

April 16, 2018

The Honorable John Thune, Chairman
The Honorable Bill Nelson, Ranking Member
U.S. Senate Committee on Commerce, Science, & Transportation
512 Dirksen Senate Building
Washington DC, 20510

RE: "Abusive Robocalls and How We Can Stop Them"

Dear Chairman Thune and Ranking Member Nelson:

We write to you regarding tomorrow's hearing on "Abusive Robocalls and How We Can Stop Them."¹ We appreciate your interest in this important issue.

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C.² EPIC played a leading role in the creation of the Telephone Consumer Protection Act ("TCPA") and continues to defend the Act,³ one of the most important and popular privacy laws in the history of the United States. EPIC supported establishment of the original Do Not Call registry.⁴ EPIC provided numerous comments to 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.⁵ EPIC has testified twice in congressional hearings on robocalling.⁶ Last year EPIC submitted comments to the FCC,

¹ *Abusive Robocalls and How We Can Stop Them*, S. Comm. on Commerce, Science, & Transportation, 115th Cong. (April 17, 2018), <https://www.commerce.senate.gov/public/index.cfm/hearings?ID=E0EB17D2-A895-40B4-B385-F94EA2716957>.

² EPIC, About EPIC (2016), <https://epic.org/epic/about.html>.

³ 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).

⁴ Comments of EPIC, *In the Matter of Rules and Regulations Implementing the Consumer Protection Act of 1991*, FCC Docket No. 02-278 (Dec. 9, 2002), <https://epic.org/privacy/telemarketing/tcpacomment.html>.

⁵ 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/>.

⁶ Marc Rotenberg, EPIC President, Testimony and Statement for the Record, *H.R. 5126, the Truth in Caller ID Act of 2006*, H.R. Comm. on Energy and Commerce, Subcomm. on Telecommunications and the Internet, 109th Cong. (2006), <https://epic.org/privacy/iei/hr5126test.pdf>; Allison Knight, EPIC Counsel, Testimony and Statement for the Record, *The Truth in Caller ID Act of 2007, S. 704*, S. Comm. on Commerce, Science, and Transportation, 110th Cong. (2007), <https://epic.org/privacy/iei/s704test.pdf>.

expressing support for a new rule that would allow phone companies to block calls from numbers they know are invalid, such as numbers that have not been assigned to a subscriber.⁷ EPIC also submitted an amicus brief in *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).⁸

Robocalls are a consistent source of annoyance for American consumers who confront bad actors that engage in identity theft, financial fraud, and debt collection scams. Robocalls are consistently one of the top complaints made to both the FCC and the FTC.⁹ The transition from land lines to mobile phones¹⁰ has only made the 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. 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. For low-income consumers who often rely on pay-as-you-go, limited-minute prepaid wireless plans,¹² these unwanted calls and texts are particularly harmful.¹³

Current laws and penalties for illegal robocalls have not been enough to stop these calls. Even with the private right of action contained within the TCPA, illegal, predatory behavior continues. This is despite the fact that in general 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. However, more must be done. While consumers now have more options to block calls from their home and cell phones, they can only do so after they have received these illegal and bothersome phone calls.

D.C. Circuit Decision

The recent decision in *ACA International v. FCC*¹⁴ was a generally positive outcome for consumers, but created some ambiguity surrounding the definition of “automated telephone dialing

⁷ Comments of EPIC, *Advanced Methods to Target and Eliminate Unlawful Robocalls*, FCC 17-24 (June 30, 2017), <https://epic.org/apa/comments/EPIC-FCC-Robocall-Comments.pdf>.

⁸ Brief of Amici Curiae EPIC et al. *ACA International v. FCC*, No. 15-1211 (D.C. Cir.), <https://epic.org/amicus/acaintl/EPIC-Amicus.pdf>.

⁹ *Consumer Complaint Center*, FCC, <https://consumercomplaints.fcc.gov/hc/en-us/articles/115002234203-Unwanted-Calls>; *FTC Releases Annual Summary of Consumer Complaints*, FTC, Mar. 3 2017, <https://www.ftc.gov/news-events/press-releases/2017/03/ftc-releases-annual-summary-consumer-complaints>.

¹⁰ 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, July–December 2016*, at 2 (May 2017), <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf>.

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 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).

¹³ Bill Moack, *Feds, Fla. Shut Down Robocall Ring That Targeted Seniors*, Clarion Ledger (Jun. 9, 2017), <http://www.clarionledger.com/story/business/2017/06/09/feds-fla-authorities-shut-down-robocall-ring-targeted-seniors/371452001/>.

¹⁴ No. 15-1211, 2018 WL 1352922 (D.C. Cir. Mar. 16, 2018), <https://epic.org/amicus/acaintl/15-1211-1722606.pdf>.

system” (“ATDS”). The court upheld the FCC’s interpretation of the consent rule, which allows consumers to revoke consent using “any reasonable means clearly expressing a desire to receive no further messages from the caller.”¹⁵ The court also affirmed the FCC’s conclusion that callers cannot “unilaterally prescribe the exclusive means for consumers to revoke consent.”¹⁶ But the court also held that the FCC’s definition of ATDS under the TCPA was an unreasonably expansive because it could include ordinary smartphones. This creates some uncertainty regarding the scope of ATDS devices.

A broad definition of ATDS should be preserved. The court only struck down the FCC’s 2015 order, leaving the 2003 and 2008 orders in place. The ATDS definition under those orders would cover most autodialers responsible for unwanted calls. But companies and scammers may continue to seek to circumvent the TCPA by developing technology that falls outside of the definition of ATDS. Any further narrowing of the ATDS definition would harm consumers.

EPIC’s Recommendations

EPIC is in favor of rules that would (1) allow phone providers to proactively block numbers that are unassigned, unallocated, or invalid; (2) block invalid numbers without requiring consumer consent; (3) provide strong security measures for any database of blocked numbers that may be created; and (4) prohibit spoofing with the intent to defraud or cause harm.

First, proactive blocking of these numbers is the most effective way to protect consumers. If providers wait until complaints pile up, consumers will be exposed to calls that are predatory and fraudulent. Some consumers choose not to answer calls from numbers that they suspect are invalid based on caller ID information. But some consumers use landlines that may not have or use caller ID, and upon answering the phone they would have no way to be alerted to the fact that the call they are receiving is likely an illegal robocall.

Second, phone providers should not require consent from consumers before blocking calls from invalid numbers. No reasonable consumer wants to receive robocalls. This is evident from the fact that these calls are consistently the number one complaint at both the FTC¹⁷ and the FCC. A consent for blocking requirement would leave individuals and, particularly, seniors at risk of identity theft, fraud, and harassment by phone scammers.

Third, databases and “white lists” of blocked numbers require strong security measures. EPIC has long advocated for strong security measures to protect personal data stored in databases.¹⁸

¹⁵ *Id.* at 5.

¹⁶ *Id.* at 17.

¹⁷ *FTC Releases Annual Summary of Consumer Complaints*, FTC, Mar. 3 2017, <https://www.ftc.gov/news-events/press-releases/2017/03/ftc-releases-annual-summary-consumer-complaints>.

¹⁸ See e.g., Comments of EPIC, *Privacy Act of 1974; Department of Homeland Security/ALL—038 Insider Threat Program System of Records*, Mar. 28, 2016, <https://epic.org/apa/comments/EPIC-DHS-Inisder-Threat-Comments.pdf>; Comments of EPIC, *Department of Defense (DoD) Insider Threat Management and Analysis Center (DITMAC) and DoD Component Insider Threat Records System*, Jun. 2, 2016, <https://epic.org/apa/comments/index.php?y=2016>; Comments of EPIC, *Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security/U.S. Customs Enforcement-016 FALCON Search and*

EPIC recommends data minimization, but in this case it is necessary to maintain a list of all numbers that have been blocked by providers. Such a database will be an attractive target for hackers.¹⁹ If compromised, it would not only allow scammers to continue with their illegal behavior, but also would severely hamper any further efforts to implement widespread blocking of invalid numbers. EPIC has suggested the implementation of certain procedures that would help enhance the security of a database of blocked numbers.²⁰

Fourth, any regulation of spoofing should contain an intent requirement—“intent to defraud or cause harm.” This language would cover the problem of pretexting, where bad actors use the number of a trusted entity, such as a bank or government agency, to fool people into giving the caller personal information. But it would also preserve legitimate uses of spoofing where callers wish to withhold their phone number, including drug treatment services, suicide prevention, domestic abuse, and crime tip line. The default for disclosure of identity should be in control of the non-commercial callers. A spoofing regulation without this intent requirement could hurt the privacy interests of callers.

We ask that this Statement from EPIC be entered in the hearing record. EPIC looks forward to working with the Committee on these issues of vital importance to the American public.

Sincerely,

/s/ Marc Rotenberg

Marc Rotenberg
EPIC President

/s/ Christine Bannan

Christine Bannan
EPIC Administrative Law and Policy Fellow

/s/ Alan Butler

Marc Rotenberg
EPIC Senior Counsel

Analysis System of Records, Jun. 5, 2017, <https://epic.org/apa/comments/EPIC-DHS-FALCON-Database-Comments.pdf>.

¹⁹ Bruce Schneier, *Data Is a Toxic Asset*, Schneier on Security, Mar. 4, 2016, https://www.schneier.com/blog/archives/2016/03/data_is_a_toxic.html (“saving [data] is dangerous because failing to secure it is damaging. It will reduce a company's profits, reduce its market share, hurt its stock price, cause it public embarrassment, and—in some cases—result in expensive lawsuits and occasionally, criminal charges. All this makes data a toxic asset, and it continues to be toxic as long as it sits in a company's computers and networks.”)

²⁰ See, e.g., Reply Comments of EPIC, *Advanced Methods to Target and Eliminate Unlawful Robocalls*, 82 Fed. Reg. 22,625 (July 31, 2017).