Statement for the Record

On behalf of the

American Bankers Association

Consumer Bankers Association

Credit Union National Association

Financial Services Roundtable

National Association of Federal Credit Unions

before the

Committee on Energy and Commerce

Communications and Technology Subcommittee

United States House of Representatives

September 22, 2016

Statement for the Record

On behalf of the

American Bankers Association

Consumer Bankers Association

Credit Union National Association

Financial Services Roundtable

National Association of Federal Credit Unions

before the

Committee on Energy and Commerce Communications and Technology Subcommittee

United States House of Representatives

September 22, 2016

Chairman Walden, Ranking Member Eshoo, and members of the Committee, the American Bankers Association (ABA),[1] Consumer Bankers Association (CBA),[2] Credit Union National Association (CUNA),[3] Financial Services Roundtable (FSR),[4] and National Association

[1] ABA is the voice of the nation's $16 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard $12 trillion in deposits, and extend more than $8 trillion in loans.

[2] Founded in 1919, the Consumer Bankers Association (CBA) is the trade association for today's leaders in retail banking - banking services geared toward consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding well over half of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.

[3] CUNA represents America's credit unions and their more than 100 million members.

[4] The Financial Services Roundtable represents the largest integrated financial services companies providing banking, insurance, payment and investment products and services to the American consumer. FSR member companies provide fuel for America's economic engine, accounting for $92.7 trillion in managed assets, $1.2 trillion in revenue, and 2.3 million jobs.

of Federal Credit Unions (NAFCU)[5] (collectively, the Associations) appreciates the opportunity to submit a statement for the record for this hearing on the harm to consumers resulting from the outdated Telephone Consumer Protection Act (TCPA). As you are aware, that statute prohibits, with limited exceptions, telephone calls to residential lines and calls and text messages to mobile phones using an automatic telephone dialing system (autodialer) unless the caller has the prior express consent of the called party.

The Associations commend the Committee for holding this hearing. As we indicated in our letter for the record for the Senate Commerce hearing on May 18, 2016, reform of the TCPA is urgently needed. Enacted 25 years ago to limit aggressive telemarketing and secondarily, to protect the nascent wireless phone industry, the TCPA was designed to provide consumers with a right to pursue an individual claim against an unlawful caller in small claims court and without the need for an attorney. Since then, the TCPA has been interpreted by the Federal Communications Commission (Commission) to apply, potentially, to any dialing technology more advanced than a rotary phone and to impose liability for calls to numbers for which consent has been obtained, but the number has been reassigned unbeknownst to the caller. With statutory damages of up to $1,500 per call, any call alleged to have been made using an autodialer and that is inadvertently made to a wireless number without documented consent can result in a class action lawsuit with a damage claim in the millions, if not billions, of dollars.[6] While the total dollar value of these class action lawsuits can be staggering, and frequently generate millions in fees for the attorneys that pursue the cases, these lawsuits rarely accomplish a substantial recovery for consumers. As the attached chart of recent TCPA settlements from one financial institution demonstrates, the median amount awarded to consumers would have been $7.70 if all class members submitted a claim.

This risk of draconian liability has led financial institutions to limit—and, in certain instances, to eliminate—many pro-consumer, non-telemarketing communications, including calls to combat fraud and identity theft, provide notice of data security breaches, and help consumers

[5] The National Association of Federal Credit Unions is the only national trade association focusing exclusively on federal issues affecting the nation's federally insured credit unions. NAFCU membership is direct and provides credit unions with the best in federal advocacy, education and compliance assistance.
[6] It is important to understand that these class action lawsuits accomplish little other than to enrich the attorneys that pursue them. As the attached chart of recent TCPA settlements demonstrates, the median amount awarded to consumer would have been $7.70 if all class members submitted a claim.

manage their accounts and avoid late fees and delinquent accounts. The balance Congress struck between protecting consumers and allowing routine and important communications between a business and its customers to occur has been lost—and, all too often, the very consumers Congress sought to protect are harmed.

In our statement, we would like to highlight three critical points:

- The TCPA, as interpreted by the Commission, has a detrimental impact on consumers by effectively preventing financial institutions from sending important, and often time-sensitive, messages to consumers.
- The TCPA is out of touch with current technology and consumer communication preferences and expectations and prevents financial institutions from effectively serving consumers who wish to communicate by cell phone.
- Congress should reform the TCPA by imposing a damages cap and mandating the establishment of a database of reassigned numbers.

I. The TCPA Has a Detrimental Impact on Consumers by Effectively Preventing Financial Institutions from Sending Important, and Often Time-sensitive, Messages to Consumers

Financial institutions seek to send automated messages to prevent fraud and identity theft, provide notice of security breaches, provide low balance and over-limit alerts, and help consumers avoid delinquency, among other beneficial purposes. Autodialers enable financial institutions to provide these important communications to large numbers of consumers quickly, efficiently, and economically. The Commission's recent interpretation of the TCPA, coupled with the threat of class action liability, discourages financial institutions from making these calls that benefit consumers.

A. The Importance of Facilitating Important Communications to Cell Phone Users, Particularly Low Income Users

Consumers today value, and increasingly expect, the convenience of wireless connectivity and the convenience of being able to use mobile financial services. Nearly 50% of U.S. households are now "wireless-only" with that percentage rising to 71.3% for adults between

25 and 29.[7] Similarly, CTIA-The Wireless Association reported that, as of year-end 2014, 44.0% of U.S. households were "Wireless Only."[8]

This new reality has profound implications for how financial institutions communicate with consumers, especially those of low and moderate incomes for whom a cell phone may be their only point of contact. Often, low income consumers strictly rely on their cell phone for Internet and other communications because purchasing multiple devices, such as landlines and laptops, can be prohibitively expensive. Research conducted by the Federal Deposit Insurance Corporation found that underbanked consumers *prefer* text messages to e-mails when receiving alerts from financial institutions because texts are faster, easier to receive, attention grabbing, and quicker and easier to digest.[9] Building on this research, the FDIC is exploring the potential for mobile banking to promote and support underserved consumers' banking relationships in part by increasing the communications and alerts sent to those underserved consumers that use mobile services.[10] The Bureau of Consumer Financial Protection also concluded that alerts to cell phones help consumers, including low income consumers, access financial services and manage personal finances:

> By enabling consumers to track spending and manage personal finances on their devices through mobile applications or *text messages*, mobile technology may help consumers achieve their financial goals. For economically vulnerable consumers, mobile financial services accompanied by appropriate consumer protections can enhance access to safer, more affordable products and services in ways that can improve their economic lives.[11]

Financial institutions want to serve their customers and members—and promote financial inclusion—by connecting with consumers who may use only cell phones for communications.

---

[7] STEPHEN J. BLUMBERG & JULIAN V. LUKE, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, CTR. FOR DISEASE CONTROL AND PREVENTION, NAT'L CTR. FOR HEALTH STATISTICS, WIRELESS SUBSTITUTION: EARLY RELEASE OF ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY, JANUARY-JUNE 2015 (2015), *available at* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201512.pdf (Tables 1 & 2).

[8] CTIA-The Wireless Association, *Annual Wireless Industry Survey*, (last visited Dec. 1, 2015), http://www.ctia.org/your-wireless-life/how-wireless-works/annual-wireless-industry-survey.

[9] FED. DEPOSIT INS. CORP., QUALITATIVE RESEARCH ON MOBILE FINANCIAL SERVICES FOR UNDERSERVED CONSUMERS (Oct. 30, 2015), at 21, *available at* https://www.fdic.gov/about/comein/2015/come-in-2015.pdf.

[10] FED. DEPOSIT INS. CORP., FIL-32-2016, REQUEST FOR COMMENTS ON MOBILE FINANCIAL SERVICES STRATEGIES AND PARTICIPATION IN ECONOMIC INCLUSION DEMONSTRATIONS 3 (2016), available at https://www.fdic.gov/news/news/financial/2016/fil16032.pdf.

[11] BUREAU OF CONSUMER FIN. PROT., MOBILE FINANCIAL SERVICES: A SUMMARY OF COMMENTS FROM THE PUBLIC ON OPPORTUNITIES, CHALLENGES, AND RISKS FOR THE UNDERSERVED, at 10 (Nov. 2015), *available at* http://files.consumerfinance.gov/f/201511_cfpb_mobile-financial-services.pdf (emphasis added).

The TCPA should not interfere with the efforts of these institutions to provide financial services to consumers of all economic levels.

B. The Threat of TCPA Litigation Unnecessarily Limits Several Types of Pro-Consumer Calls

The threat of class action liability threatens to curtail the following categories of pro-consumer, non-telemarketing communications made by financial institutions:

(1) Breach Notification and Fraud Alerts

With identity theft and fraud losses at all-time highs,[12] financial institutions are relentlessly pursuing fraud detection and prevention capabilities. A key component is autodialed calling to consumers' wireline and mobile telephones, including text messaging to consumers' mobile devices, to alert consumers to out-of-pattern account activity and threatened security breaches. In addition, financial institutions are required to establish response and consumer notification programs following any unauthorized access to consumers' personal information, under Section 501(b) of the Gramm-Leach-Bliley Act, as well as under the breach notification laws of 46 states and the District of Columbia.[13] The volume of these required notifications, which average 300,000 to 400,000 messages per month for one large financial institution alone, cannot be accomplished at all, much less with acceptable speed, unless the process is automated.[14] In addition, identity theft victims have the right, under the Fair Credit Reporting Act (FCRA), to have fraud alerts placed on their credit reporting agency files, which notify all prospective users of a consumer report that the consumer does not authorize the establishment of

---

[12] In 2015, 781 data breaches were reported, a 27 percent increase from 2013. Press Release, Identity Theft Resource Center, Identity Theft Resource Center Breach Report Hits Near Record High in 2015 (Jan. 25, 2016), *available at* http://www.idtheftcenter.org/index.php/ITRC-Surveys-Studies/2015databreaches.html. In 2014, 12.7 million people were victims of identity fraud. AL PASCUAL & SARAH MILLER, JAVELIN STRATEGY & RESEARCH, 2015 IDENTITY FRAUD: PROTECTING VULNERABLE POPULATIONS (Mar. 2015), https://www.javelinstrategy.com/coverage-area/2015-identity-fraud-protecting-vulnerable-populations.

[13] Gramm-Leach-Bliley Financial Services Modernization Act of 1999, Pub. L. 106-102, 113 Stat. 1338, § 501(b); *see, e.g.*, Cal. Civ. Code § 1798.29; Fla. Stat. § 817.5681; 815 ILCS § 530/10(a); NY CLS Gen. Bus. § 899-aa; N.C. Gen. Stat. § 75-65; Rev. Code Wash. § 19.255.010.

[14] The greater efficiency of automated calling is suggested by a report issued by Quantria Strategies, LLC, which states that automated dialing permits an average of 21,387 calls per employee per month, as opposed to an average of 5,604 calls per employee per month when manual dialing is used. The gain in efficiency when automated methods are used is 281.6%. *See* J. Xanthopoulos, *Modifying the TCPA to Improve Services to Student Loan Borrowers and Enhance Performance of Federal Loan Portfolios* 9 (July 2013), *available at* http://apps.Commission.gov/ecfs/document/view?id=7521337606.

any new credit plan or extension of credit without verification of the consumer's identity. Further, the FCRA expressly directs financial institutions to call consumers to conduct this verification.[15]

Although the Commission granted an exemption from the TCPA's consent requirements for these data breach and suspicious activity alert calls, the Commission inexplicably required that exempted calls be made *only* to a number that was *provided* by the customer. As a result of this requirement, many consumers will not be contacted with time-sensitive messages intended to prevent fraud and identity theft simply because there is no documentation that the consumer, not a spouse or other joint account holder, provided the number to the financial institution. What we have learned from the marketplace is that the "provided number" condition is unnecessarily limiting the ability of financial institutions to send exempted messages:

- One bank is unable to send approximately 3,000 exempted messages ***each day*** due to the provided number condition.
- A second large bank is not able to send exempted messages to approximately 6 million customers because of the condition.
- A third bank is not able to send an exempted message to 62% of its customers because of the condition.

Small financial institutions, including credit unions and community banks, have also expressed concerns, or found that they do not have the resources to comply with a number of conditions that must be met to qualify for this exemption. The experience of these financial institutions shows that the provided number condition, rather than serving the interests of consumers, has effectively prevented consumers from enjoying the benefits the exemption was intended to provide.

(2) Consumer Protection and Fee Avoidance Calls

Financial institutions use autodialed telephone communications to protect consumers' credit and help them avoid fees. Institutions seek to alert consumers about low account balances, overdrafts, over-limit transactions, or past due accounts in time for those consumers to take action and avoid late fees, accrual of additional interest, or negative reports to credit bureaus.

[15] Fair Credit Reporting Act § 605A (codified at 15 U.S.C. § 1681c-1).

Indeed, the FDIC listed "low-balance alerts" as one of the "most promising strategies" for financial institutions to help consumers avoid overdraft or insufficient funds (NSF) fees.[16] Autodialed calls that deliver prerecorded messages are the quickest and most effective way for these courtesy calls to be made. Failure to communicate promptly with consumers who have missed payments or are in financial hardship can have severe, long-term adverse consequences. These consumers are more likely to face repossession, foreclosure, adverse credit reports, and referrals of their accounts to collection agencies. Prompt communication is a vital step to avoid these harmful consumer outcomes.

(3) Loan Modification Calls

Financial institutions also rely upon automated calling methods to contact consumers who are encountering difficulty paying their mortgages or student loans. Autodialers and prerecorded messages are used to initiate contact with delinquent borrowers, to remind them to return the paperwork needed to qualify for a modification, and to notify borrowers that a modification is being delivered so that the package will be accepted. According to the Department of Education, "If servicers are able to contact a borrower, they have a much better chance at helping that borrower resolve a delinquency or default… With phone numbers changing or being reassigned on a regular basis, it is virtually impossible for servicers to use auto-dialing technology."[17] Additionally, the Commission's consent requirements are in conflict with the Bureau of Consumer Financial Protection's mortgage servicing rules, which require servicers to make a good faith effort to establish live contact with a borrower. If the servicer has not obtained the consent of the borrower, it cannot—consistent with the TCPA—use efficient dialing technology to make the calls required by the Bureau's rules to the approximately 50% of consumers with wireless numbers only. These inconsistent standards leave financial institutions with an unworkable choice--violate the mortgage rules or potentially be subjected to TCPA litigation.

(4) Customer Service Calls

---

[16] FED. DEPOSIT INS. CORP., FIL-32-2016, REQUEST FOR COMMENTS ON MOBILE FINANCIAL SERVICES STRATEGIES AND PARTICIPATION IN ECONOMIC INCLUSION DEMONSTRATIONS 3 (2016), *available at* https://www.fdic.gov/news/news/financial/2016/fil16032.pdf.

[17] DEPT. OF EDUCATION "STRENGTHENING THE STUDENT LOAN SYSTEM TO BETTER PROTECT ALL BORROWERS": ALLOW SERVICERS TO CONTACT FEDERAL STUDENT LOAN BORROWERS VIA THEIR CELL PHONES (OCT. 1, 2015) AT 16, *available at* HTTP://WWW2.ED.GOV/DOCUMENTS/PRESS-RELEASES/STRENGTHENING-STUDENT-LOAN-SYSTEM.PDF

Financial institutions rely upon the efficiency of autodialed calling to provide follow-up calls to resolve consumers' service inquiries. For example, if a consumer inquiry requires account research, a customer service representative often completes the necessary research and places an autodialed follow-up call to the consumer. Autodialed calls are initiated also to remind consumers that a credit card they have requested was mailed and must be activated. Our members go to great lengths to maintain good customer relations, but the risk of TCPA litigation prevents them for fully serving their customers.

(5) Insurance Policyholder Alerts

Insurance providers use autodialers to advise consumers of the need to make payment on automobile and life insurance policies to prevent potential lapse. Automobile insurers are required to give written notice 10-30 days in advance before terminating policies for failure to pay. Using an autodialer helps ensure the consumer is aware of the need to make payment in time to avoid a lapse in policy, late fees, or driving without legally-required liability insurance.

Similarly, life insurance policies require advance written notice of cancellation. If a policy lapses for non-payment, some individuals may no longer be eligible for life insurance or may have to pay substantially more for that insurance. Use of the autodialed messages helps avoid nonpayment cancellation of the life insurance.

(6) Disaster Notifications

Many property insurance companies rely on the speed of autodialers to notify their customers when a catastrophe is imminent of how and where to file a claim. Furthermore, immediately after a disaster, wireline phone use may be unavailable, claim locations may have changed, and normal communications may not be operating, necessitating calls to mobile phones. Similarly, autodialers may also be used by insurers to give information regarding the National Flood Insurance Program.

II. The TCPA Prevents Financial Institutions from Efficiently Serving Consumers who Wish to Communicate by Mobile Phone

As interpreted by the Commission, the TCPA imposes significant impediments on the ability of financial institutions and other businesses to communicate with those consumers who elect to communicate by cell phone. Put simply, the TCPA effectively prevents financial institutions from using the most efficient means available to advise these mobile phone-electing consumers of important and time-sensitive information affecting the consumers' accounts. This is not what Congress intended. In enacting the TCPA, Congress sought to provide consumers with *choice* of contact, not isolation from contact. Making that choice for cell phone users more burdensome and less efficient—as the Commission has done in its recent orders—is not what Congress sought to accomplish. The report from this Committee accompanying the enactment of the TCPA clearly states that, under the TCPA, "a retailer, insurer, banker or other creditor would not be prohibited from using an automatic dialer recorded message player to advise a customer . . . that an ordered product had arrived, a service was scheduled or performed, or a bill had not been paid."[18] In light of litigation risk, fulfilling this Congressional intent in providing important information to their consumer using automated dialing technology is not an option.

There are two primary ways in which the TCPA, as interpreted by the Commission, imposes significant impediments on the ability of financial institutions to contact consumers, as described below.

A. The TCPA Has Been Interpreted to Sweep all Non-manual Dialing Technologies within the TCPA's Limited Autodialer Category.

The Commission has construed the definition of an autodialer so broadly that it sweeps in technologies used by financial institutions to send important messages to consumers that were never contemplated to fall within the definition of this term. This expansive interpretation effectively prohibits financial institutions from using many efficient dialing technologies unless the consumer's prior express consent has been obtained. Congressional action is needed to return the definition of autodialer to its original, limited application.

As defined in the TCPA, an autodialer has the "capacity- (A) to store or produce telephone numbers to be called, *using a random or sequential number generator*; and (B) to dial such numbers."[19] Significantly, financial institutions, unlike the abusive telemarketers from which Congress intended to protect consumers, are interested only in calling the telephone numbers of *actual* consumers and members and have no desire or incentive to dial numbers generated randomly or in sequence.

[18] H.R. Rep. 102-317 (1991).
[19] 47 U.S.C. § 227(a)(1) (emphasis added).

However, the Commission greatly expanded the scope of the devices classified as an autodialer beyond devices that use a random or sequential number generator. In addition, the Commission concluded a device is an autodialer if it has the "potential ability" to perform the autodialer's functions—even if it does not have the present ability to do so.[20] This interpretation, divorced from the statutory text, sweeps in dialing systems used by financial institutions, preventing them from sending important messages to consumers efficiently. In fact, one financial institution has resorted to purchasing last generation "flip" cell phones solely to ensure compliance with the Commission's rulings concerning the TCPA . Financial institutions should not be forced to use all-but obsolete technology in order to remain compliant with federal law.

B. The TCPA's Imposition of Liability for Calling Reassigned Numbers is Harmful to Consumers

As interpreted by the Commission, the TCPA creates a risk of liability for calling a number for which the caller has received consent, but which has been subsequently reassigned to another consumer unbeknownst to the caller. The potential liability for calls made in good faith to reassigned numbers threatens to curtail important and valued communications between the institution and consumers.[21] If the fear of calling a reassigned number prevents a financial institution from sending an alert to a consumer about potential identity theft, suspicious activity on the account, or a low balance, the consumer suffers.

The TCPA's imposition of liability for calls made to reassigned numbers is wholly unnecessary to protect the privacy of consumers. There is simply no need or incentive for a financial institution to place a non-telemarketing, informational call to anyone other than the intended recipient. Moreover, institutions make significant efforts to promote accuracy in the numbers they call, such as providing consumers multiple means to edit contact information, confirming a consumer's contact information during any call with the consumer, regularly

[20] In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 et al., 30 F.C.C. Rcd. 7961, 7976 (2015).

[21] Although the Commission established a "one call" safe harbor, this provides little comfort to financial institutions, as callers often do not learn whether a call has connected with the intended recipient—as opposed to a party to which the number may have been reassigned—and thus do not receive notice when the number has been reassigned to another consumer.

checking to confirm that a residential landline number has not been transferred to a wireless number, or providing instructions for reporting a wrong number call.

Financial institutions—which can place billions of informational calls annually—cannot completely avoid calling reassigned wireless telephone numbers. Telephone companies recycle as many as 37 million telephone numbers each year,[22] and yet there is no public wireless telephone directory or tool available to identify numbers that have been reassigned. We recommend that Congress mandate the establishment of a database of reassigned numbers to assist callers with contacting consenting consumers at those consumers' current number. We applaud Chairman Thune and Senator Markey for highlighting the need for a reassigned database in their July 14, 2016 letter to CTIA – the Wireless Association. We look forward to developments on the proposed database and welcome the opportunity for dialogue about how wireless companies can work with the FCC to make such a database available at no, or limited cost, to consumers and those seeking to communicate with them.

III. Congress Should Reform the TCPA by Imposing a Damages Cap.

We urge Congress to reform the TCPA to ensure that financial institutions and other callers can make important, and often time-sensitive, calls to consumers. A statute designed to provide consumers with a right to pursue an individual claim against an unlawful telemarketer in small claims court and without the need for an attorney[23] now threatens any company or financial service provider that seeks to use automated dialing technologies to communicate with its customers or members with abusive class action litigation. The balance that Congress struck between protecting consumers and safeguarding beneficial calling practices has been eviscerated, and recent interpretations of the TCPA clearly demonstrate the Commission's refusal to restore this balance.

---

[22] Alyssa Abkowitz, *Wrong Number? Blame Companies' Recycling*, Wall Street J. (Dec. 1, 2011), available at http://www.wsj.com/articles/SB10001424052970204012004577070122687462582#ixzz1fFP14V4h.

[23] *See* 137 Cong. Rec. 30821-30822 (1991) (statement of Sen. Hollings) ("The substitute bill contains a private right-of-action provision that will make it easier for consumers to recover damages from receiving these computerized calls. The provision would allow consumers to bring an action in State court against any entity that violates the bill. The bill does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. **Nevertheless, it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court** . . . . Small claims court or a similar court would allow the consumer to appear before the court without an attorney. **The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer."**) (emphasis added).

Congress should amend the TCPA by imposing a damages cap similar to the damage caps assigned to other consumer financial protection statutes. The Truth in Lending Act (TILA), the Electronic Funds Availability Act, and the Fair Debt Collection Practices Act each limit the amount awarded in individual and class action litigation. TILA, for example, includes not only individual statutory damages caps, but also imposes an aggregate cap in the event of a class action or series lawsuits tied to the same lack of compliance. We believe that a similar cap would be an appropriate addition to the TCPA. We welcome the opportunity to work with Congress to determine what the proper damages cap amount would be for TCPA litigation.

Conclusion

In enacting the TCPA, Congress struck a balance between protecting consumer privacy and safeguarding calling practices that help consumers avoid identity theft, late fees, and other harms. The Commission's interpretations of the TCPA effectively eliminated that balance, preventing financial institutions and others who wish to communicate. We agree with Chairman Walden that "[a]s technology evolves, so too should our laws. The TCPA should be ensuring Americans receive the calls they want without being harassed by calls they don't. Instead, it's a prime example of an outdated law that lags behind modern communications technology and consumer preferences." We look forward to working with the Congress on modernizing the TCPA to protect consumers' ability to receive important, and often time-sensitive, communications.