community of this fundamental aspect of the care giver-patient relationship by imposing outdated and artificial

restraints on effective communication. In addition, the TCPA prevents providers from fulfilling statutory and regulatory mandates in an effective and efficient manner, all at the expense of greater patient care.

Those in the healthcare sector aren't looking to inundate consumers with telemarketing calls. The great majority of the communication with patients is care related and mandated by federal statute or regulation. Any government mandate in and of itself, should provide a safeguard against unwarranted lawsuits against hospitals for fulfillment of the essence of the caregiver-patient relationship and to make calls they are required by law to make.

In today's technologically burgeoning society, it makes no sense for the FCC to allow technology to be used to contact consumers via their landline phone, but not their cell phone. Almost 40% of homes today rely on their cell phones as the primary means of communication. This number is expected to continue to rise. With this trend, the FCC is missing a golden opportunity to truly modernize the TCPA in a way that will have beneficial impacts on industry, while also safeguarding the protections consumers want.

Today the FCC is looking at the modernization the TCPA the wrong way. The FCC should be looking at meeting two mutually achievable goals; balancing the needs of consumers for obtaining healthcare and other information quickly and efficiently through their mobile devices while maintaining the strong anti-telemarketing rules that already exist.

This is not a challenging endeavor. AAHAM has met with key members of the FCC several times and the message has been the same. AAHAM has explained in great detail what healthcare calls are and what, in the healthcare industry, would be considered (and prohibited) healthcare telemarketing calls. Yet, still getting the needed changes has been challenging.

We urge Congress to immediately modernize the TCPA to allow automated dialing technology to be used to text or call mobile phones, as long as these texts or calls are **not** for telemarketing purposes. These changes are critical to the future of caregiver-patient communication.

Mr. Chairman and Ranking Member Nelson, this is not a partisan issue, nor should it be. This is a simple issue of the need for government regulations to keep pace with the needs of today's consumers and businesses. This is an issue about government working to bring healthcare costs down for consumers, not drive them up by continuing to rely on outdated rules and regulations.

The TCPA is outdated and needs to be modernized immediately. The FCC's recent decision was disappointing and troubling for us in the healthcare industry. AAHAM's petition was very modest and simply asked for clarification on the definition of consent. The ruling did not effectively end this inquiry. This means that the caregiver community, those upon which we all rely to provide effective healthcare to us, will continue to be subjected to costly lawsuits draining resources that would otherwise go to patient care.

Thank you for this opportunity and if you or your staff have any questions, please feel free to contact me. I would love to work with the Committee on real solutions to this very important issue.