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The Imperative to Modernize the TCPA: Why an Outdated Law Hurts Consumers and Encourages Abusive Lawsuits

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The Imperative to Modernize the TCPA: Why an Outdated Law Hurts Consumers and Encourages Abusive Lawsuits

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Introduction

This paper addresses the Telephone Consumer Protection Act (TCPA) in the context of modern communication technology development, adoption, and usage by consumers. Additionally, the dramatic rise in TCPA-related litigation is examined as a manifestation of the outdated nature of the regulation itself and its openness to exploitation by trial lawyers. To function as an effective consumer-protection measure, the TCPA must be reformed to more accurately reflect the current state of communication technology in addition to the ways both businesses and consumers use those technologies.

Executive Summary

- The TCPA was originally designed to protect consumers from harassing telemarketing calls but has increasingly been applied across a diverse range of industries far outside the scope of telemarketing. Between 2010 and 2015 there was a 948% increase in litigants involved in TCPA-related lawsuits.
- TCPA litigation has been driven by the onerous statutory damages provided for in the law. These damages are set at $500 per violation and three times the damages if violations are found to be intentional; as such, businesses are at risk of being assessed $1,500 for each individual violation of the TCPA. Rather than compensating consumers, the outcomes of class action lawsuits generally benefit the plaintiff's attorneys. In 2014, the average attorneys' fees for a TCPA class action settlement were $2.4 million while the individual consumer received $4.12.
- The stark disparity in the damages received by consumers relative to the fees retained by attorneys undermines the initial purpose of the TCPA, rendering it more a tool for attorney enrichment than consumer protection.
- The TCPA is problematic for businesses in part because the statutory scheme established in 1991 is poorly suited for the contemporary communication technology environment. This problem has been exacerbated by the Federal Communications Commission (FCC), the agency responsible for implementing the TCPA, whose broad interpretation of the statute has failed to provide a pathway to compliance for businesses using modern communication technology. This combination, an outdated statute and impossible-to-comply-with regulations, has created an uncertain environment for businesses struggling to decipher how to communicate with consumers using modern communication technology without inadvertently exposing themselves to enormous liability risk.
- Since the law was enacted in 1991:
  - Fixed telephone ("landline") subscriptions have fallen from 54 per 100 people to 40 per 100 people in 2014; a 26% decline from 1991.
  - Mobile cellular subscriptions have increased from 3 per 100 people to 110 per 100 people in 2014. This represents an increase of 3,567% since 1991.
  - The first text message was sent in 1992. As of 2011, Americans sent 6 billion text messages on a daily basis and the average mobile phone customer sent or received 35 messages each day.

- In 2015, 47.7% of adults reported living in a household that had wireless telephone service only.
- Text messaging is presently the most effective method of contact for consumers between the ages of 18-24; for those consumers aged 25-34 and 35-44, text messaging is the second most effective method of contact after E-mail.

The Telephone Consumer Protection Act

The Telephone Consumer Protection Act (TCPA) was enacted in 1991 as a response to the growth in telemarketing calls in an era of limited cellular telephone ownership and usage. In enacting the TCPA, Congress sought to strike a balance between protecting consumers from unwanted invasions of privacy while at the same time preserving the ability of legitimate businesses to communicate beneficial information to consumers. The Federal Communications Commission (FCC) implemented rules under the TCPA that prohibit making a telemarketing call to a residential line with an automated dialing system or prerecorded voice without prior consent. The TCPA also specifically prohibits making *any* call- both telemarketing and non-telemarketing - using an automated dialer or prerecorded voice to call "any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call" unless prior express consent is first obtained. [1, 2]

In addition to prohibiting specified actions, the TCPA also provides avenues for consumer recourse for violations of the Act. Section 227 (b)(3)(A) establishes a private right of action whereby a consumer may receive $500 in damages for each violation of the TCPA relative to certain calls received without prior consent, while Section 227 (b)(3)(C) allows for three times the damages when violations are found to be intentional. As such, the financial penalties can quickly accumulate for TCPA violations. [1]

This paper will address two of the more problematic elements of the TCPA as it exists today. First, while initially implemented to protect consumers from aggressive and harassing telemarketers, the TCPA has increasingly been applied to non-solicitation communications from a range of industries, often with an indifference to the legitimacy of those communications. The potential to accumulate large sums in statutory damages has not only deterred the bad behavior that Congress intended to target, but it has also created the unintended consequence of incentivizing plaintiffs' attorneys to file frivolous TCPA lawsuits based on ambiguities in the law and regulations.

Second, the TCPA is now a quarter-century old and as a result outlines policies for the use of communication technologies that are profoundly antiquated. Despite being a technology statute, the TCPA has failed to anticipate or account for the development of new, more mobile and efficient technology over the course of the last twenty-five years, resulting in requirements that are insufficient and poorly applicable to the current communication landscape.

The Growth and Impact of TCPA Litigation

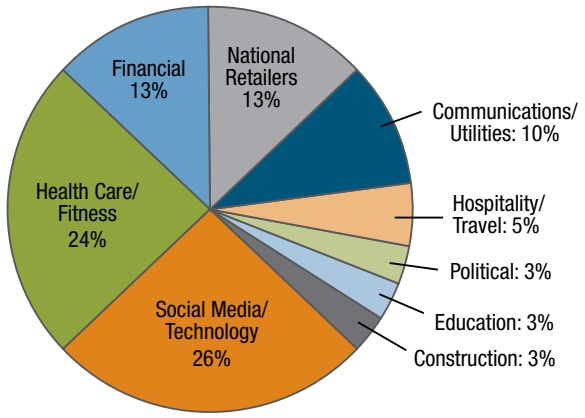
The TCPA was originally designed to protect consumers from harassing telemarketing calls; however, it has increasingly been applied across a diverse range of industries. Figure 1 illustrates the spectrum of businesses, nonprofit organizations, and government entities impacted by the expansive application of the TCPA. [3] Given the generally low barriers to filing a TCPA lawsuit, the ambiguities in its application to modern communication technology, and the potential for huge payouts, TCPA litigation has grown exponentially. Figure 2 shows the total number of unique consumer plaintiffs in TCPA litigation. [4] Between 2010 and 2015 there was a 948% increase in litigants; between 2014 and 2015 alone the total number of litigants increased 45%.

As the TCPA has been broadly interpreted and applied, an increasing number of non-telemarketing businesses are at risk of lawsuits for engaging in a variety of legitimate business-related communications if the incorrect consumer is inadvertently contacted. These high-risk business communications can include reminders of due dates for bills; notices from financial institutions such as overdrafts or late fees; notices of flight changes, school cancellations, or changes in a work schedule; or updates from utility companies about planned outages or billing. [5] As a result of the uncertainty surrounding the interpretation of the TCPA and the potential threat of a frivolous lawsuit, or a lawsuit for which the consumer has suffered no tangible harm, compliance-minded businesses have become apprehensive about engaging in direct communication with consumers, negatively impacting customer service initiatives and outreach.

The relative ease of filing a TCPA lawsuit coupled with the potential for extraordinarily high statutory damages has had the unintended consequence of incentivizing plaintiff-driven TCPA litigation. This litigation often results in settlements by defendants, often in the millions of dollars, to mitigate the risk of fighting "against claims alleging literally billions of dollars in statutory damages." [6] Table 1 shows some class action settlements by industry; of note is how little the industries listed have to do with telemarketing.

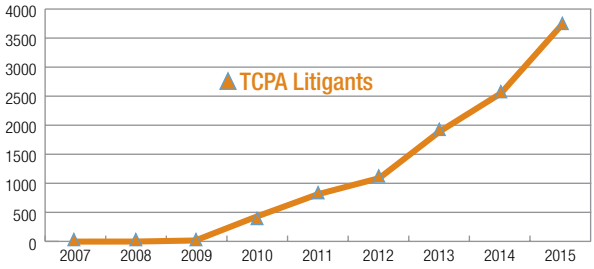
While the TCPA was established as a consumer protection measure with damages for violations as compensation for the consumer, its current application appears to function more as a revenue stream for law firms. Indeed, compensation for consumers appears to be minimal at best. Figure 3 shows the average amount received by both consumers and attorneys for class action settlements between 2011 and 2014. In 2014, the average attorneys' fees for a TCPA class action settlement were $2.4 million while the individual consumer received $4.12. [3]

Figure 1. TCPA Class Actions by Industry



Source: Squire Patton Boggs, 2015

Figure 2. TCPA Litigation by Individual Litigants, 2007-2015



Source: WebRecon, 2016

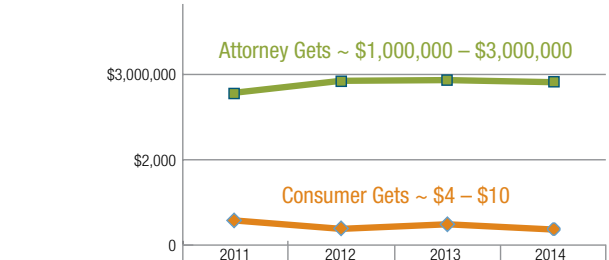
Table 1. TCPA Class Action Settlements by Industry

Industry Category	Settlement Amount	Date
National Food Retailer	$16.5 MM $9.75 MM	May 2013 June 2013
National Footwear Retailer/ Manufacturers	$10 MM $6.25 MM	February 2013 February 2012
National Apparel Retailer/ Manufacturers	$10 MM	February 2013
Automotive Services	$35-47 MM	August 2012
Mortgage Lenders	$17 MM $7-9 MM	June 2012 January 2012
Debt Collection	$9 MM $24 MM	September 2012 September 2012
Auto Warranty	$17 MM	September 2012
Banks	$17.1 MM $32 MM	June 2013 September 2013

Source: Institute for Legal Reform, 2013

Table 2 shows a selection of specific TCPA class action settlements between 2013 and 2015. Again, the same pattern from Figure 3 is repeated here; businesses agree to multi-million dollar settlements that translate into multi-million dollar attorneys' fees while the individual consumer in the class action often receives a nominal award. This stark disparity in the damages received by consumers relative to the fees retained by attorneys undermines the initial purpose of the TCPA, rendering it more a tool for attorney enrichment than consumer protection.

Figure 3. Recent TCPA Class Action Settlement Averages, 2011-2014



	2011	2012	2013	2014
Attorney's Fees*	$870,000	$2,593,333	$2,911,500	$2,400,000
Per Class Member**	$9.53	$3.93	$6.28	$4.12

Source: Squire Patton Boggs, 2015

*The high average payments to plaintiff's attorneys make obvious their preference to continue the status quo.
**The average payments to consumers make obvious the frivolous nature of TCPA claims – these settlements are so low because the vast majority of class members do not have valid claims and it is impossible to ascertain those that do without extensive mini-trials that preclude class certification.

Table 2. Select TCPA Class Action Settlements

Date: 1. Case Filed 2. Settlement Filed 3. Settlement Approved	Case Name	Potential Class Size	Total Amount Allocated	Attorney's Fee/Cost Allocation	Per Member Recovery if All Claim
1. April 9, 2013 2. September 30, 2014 3. February 11, 2015	*Hageman et al. v. AT&T Corp. et al.* (C.D. Mont.)	16,000	$45 Million	$15 Million	Pro rata cash awards not to exceed $500
1. January 10, 2014 2. June 17, 2014 3. July 25, 2014	*HSBC v. Wilkins Bank* (N.D.Ill.)	1.4 Million	$39.975 Million	Approx. $12 Million	$20
1. October 12, 2012 2. September 5, 2014 3. October 2, 2014	*Couser v. Comenity Bank* (S.D.Cal.)	4 Million	$8.4 Million	$2.118 Million	$1
1. June 16, 2010 2. March 12, 2012 3. May 30, 2014	*Connor v. JP Morgan Chase* (S.D. Cal.)	1,718,866; 1,181,441with monetary claims	Between $7 Million and $9 Million	$3 Million	$7.62
1. August 25, 2010 2. August 27, 2012 3. February 15, 2013	*Sarabri v. Weltman, Weinberg & Reis* (S.D. Cal.)	618,000	$525,000	$225,000	$0.85
1. June 17, 2011 2. January 12, 2013 3. May 24, 2013	*Spillman v. RPM Pizza* (M.D.La.)	Unknown	$9.76 Million	Up to $3 Million	$15 per person or a free one topping pizza depending on claim period

Source: ACA International, 2015

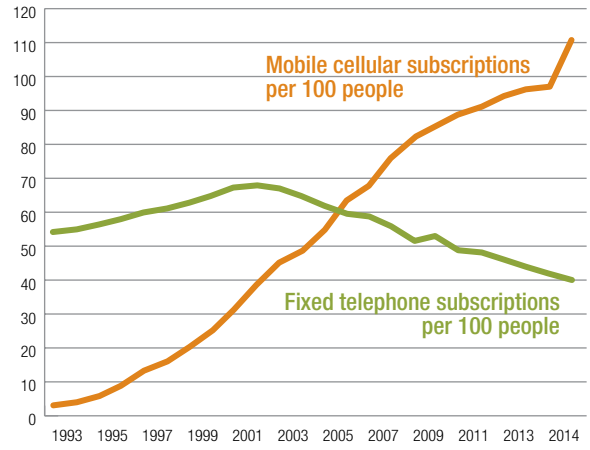
The Modernization Imperative

Enacted a quarter of a century ago, the TCPA articulates a woefully outdated understanding of contemporary technologies and their uses. The TCPA defines an "automatic telephone dialing system" (ATDS) as "equipment which 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." Because this language has not been updated in twenty-five years, there has been tremendous uncertainty over how modern communication technologies, including consumers' access to and preferred use of those technologies, fit into this statutory framework.

Furthermore, instead of making common-sense clarifications to the TCPA that would allow it to reflect the substantial advances in communications technology, the FCC has made the TCPA landscape much worse. For example, the FCC's interpretation of the term "capacity" in the definition of an ATDS to include both current technologies that have the statutory characteristics of an autodialer as well as "equipment that has the potential to be modified in the future to possess the statutory elements" has muddied the waters even more while at the same time increasing exposure to massive TCPA liability risk for legitimate businesses. [7] By applying the FCC's broad interpretation of "potential functionalities," all modern telecommunications devices including tablets, smartphones, and laptops have the capacity to be used as automatic telephone dialing systems. [7] Indeed, the FCC could only point to a rotary telephone as an example of equipment that would not qualify as an ATDS. The effect of this interpretation is to limit the ability of businesses to contact consumers on mobile devices for fear of violating the TCPA.

Part of the disconnect between the statutory guidelines established in the TCPA and modern business practices is rooted in the TCPA's inability to keep pace with the rapid development of communication technologies over the past twenty-five years. Figure 4 shows the trajectory of fixed telephone subscriptions (broadly understood as "landlines") per 100 people in the U.S. from 1991, when the TCPA was enacted, through 2014. As of 1991, there were 54 fixed telephone subscriptions per 100 people; subscriptions peaked in 2000 at 68 per 100 people. After the year 2000, fixed telephone subscriptions began a steady decline with only 40 subscriptions per 100 people by 2014. [8] This shift in fixed telephone subscriptions represents a 26% decline from 1991. Fixed phone lines have continued to decline as mobile communication technologies have become increasingly more affordable and accessible.

Figure 4. Fixed Telephone and Mobile Cellular Subscriptions per 100 People in the U.S., 1991-2014



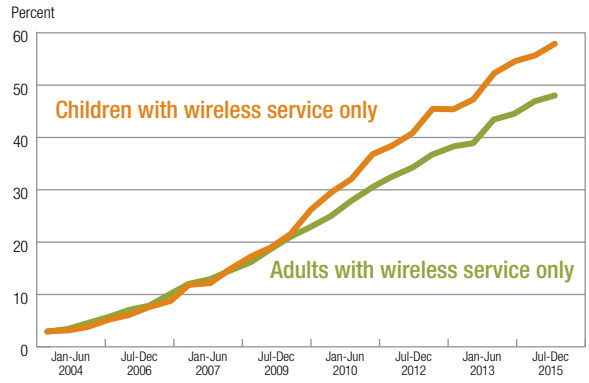
Data Source: World Bank, 2016a; 2016b

When the TCPA was enacted in 1991, there were three mobile cellular subscriptions per 100 people in the U.S. Figure 4 further demonstrates the dramatic increase in mobile cellular subscriptions between 1991 and 2014. By 2001, there were 45 mobile cellular subscriptions per 100 people, an increase of 1,400% over the first decade that the TCPA was in effect. In 2004, mobile cellular subscriptions surpassed fixed telephone subscriptions. When the TCPA was twenty years-old, mobile cellular subscriptions stood at 94 per 100 people; by 2014 that figure had increased to 110 mobile cellular subscriptions per 100 people, representing an increase of 3,567% from 1991. [9]

The market penetration of mobile technologies and the steady decline of fixed telephone lines have also shifted the ways consumers access and use new technology. The Pew Research Center found that 92% of American adults own cell phones while 68% own smart phones. [10] Additionally, as of the latter half of 2015, 47.7% of adults and 57.7% of children in the U.S. live in households with wireless telephone service only (see Figure 5). [11]

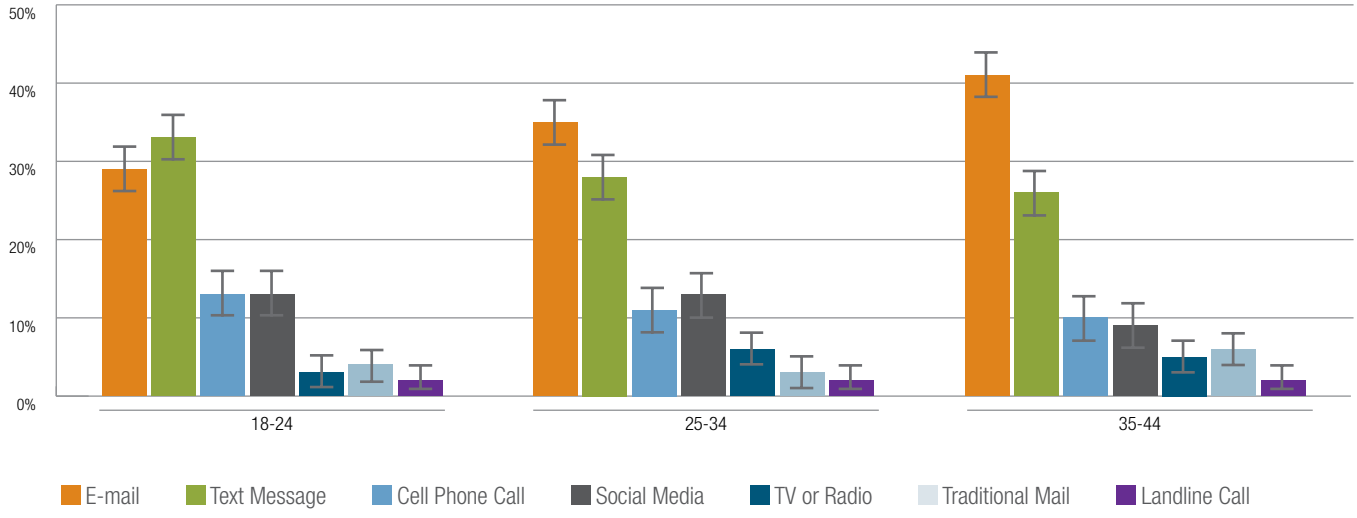
In conjunction with the growth of mobile technology usage is an attendant rise in communications facilitated by those technologies, including text messaging. The first text message was sent in 1992, a year after the enactment of the TCPA, and in 1995 the average mobile customer sent 0.4 messages per month. [12] By 2011, researchers found that 6 billion text messages were sent on a daily basis in the U.S., with the average mobile phone customer sending or receiving 35 messages each day. [13] Text messaging is the most commonly used feature of mobile phones, with 97% of smartphone owners using text messaging at least once over a one-week period. [14] Similarly, 57% of smartphone owners report using their mobile phones for online banking. [14] Consumers between the ages of 18-24 have reported that text messaging is their most effective method of contact; for consumers aged 25-34 and 35-44 text messaging is the second most effective method of contact after E-mail (see Figure 6). E-mail is the most preferred method of first contact for each of these consumer groups while landline telephone calls are the least preferred method of contact. [15] Despite the rapid development of mobile communication technology and consumers' ready adoption of these new technologies, the TCPA continues to govern business communications from an understanding of technology that is twenty-five years out-of-date.

Figure 5. Percentage of Adults and Children Living in Households with Only Wireless Telephone Service, 2003-2015.



Source: CDC/NCHS, National Health Interview Survey

Figure 6. Most Effective Contact Method by Age Group*



Source: NCHER, 2016
*Weighted by Age, Gender and Region

Conclusion

As a consumer protection measure, the TCPA appears to fall short as its outmoded understanding of technology is barely applicable to the modern consumer. Furthermore, litigation focused on violations of the TCPA functions as a lucrative income stream for trial lawyers while consumers receive very little from class action settlements. As such, both consumers and businesses would benefit from an overall modernization of the TCPA.

Mobile communication technology is widespread, easily accessible, and the preferred method of contact for many consumers. Nevertheless, the TCPA treats these modern communication technologies much the same way it would in 1991, neglecting twenty-five years of innovation, technological development, and increasing affordability as well as consumer preferences and behavior. Businesses are hesitant to take advantage of these technologies for legitimate purposes such as "airline flight changes, adverse financial actions, negative credit reporting, due date reminders, or data breaches" for fear of violating the TCPA. [16] Rather than improving the consumer experience, the TCPA has come to act as a barrier to communication between businesses and their customers. Indeed, in 2013 the U.S. Department of Education recommended allowing the use of automated dialing systems in pursing the recovery of outstanding student loans; the Obama Administration made a similar recommendation in 2015 to assist the federal government in the recovery of outstanding taxes. [16] These recommendations indicate that the ability to use modern communication technology is essential for reaching consumers in the contemporary marketplace.

Because of an overall lack of clarity and dated approach to communication technologies, coupled with high statutory damages for violations, the TCPA has proven to be a lucrative tool for plaintiff attorneys. This is evidenced in the 948% increase in TCPA litigation between 2010 and 2015. When businesses settle TCPA lawsuits the outcome is a significant financial windfall for trial lawyers while consumers often receive only nominal sums. There is also substantial unpredictability associated with TCPA liability as "instead of actual wrongdoing, current TCPA liability often hinges on sheer luck of who happens to answer a call or which court is assigned a case." [16] As such, compliance-minded businesses seeking to engage in legitimate communications are faced with an inhospitable regulatory environment with little clarity as to how they can acceptably communicate with their customers.

As evidenced by an understanding of technology frozen in the past and a propensity to be abused by unscrupulous attorneys, the TCPA is in desperate need of reform. Indeed, the Institute for Legal Reform has described the TCPA as "a juggernaut" that operates as "a destructive force that threatens companies with annihilation for technical violations that cause no actual injury or harm to any consumer." [6] It is this threat of destruction that has a chilling effect on the ability and willingness of businesses, service providers, non-profits, and charitable organizations alike to communicate with their customers. Because of the expansive and undifferentiated application of the TCPA, the voices calling for reform transcend political parties and the business community. This diversity has been displayed in a 2016 lawsuit to have the TCPA declared unconstitutional filed by a bipartisan coalition that includes American Association of Political Consultants, Inc., the Democratic Party of Oregon, Public Policy Polling, LLC, Tea Party Forward PAC, and the Washington State Democratic Central Committee. [17]

In May 2016, the Senate Commerce, Science & Transportation Committee held a full committee hearing on TCPA entitled: "The Telephone Consumer Protection Act at 25: Effects on Consumers and Business." The committee heard testimony from a range of constituents cataloging the deep technological flaws enshrined in the TCPA as well as its capacity for abuse in the courts. During the hearing, Senator John Thune remarked that "while there's strong bipartisan interest in making sure consumers are protected from harassing robo-calls, the TCPA isn't working as it should; legitimate companies are facing needless lawsuits and consumers are being denied information they need. What I think this cries out for is a balanced solution." A series of these solutions were offered by Monica Desai of Squire Patton Boggs. In her testimony, Desai argued that Congress should mandate

a reassigned number database, and create a safe harbor for businesses that accidentally call reassigned numbers after checking them against this database; confirm that the statutory defense for "prior express consent of the called party" was not intended to be meaningless; and clarify that the definition of an automatic telephone dialing system was never meant to include any and every kind of modern dialing technology.

The support for TCPA reform signals a serious problem in need of redress that can only be achieved through a radical modernization of the TCPA itself. As it currently exists, the TCPA harms both consumers and businesses behind the façade of consumer protection while effectively operating as a catalyst for frivolous lawsuits. Modernization of the TCPA will ensure consumers are not deprived of normal, expected, and desired information, provide clarity for businesses to engage in targeted, beneficial communication with specific consumers, and free the courts to attend to the needs of real victims of harassment and abuse.

Similarly, as the agency that oversees the TCPA, the FCC has a duty to maintain the balance Congress contemplated in enacting the TCPA to protect consumer privacy interests without impeding legitimate business operations. It is therefore critical that the FCC stop exacerbating the TCPA compliance conundrum through untenable interpretations of the statute and instead use its authority to modernize the TCPA rules in a way that will allow covered communications to be governed by a clear, fair and consistent regulatory framework.

Sources

[1] Telephone Consumer Protection Act 47 U.S.C. § 227 of 1991.

[2] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227. The FCC's rules implementing the TCPA are located at 47 C.F.R. § 64.1200 et seq.

[3] Squire Patton Boggs. 2015. Notice of Ex Parte – CG Docket No. 02-278 Wells Fargo.

[4] WebRecon. 2016. "Out Like a Lion… Debt Collection Litigation & CFPB Complaint Statistics, December 2015 & Year in Review." January 18, 2016.

[5] ACA International. 2015. "TCPA Modernization 2015: Catching Up With the Times."

[6] Institute for Legal Reform. 2013. "The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages." U.S. Chamber Institute for Legal Reform.

[7] ACA International. 2015. "TCPA Declaratory Ruling and Order."

[8] World Bank. 2016a. Fixed telephone subscriptions (per 100 people).

[9] World Bank. 2016b. Mobile cellular subscriptions (per 100 people).

[10] Anderson, Monica. 2015. "Technology Device Ownership: 2015." Pew Research Center.

[11] Blumberg, Stephen and Julian V. Luke. 2016. "Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July–December 2015." National Health Interview Survey Early Release Program, National Center for Health Statistics.

[12] History of text messages: Silver, Katie. 2011. "OMG: Text messaging turns 19 this week … and this is the Brit we have to thank for our sore thumbs." *Daily Mail,* December 7, 2011.

[13] O'Grady, Michael. 2012. "SMS Usage Remains Strong In The US: 6 Billion SMS Messages Are Sent Each Day." Forrester, June 19, 2012.

[14] Smith, Aaron. 2015. "U.S. Smartphone Use in 2015." Pew Research Center.

[15] National Council of Higher Education Resources (NCHER). 2016. "Student Loan Online Survey Insights."

[16] ACA International. 2015. "Modernize the Telephone Consumer Protection Act of 1991 (TCPA)."

[17] Bauer, Tim. 2016. "Democrats and Republicans Find Common Ground – Ask Court to Declare the TCPA Unconstitutional." insideARM, May 16, 2016.