

MODERNIZING THE TELEPHONE CONSUMER PROTECTION ACT

HEARING BEFORE THE SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY OF THE COMMITTEE ON ENERGY AND COMMERCE HOUSE OF REPRESENTATIVES ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

SEPTEMBER 22, 2016

Serial No. 114-172



Printed for the use of the Committee on Energy and Commerce
energycommerce.house.gov

U.S. GOVERNMENT PUBLISHING OFFICE

22-980

WASHINGTON : 2017

For sale by the Superintendent of Documents, U.S. Government Publishing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2104 Mail: Stop IDCC, Washington, DC 20402-0001

COMMITTEE ON ENERGY AND COMMERCE

FRED UPTON, Michigan
Chairman

JOE BARTON, Texas <i>Chairman Emeritus</i>	FRANK PALLONE, JR., New Jersey <i>Ranking Member</i>
JOHN SHIMKUS, Illinois	BOBBY L. RUSH, Illinois
JOSEPH R. PITTS, Pennsylvania	ANNA G. ESHOO, California
GREG WALDEN, Oregon	ELIOT L. ENGEL, New York
TIM MURPHY, Pennsylvania	GENE GREEN, Texas
MICHAEL C. BURGESS, Texas	DIANA DeGETTE, Colorado
MARSHA BLACKBURN, Tennessee <i>Vice Chairman</i>	LOIS CAPPS, California
STEVE SCALISE, Louisiana	MICHAEL F. DOYLE, Pennsylvania
ROBERT E. LATTA, Ohio	JANICE D. SCHAKOWSKY, Illinois
CATHY McMORRIS RODGERS, Washington	G.K. BUTTERFIELD, North Carolina
GREGG HARPER, Mississippi	DORIS O. MATSUI, California
LEONARD LANCE, New Jersey	KATHY CASTOR, Florida
BRETT GUTHRIE, Kentucky	JOHN P. SARBANES, Maryland
PETE OLSON, Texas	JERRY McNERNEY, California
DAVID B. McKINLEY, West Virginia	PETER WELCH, Vermont
MIKE POMPEO, Kansas	BEN RAY LUJAN, New Mexico
ADAM KINZINGER, Illinois	PAUL TONKO, New York
H. MORGAN GRIFFITH, Virginia	JOHN A. YARMUTH, Kentucky
GUS M. BILIRAKIS, Florida	YVETTE D. CLARKE, New York
BILL JOHNSON, Missouri	DAVID LOEBSACK, Iowa
BILLY LONG, Missouri	KURT SCHRADER, Oregon
RENEE L. ELLMERS, North Carolina	JOSEPH P. KENNEDY, III, Massachusetts
LARRY BUCSHON, Indiana	TONY CARDENAS, California
BILL FLORES, Texas	
SUSAN W. BROOKS, Indiana	
MARKWAYNE MULLIN, Oklahoma	
RICHARD HUDSON, North Carolina	
CHRIS COLLINS, New York	
KEVIN CRAMER, North Dakota	

SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY

GREG WALDEN, Oregon
Chairman

ROBERT E. LATTA, Ohio <i>Vice Chairman</i>	ANNA G. ESHOO, California <i>Ranking Member</i>
JOHN SHIMKUS, Illinois	MICHAEL F. DOYLE, Pennsylvania
MARSHA BLACKBURN, Tennessee	PETER WELCH, Vermont
STEVE SCALISE, Louisiana	JOHN A. YARMUTH, Kentucky
LEONARD LANCE, New Jersey	YVETTE D. CLARKE, New York
BRETT GUTHRIE, Kentucky	DAVID LOEBSACK, Iowa
PETE OLSON, Texas	BOBBY L. RUSH, Illinois
MIKE POMPEO, Kansas	DIANA DeGETTE, Colorado
ADAM KINZINGER, Illinois	G.K. BUTTERFIELD, North Carolina
GUS M. BILIRAKIS, Florida	DORIS O. MATSUI, California
BILL JOHNSON, Missouri	JERRY McNERNEY, California
BILLY LONG, Missouri	BEN RAY LUJAN, New Mexico
RENEE L. ELLMERS, North Carolina	FRANK PALLONE, JR., New Jersey (<i>ex officio</i>)
CHRIS COLLINS, New York	
KEVIN CRAMER, North Dakota	
JOE BARTON, Texas	
FRED UPTON, Michigan (<i>ex officio</i>)	

CONTENTS

	Page
Hon. Greg Walden, a Representative in Congress from the State of Oregon, opening statement	1
Prepared statement	3
Hon. Anna G. Eshoo, a Representative in Congress from the State of Cali- fornia, opening statement	4
Hon. Frank Pallone, Jr., a Representative in Congress from the State of New Jersey, opening statement	6
Hon. Fred Upton, a Representative in Congress from the State of Michigan, prepared statement	60

WITNESSES

Michelle Turano, Vice President, Public Policy and Government Affairs, Wellcare Health Plans	8
Prepared statement	11
Answers to submitted questions	112
Shaun Mock, Chief Financial Officer, Snapping Shoals Electric Membership Corporation	19
Prepared statement	21
Answers to submitted questions	116
Spencer Weber Waller, Professor and Director, Institute for Consumer Anti- trust Studies, Loyola University Chicago	29
Prepared statement	31
Answers to submitted questions	122
Richard Shockey, Principal, Shockey Consulting	35
Prepared statement	36
Answers to submitted questions	127

SUBMITTED MATERIAL

Statement of Indiana Attorney General Greg Zoeller, submitted by Mr. Wal- den	62
Statement of the National Association of Federal Credit Unions, submitted by Mr. Walden	64
Statement of several non-profit consumer groups, submitted by Ms. Eshoo	74
Statement of several banking associations, submitted by Mr. Walden	
Article entitled, "The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology," Loyola Consumer Law Re- view, 2014, submitted by Mr. Walden ¹	62
Statement of the Electronic Privacy Information Center, submitted by Ms. Eshoo	89
Statement of America's Health Insurance Plans, submitted by Mr. Latta	93
Statement of the Credit Union National Association, submitted by Mr. Latta ..	107

¹ Available at: <http://docs.house.gov/meetings/IF/IF16/20160922/105351/HHRG-114-IF16-20160922-SD008.pdf>.

MODERNIZING THE TELEPHONE CONSUMER PROTECTION ACT

SEPTEMBER 22, 2016

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 11:00 a.m., room 2322, Rayburn House Office Building, Hon. Greg Walden (chairman of the subcommittee) presiding.

Present: Representatives Walden, Latta, Shimkus, Blackburn, Lance, Guthrie, Pompeo, Bilirakis, Long, Collins, Eshoo, Doyle, Welch, Clarke, McNerney, and Pallone (ex officio).

Also Present: Representative Schakowsky.

Staff Present: Rebecca Card, Assistant Press Secretary; Gene Fullano, Detailee, Telecom; Kelsey Guyselman, Counsel, Telecom; Grace Koh, Counsel, Telecom; David Redl, Chief Counsel, Telecom; Charlotte Savercool, Professional Staff, Communications and Technology; Dan Schneider, Press Secretary; Gregory Watson, Legislative Clerk, Communications and Technology; Jeff Carroll, Minority Staff Director; David Goldman, Minority Chief Counsel, Communications and Technology; Elizabeth Letter, Minority Professional Staff Member; Jerry Leverich, Minority Counsel; Lori Maarjberg, Minority FCC Detailee; Dan Miller, Minority Staff Assistant; Matt Schumacher, Minority Press Assistant; and Andrew Souvall, Minority Director of Communications, Outreach and Member Services.

OPENING STATEMENT OF HON. GREG WALDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. WALDEN. We will call to order the subcommittee on Communications and Technology and welcome our witnesses here today. We look forward to your participation in this hearing.

We are here today to talk about modernizing the Telephone Consumer Protection laws. As you all know, it has been 25 years, 25 years, quarter of a century since Congress passed the Telephone Consumer Protection Act. And I don't have to tell you the world has changed pretty dramatically in that time period. Back in '91, virtually everybody had a landline, and that is what they used to call each other on. Today, half of U.S. households or thereabouts have become wireless-only, eliminating their landline phones entirely. And there are more cell phones than people in the United States.

Current law is not reflective of these incredible technological changes in our culture. Despite an extraordinary number of lawsuits over the years, calls and texts from bad actors continue to happen. Clearly, this approach isn't a deterrent to those who place harassing, malicious calls. We all share the goal of preventing harmful phone calls, but it is increasingly clear that the law is outdated and, in many cases, counterproductive. We will hear about that today from our witnesses.

The attempts to strengthen the TCPA rules have actually resulted in a decline in legitimate informational calls that consumers want and need. The FCC has granted narrow exceptions to specific industries in attempts to clear up ongoing uncertainty, but the number of petitions still pending before the Commission demonstrate that it is time to examine how effective this approach has been.

Industries across the board have real needs to communicate with their customers in a positive and beneficial way, and today we will hear from those whose daily operations have been impacted by this 25-year-old law. We have a public utility co-op from Georgia that needs to inform their customers of neighborhood tree maintenance, for example, and ways to reduce their energy footprint during peak energy consumption periods.

We will also hear from a managed health care provider that is seeking clarification to be able to provide critical information to patients to help lower the cost of their health care. And these folks, like many others, struggle with how to serve the needs of the consumers and the economy with the lack of clarity in the current law.

I heard from a staffing company that operates in Oregon and in my district that connects blue-collar workers to temporary, short-term job opportunities. It used to be these workers would have to sit around the waiting room all day waiting to hear if a job that met their skill set was available. The company figured a way to use technology to improve the lives of these people, the company instead used text messages to communicate with workers when a job that matched their skill set is available. That gave the people looking for the jobs the opportunity to continue with the rest of their lives rather than sitting around a waiting room, while still finding the chance to work, which sounds great and efficient and kind of the modernization of the workplace we all expect today.

Unfortunately, the 25-year-old law, TCPA, they were smacked with a lawsuit for their efforts. For a business like this, a massive class-action lawsuit could actually mean bankruptcy.

So I think we can all agree there is a big difference between the call fraudulently purporting to be the IRS and a legitimate reminder from the doctor's office of an upcoming appointment or a job agency of a temporary job now available. This is the critical distinction we need to recognize in order to strike the correct balance.

How can we protect consumers from the harassing, spoofed calls they do not want to receive—none of us do—while at the same time ensuring they do receive the legitimate calls that improve quality of life? What are the solutions out there that can be used to determine the differences, and are there changes to the law that would actually help consumers?

I want to thank my Democratic colleagues for requesting this hearing and all of our members for the commitment to a productive conversation about taking a look at a 25-year-old law.

Just yesterday, the full committee passed the Anti-Spoofing Act in a bipartisan manner, legislation prohibits bad actors from deliberately manipulating a text message number for illegal purposes. Spoofing is a major component of the robocall problem, but just one piece of this complicated puzzle. There is no silver bullet here to solve the problem of unwanted calls, but if there are legislative changes that will protect our constituents, we owe it to them to make every effort to mitigate the problem. So I hope the momentum from our accomplishments yesterday can carry on to our efforts today to work toward the shared goal of protecting consumers from illegal phone calls.

We have a unique set of perspectives here today that I hope will guide us through a productive discussion. From a professor who has studied the law extensively, to a couple of businesses concerned about violating the law while trying to providing their services, and those who have been developing technical solutions to these issues at stake; this hearing should set the stage for a constructive consideration about protecting consumers in this new technological era.

So I thank our witnesses for being here and our members and look forward to the discussion we are going to have today.

[The prepared statement of Mr. Walden follows:]

PREPARED STATEMENT OF HON. GREG WALDEN

We are here today to talk about modernizing the telephone consumer protection laws. It has been 25 years since Congress passed the Telephone Consumer Protection Act, and the world has changed dramatically since then. When the law was signed back in 1991, consumers relied primarily on landline phones to communicate, but today almost half of U.S. households have become “wireless-only,” eliminating their landline phones entirely, and there are more cell phones than people in the US.

The current law is not reflective of these technological advances. Despite an extraordinary number of lawsuits over the years, calls and texts from bad actors continue to happen—clearly this approach isn’t a deterrent to those who place harassing, malicious calls. We all share the goal of preventing harmful phone calls, but it is increasingly clear that the law is outdated and in many cases, counter-productive. The attempts to strengthen the TCPA rules have actually resulted in a decline in legitimate, informational calls that consumers want. The FCC has granted narrow exceptions to specific industries in attempts to clear up ongoing uncertainty, but the number of petitions still pending before the Commission demonstrate that it’s time to examine how effective this approach has been.

Industries across the board have real needs to communicate with their customers in a positive and beneficial way, and today we’ll hear from those whose daily operations have been impacted by the TCPA. We have a public utility co-op from Georgia that needs to inform their customers of neighborhood tree maintenance and ways to reduce their energy footprint during peak energy consumption periods. We’ll also hear from a managed healthcare provider that is seeking clarification to be able to provide critical information to patients to help lower the cost of health care. These folks, like many others, struggle with how to serve the needs of their customers and the economy with the lack of clarity in the law.

I heard from a staffing company that operates in my district that connects blue-collar workers to temporary, short-term job opportunities. It used to be that those workers would have to sit around the waiting room of a staffing agency all day, waiting for a job to come up, or not. Thanks to technological advances, this company instead uses text messages to communicate with workers when a job that matches their skill set is available, giving the workers the opportunity to continue with their lives while still having the chance to find work. Sounds great, right? Unfortunately,

thanks to the TCPA, they were smacked with a lawsuit for their efforts. For a business like this, a massive class-action lawsuit could mean bankruptcy.

I think we can all agree that there is a big difference between the call fraudulently purporting to be the IRS and the legitimate reminder from the doctor's office of an upcoming appointment. This is the critical distinction we need to recognize in order to strike the right balance. How can we protect consumers from the harassing, spoofed calls they do not want to receive, while at the same time ensuring that they do receive the legitimate calls that improve their quality of life? What are the solutions out there that can be used to determine the difference and are there changes to the law needed to bring them to consumers?

I want to thank my colleagues on the Democratic side for requesting this hearing and for all of our members for the commitment to a productive conversation about modernizing an outdated law. Just yesterday, the full committee passed the Anti-Spoofing Act in a bipartisan manner, legislation that prohibits bad actors from deliberately manipulating a text message number for illegal purposes. Spoofing is a major component of the robo-call problem, but just one piece of this complicated puzzle. There is no silver bullet to solve the problem of unwanted calls, but if there are legislative changes that will protect our constituents, we owe it to them to make every effort to mitigate the problem. I hope the momentum from our accomplishment yesterday can carry on through our efforts today to work towards the shared goal of protecting consumers from illegal phone calls.

We have a unique set of perspectives here today that I hope will guide us through a productive discussion. From a professor who has studied the law extensively, to businesses concerned about violating the law while providing their services, and those who have been developing technical solutions to these issues at stake; this hearing should set the stage for a constructive consideration of protecting consumers in a new technological era. I thank all of our witnesses for being here and I look forward to hearing your testimony.

Mr. WALDEN. And I will yield back the remaining 3 seconds of my time and recognize my friend from California, Ms. Eshoo, for her opening comments.

Ms. ESHOO. Thank you, Mr. Chairman—

Mr. WALDEN. But before I do, could I ask unanimous consent to insert into the record a letter from the Indiana Attorney General Greg Zoeller, a letter from the National Association of Federal Credit Unions, a letter signed by several consumer groups, a statement from several banking associations, along with the very, very distinguished paper from our professor today and from 2014, the Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology.¹ Without objection, we will enter those into the record.

[The information appears at the conclusion of the hearing.]

Mr. WALDEN. Now, I recognize my friend from California.

OPENING STATEMENT OF HON. ANNA G. ESHOO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. ESHOO. Thank you, Mr. Chairman. Good morning, everyone. Welcome to the witnesses.

There is one issue that I hear consistently about from my constituents, and that is the need to put an end to unwanted phone calls. Whether I am in the grocery store—now, I am going grocery shopping late at night so that I can just get it done quickly because, people see me, recognize me, and this is what they come up to me to talk about. And they are 40,000 feet and climbing over it. Their sleep is interrupted. The day doesn't belong to them. It is a

¹The information has been retained in committee files and is also available at: <http://docs.house.gov/meetings/IF/IF16/20160922/105351/HHRG-114-IF16-20160922-SD008.pdf>.

consistent form of harassment the way they view it. For many seniors, there are many scams, and they are susceptible to them.

So this barrage of unwanted calls using auto-dialers and prerecorded messages, they are disruptive to say the least and they really are intrusive. And I can speak for myself when I get them because I consider my home my oasis, and I can't stand hearing from these people.

Now, how bad is the problem? Obviously, from what I have said, it is pretty bad. And estimates have found that robocalls make up nearly 35 percent of calls that consumers receive today. And it keeps climbing. The robocall blocking service YouMail tracked the number of robocalls made last month, August of this year alone, and found that there were 2.64 billion with a B. We usually talk about dollars with a B, these calls. That is a 9 percent increase over the previous month of July of this year. And that is just one month's worth of robocalls, so it is no wonder that these kinds of calls are the number-one source of consumer complaints at the FCC.

Now, Congress sought to address this 25 years ago, a quarter of a century ago, by passing the Telephone Consumer Protection Act, the TCPA. At that time the law put important protections in place to restrict the use of technology used to place robocalls. We took other steps to crack down on unwanted calls, including the passing of the Do Not Call list. That worked for a long time. People were really thrilled with it. And I was proud to be a cosponsor of that effort. So the TCPA was, for a long time, an effective way to limit the number of unwanted calls.

Now, the FCC, I think, has done its best to implement the law in a way that keeps pace with today's practices. But the law, along with the technologies that were embedded in it or referred to, have aged in plenty of ways. And it is up to us and I think it is very clear to us that it is time to start thinking about how we can update the TCPA to better protect consumers. And it is exactly why Ranking Member Pallone, Congresswoman Jan Schakowsky, and I called for a hearing on this. And thank you, Mr. Chairman, all our thanks on behalf of our constituents that we are doing this today.

Now, there are a number of issues for us to consider as we examine the TCPA. For instance, does the FCC and the FTC have the tools they need to effectively enforce the law? Well, we are going to examine that. Are intentional violations sufficiently punished under the current structure of the law? We have come to a time and a place in our country where people break the law and then they settle with the regulators, and no one is punished really for anything. And that is a great source of frustration to people, and I don't think it is fair. How do we target calls from overseas? This is a big thing because so much is coming from overseas that can result in fraud.

So I look forward to hearing from the witnesses.

And I think one thing Congress should not be doing is passing more exemptions to the TCPA. The 2015 Budget Act contains an exemption allowing robocalls for Federal debt collection, including calls to cell phones. So I am glad that the FCC put some limits on that exemption, but the fact remains that we still—and our constituents most importantly, people across the country—are asking

us for more protection, not more loopholes. And I think we have to keep our eye on that ball, too, Mr. Chairman.

So, again, thank you for holding this hearing today, and I look forward to hearing from today's witnesses and some solid suggestions about how we can actually update the TCPA to eliminate these issues that are plaguing all of our constituents.

Thank you, and I yield—I have no time to yield back. Thank you.

Mr. WALDEN. The gentlelady yields back.

The chair recognizes the vice chair of the subcommittee, Mr. Latta.

Mr. Latta. Well, thank you, Mr. Chairman, and thanks for holding today's hearing. The Telephone Consumer Protection Act is clearly outdated and needs to be reformed to accommodate current technological challenges. It is not reasonable to govern communications based off technology available in 1991. While it is essential we continue to protect consumer privacy, we must find the right balance between consumer rights and expectations and allowing institutions to provide information to their customers.

Additionally, we must recognize the importance of distinguishing the content of communications on modernizing this act. Our goals should be to deter the bad actors and not punish businesses and organizations with the best of intentions.

The FTC has attempted to modernize the TCPA. However, these reforms have not necessarily made the law better and it still remains far from perfect. In fact, the broad interpretation of the FTC's definition of auto-dialer is concerning as it creates greater uncertainty for consumers and companies.

Today's hearing will provide robust conversation and ideas on how to best update the TCPA, and consumers' privacy needs to be protected and businesses need an avenue to inform and communicate with their customers.

And with that, Mr. Chairman, I yield back.

Mr. WALDEN. The gentleman yields back.

Any others seeking time?

Then we will go to Mr. Pallone, the ranking member of the full committee, for opening comments.

OPENING STATEMENT OF HON. FRANK PALLONE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. PALLONE. Thank you.

If you think you are getting more robocalls than ever, you are probably right. Just this past month, a record 2.6 billion robocalls flooded our cell phones, work phones, and home phones. And these calls are more than just a nuisance; they can add up to harassment or even outright fraud.

When Congress first passed the Telephone Consumer Protection Act 25 years ago, we stated that consumers were already "outraged over the proliferation of intrusive nuisance calls their homes." Back then, we sought to balance individual privacy rights, public safety interests, and commercial freedoms of speech and trade. And for a time, the law worked.

Unfortunately, a little over a decade later, these nuisance calls were on the rise again, but this time the calls did not only cause

a nuisance, many of them sought to defraud consumers. According to the FTC, consumer complaints of unwanted telemarketing calls increased over 1,000 percent between '98 and 2002. Congress stepped in once more to stop this dramatic surge in calls, and we required the FTC to create a Do Not Call Registry, among other things, again turning back the tide of unwanted calls.

But almost like clockwork, however, nuisance calls were rebounding again nearly a decade later. Robocalls were finding new ways to circumvent the system, and the law simply wasn't keeping up.

The FCC tried to reduce these robocalls, but they keep coming. By 2012, the FCC was receiving an average of over 10,000 complaints per month from mobile phones alone, and that number has only continued to grow to a point where last year, the FCC received more than 170,000 robocall and telemarketing complaints.

So last month, the FCC convened a new Robocall Strike Force hoping to leverage the industry in the FCC's ongoing effort, and I commend the Commission for working so diligently to address this issue. But the fact that the FCC's actions are not reducing the number of robocalls demonstrates that it is time for Congress to once again step in.

So I urge the strike force to continue to look for technical and regulatory solutions to this problem, but Congress has a role as well. So that is why I joined Ranking Member Eshoo and Schakowsky last month in asking that the committee hold a hearing on updating the TCPA. Our constituents are rightfully growing impatient with these calls, and they expect us to fix the problem.

And I appreciate that Chairman Walden agreed to our request for this hearing, and I also want to thank the phone carriers for offering to work with us to address this problem. It is not a moment too soon, and we all need to work together to solve it.

Now, we acted to protect consumers in '91 and 2003. Now, 13 years later, we should again put the FTC and the FCC back on firm footing so they can step up to protect consumers from these annoying and so often dangerous calls.

And again, I want to thank our witnesses, and I yield the balance of my time to Ms. Schakowsky.

Ms. SCHAKOWSKY. I am so grateful for the opportunity to join you today. I thank Ranking Member Pallone for yielding time to me.

As has been mentioned, last month, I joined Ranking Members Eshoo and Pallone to request a hearing on updating the Telephone Consumer Protection Act for the 21st century. This year marks the 25th anniversary of TCPA. Congress has made some updates over that time such as the Do Not Call Registry, but the law is beginning to show its age.

Consumer complaints about unwanted calls are on the rise. I think Ranking Member Eshoo really described what all of us are hearing. I have heard from many constituents in recent months trying to stop robocalls. I have received many on my cell phone. We need to close loopholes and improve enforcement tools.

My Democratic colleagues and I have introduced many bills to protect consumers as they use their phones. For instance, I introduced the Protect Consumers from Phony Pay Charges Act in June to stop telephone companies from including unauthorized charges on phone bills. Until we act on such improvements, we are going

to continue to see family meals disrupted, fraudsters exploiting seniors, consumers subjected to unwanted charges. And it is time to reform TCPA.

I am going to apologize that I have to leave in a moment because the Consumer, Manufacturing, and Trade Subcommittee, on which I am the ranking Democrat, is also having its hearing right now. But that said, I hope this is just the beginning of this discussion and that we will have the opportunity for joint hearings with this subcommittee and the CMT in the future.

The Federal Trade Commission and Federal Communications Commission frequently work together on these issues and the subcommittees with jurisdiction over those agencies should as well.

So I thank the opportunity to be here this morning, and I yield back.

Mr. WALDEN. All time has been consumed. I will now go to our witness panel. And again, thank you all for being here this morning.

And our first witness is Michelle Turano—we appreciate you being here—Vice President, Government Affairs and Public Policy for WellCare. Good morning.

Ms. TURANO. Good morning.

Mr. WALDEN. Pull that microphone fairly close. Make sure the light is on on the base there, and you are good to go.

STATEMENTS OF MICHELLE TURANO, VICE PRESIDENT, PUBLIC POLICY AND GOVERNMENT AFFAIRS, WELLCARE HEALTH PLANS; SHAUN MOCK, CHIEF FINANCIAL OFFICER, SNAPPING SHOALS ELECTRIC MEMBERSHIP CORPORATION; SPENCER WEBER WALLER, PROFESSOR AND DIRECTOR, INSTITUTE FOR CONSUMER ANTITRUST STUDIES, LOYOLA UNIVERSITY CHICAGO; AND RICHARD SHOCKEY, PRINCIPAL, SHOCKEY CONSULTING

STATEMENT OF MICHELLE TURANO

Ms. TURANO. Thank you. Mr. Chairman, Representative Eshoo, Ranking Member Pallone, members of the committee, I am Michelle Turano, vice president of Public Policy and Government Affairs for WellCare Health Plans. Thank you for your invitation to appear today.

We fundamentally agree with the premise of this hearing that we need to minimize nuisance and unsolicited phone calls while ensuring laws and regulations keep pace with the evolution of telecommunications technology. We also share the goal of maintaining privacy, consistent with strict Federal standards such as under the Health Insurance Portability and Accountability Act, or HIPAA.

Let me begin by telling you a little bit about WellCare. Headquartered in Tampa, Florida, WellCare focuses exclusively on providing government-sponsored managed health care through Medicare Advantage, Medicaid, and Medicare prescription drug plans to families, children, seniors, and individuals with complex medical needs.

Our members tend to be vulnerable older or disabled Americans with limited access to resources who are often transitory and rely heavily on cell phones versus a dedicated landline, which under-

scores the need for laws and regulations to be updated to reflect cell phone use.

I would like to be clear. Our communications with these members is for the purpose of sharing health care information, not for sales and not for marketing. WellCare has statutory and contractual mandates from Federal and State governments to serve our members. Communication with our members to coordinate and assist with care often requires the use of a cell phone. In many cases, we receive an enrollee's contact information via the State or Federal Government.

Beneficiaries can be randomly assigned to WellCare and might not apply to us directly. Sometimes we have no way of verifying if the number provided to us is a cell phone or a landline, yet we are still required to contact them.

State Medicaid contracts require WellCare to make telephone contact with members for health-related purposes. For example, Florida requires outreach to enrollees within 30 days to complete a health risk assessment. Georgia requires outreach to parents with newborns within 7 days to inform them of certain health services. These are not marketing calls but are directly tied to providing critical care to our members and making the best and most efficient use of taxpayer dollars.

The uncertainty surrounding the FCC's interpretation of the TCPA has had a chilling effect on the ability of WellCare and other managed health care plans to conduct this kind of outreach to members. This adds cost while reducing efficiency and negatively affects the health of our members.

While the TCPA serves an important privacy-enhancing purpose, the FCC's interpretation does not acknowledge that there is comprehensive regulation of the use of protected health information by HIPAA that governs not only treatment, payment, and health care operations messages but severely restricts marketing communications.

Recent interpretations of the TCPA could be read to provide that companies like WellCare cannot conduct automated outreach to a cell phone to deliver a health care message unless the calling party can also prove prior express consent, a requirement that the HIPAA privacy rule expressly does not require. These are the exact same phone calls that health care providers like doctors and pharmacies can make today. But the FCC has excluded managed health care firms from making these same sorts of calls.

WellCare and others recently petitioned the FCC seeking clarification around the use of member telephone numbers under the TCPA compared to the use of the same information under HIPAA. In doing so, we are hoping the Commission will protect non-tele-marketing calls allowed under TCPA in light of their unique value to and acceptance by consumers and do so in an expedited manner.

Legislatively, it would be helpful if Congress could clarify that the provision of a phone number to a HIPAA-covered entity or business associate constitutes prior express consent for health care communications to that number. The TCPA's protection of a consumer's right to control unwanted calls would still be respected by allowing the consumer to revoke that consent at any time.

In closing, I want to reiterate that the health and well-being of our enrollees is WellCare's top priority. We need to work together and we look forward to working together with this committee and Congress on modernizing the TPCA.

Thank you for your invitation to testify, and I look forward to answering your questions.

[The prepared statement of Michelle Turano follows:]

Written Testimony of Michelle Turano

Vice President, Public Policy and Government Affairs, WellCare Health Plans

Before the House Committee on Energy and Commerce
“Modernizing the Telephone Consumer Protection Act”
Thursday, September 22, 2016, 11 AM
Rayburn House Office Building Room 2322

Mr. Chairman, Representative Pallone, members of the Committee, I am Michelle Turano, Vice President, Public Policy and Government Affairs for WellCare Health Plans. I want to thank you for your invitation to appear today to share our experiences regarding the impact the Telephone Consumer Protection Act (TCPA) has on health care consumers and the health care providers trying to contact them.

We fundamentally agree with the premise of this hearing that the TCPA is in need of modernization in light of the broad policy goals of the TCPA of eliminating unwanted calls from unwanted callers. It must be updated to ensure that the public benefits from evolutions in telecommunications technology and accounts for the way Americans interact and consume information in the modern world. We also share the goals of maintaining privacy consistent with strict, federal standards, such as the Health Insurance and Portability and Accountability Act (HIPAA), and minimizing nuisance from unwanted communications to individuals’ home or cell phones.

We would like to use this opportunity to illustrate the positive way modern technologies can improve individuals’ health and wellness and create efficiencies in health care treatment, payment, and operations that benefit consumers through lower premiums and earlier treatment and prevention. We also would like to address how the privacy of our members is well guarded through the careful structure of HIPAA, which overlays such communications outreach.

Background on WellCare

Headquartered in Tampa, Florida, WellCare focuses exclusively on providing government-sponsored managed healthcare services, primarily through Medicaid, Medicare Advantage and Medicare Prescription Drug Plans, to families, children, seniors, the dually-eligible (those who qualify for both Medicare and Medicaid) and individuals with complex medical needs. WellCare has statutory and contractual mandates from federal and state government partners to serve its members and ensure that they not fall outside of the healthcare protections that Congress has created. Our main goal is to ensure beneficiaries receive the right care, at the right time, in the most appropriate environment – in many cases this means providing education and care to manage chronic conditions. This proactive and preventative care not only improves the health of our members, but also reduces costs in the healthcare system. Managed health care plans create an integrated healthcare delivery system, allowing for the coordination of care between the member’s doctors and specialists, hospitals and other healthcare service providers, as well as working with the local community and social service agencies to meet our members’ need for support.

Managed health care companies like WellCare administer Medicaid and Medicare benefits under contract with state and federal agencies and many contracts require telephonic contact with members for many health-related purposes. Our state and federal partners have realized the more interaction a member has with their health plan, the more likely the member is to enjoy better health outcomes and lower healthcare costs. For example, Florida requires outreach to new enrollees within 30 days to complete a health risk assessment and Georgia requires outreach to parents with newborns within 7 days to inform them of health check services.

TCPA Effect on Health Care Policy Initiatives

While the TCPA serves an important privacy-enhancing purpose, the FCC's interpretation of this purpose has failed to acknowledge that there is a pre-existing and comprehensive regulation of the use of protected health information by HIPAA Covered Entities and their business associates that governs not only treatment, payment and health care operations messages, but severely restricts marketing communications. The uncertainty surrounding the Federal Communications Commission's (FCC) interpretation of the TCPA has had a chilling effect on the ability of WellCare and other managed health care plans that are extensively regulated in these communications by HIPAA to conduct outreach to their members and otherwise fulfill the public policy objectives specified by states and the federal government.

Empirical studies demonstrate that health care related texts and calls lead to more engaged patients, better patient outcomes, and lower health care costs for consumers, which are critical public health goals. Many Americans are not receiving recommended health tests and screenings. For example, among adults in the age groups recommended for cancer screenings, about two in five were not up to date with colon cancer screenings, one in four women were not up to date with breast cancer screenings, and one in five women were not up to date with cervical cancer screening.¹ Text messages in particular have proven effective in delivering health care reminders and increasing adherence to treatment attendance at health care appointments.² In studies among low-income urban populations, researchers found that 72.7% of parents who received text reminders brought their children in for recommended follow-up vaccination

¹ *Many Americans Not Getting Routine Cancer Screenings: CDC*, HealthDay News, May 7, 2015, available at <https://consumer.healthday.com/cancer-information-5/breast-cancer-news-94/many-americans-not-getting-routine-cancer-screenings-cdc-699217.html> (last visited July 20, 2016) (citing to Stephanie Bernik, M.D., chief, surgical oncology, Lenox Hill Hospital, New York City; Louis Potters, M.D., chief, radiation medicine, North Shore-LIJ Cancer Institute, New Hyde Park, N.Y.; U.S. Centers for Disease Control and Prevention, news release, May 7, 2015.)

² Kati Annisto, Marita Koivunen & Maritta Valimaki, *Use of Mobile Phone Text Message Reminders in Health Care Services: A Narrative Literature Review*, 16(10) J. Med. Internet Res. e222 (2014).

appointments.³ With some 20,000 children hospitalized annually for influenza, any increase in inoculation rates directly improves public health.⁴

Additionally, 20% to 30% of prescriptions are never retrieved by patients and up to 50% of medications are not taken as prescribed.⁵ This non-adherence produces between \$100 billion and \$289 billion of avoidable costs annually.⁶ Telephone outreach, to be effective, needs to use technology that is (or is at risk of being deemed, given the FCC's overbroad interpretation) an automatic telephone dialing system (ATDS). Automated technology saves enormous time and money by using technology to take over expensive, time intensive manual processes. These time and cost savings enable communications that are important for public health goals, which is why the use of automated technologies in the health care industry have historically been and should continue to be treated very differently from other contexts. Those cost savings directly benefit patients in lowered overall health care costs. Further, when attempting to contact thousands, if not millions of members, compliance with outreach requirements is practically impossible without automated systems. Critical outreach on a large scale simply cannot occur without these technologies.

In order to modernize the TCPA, we must start at the heart of the issue. Today's reality is much different than that of 1991 when the TCPA was first introduced. In 1991, it was never envisioned that by 2015, 47.4% of American households relied exclusively on wireless devices for telephone service, and "more than two-thirds of all adults aged 25–34 and of adults renting their homes" live in wireless-only households.⁷

For automated telephonic outreach to be effective, it must reach consumers' residential and mobile phones. Wireless-only households are more likely to have numerous health challenges, such as financial barriers, substance abuse, and lack of influenza vaccinations.⁸ Hard-to-reach

³ Melissa S. Stockwell, MD, MPH, et al., *Text Message Reminders for Second Dose of Influenza Vaccine: a Randomized Controlled Trial*, 135(1) *Pediatrics* e83-e91 (2015), available at <http://pediatrics.aappublications.org/content/135/1/e83>.

⁴ See Stockwell et al., *Effect of a Text Messaging Intervention on Influenza Vaccination in an Urban, Low-Income Pediatric and Adolescent Population*, 307(16) *JAMA* 1702–08 (2012); Maanvi Singh, *Texted Reminders Help Parents Get Kids In For Flu Shots*, <http://www.npr.org/sections/health-shots/2014/12/29/373767691/texted-reminders-help-parents-get-kidsin-for-flu-shots> (last visited June 3, 2016).

⁵ Brian Fung, *The \$289 Billion Cost of Medication Noncompliance, and What to Do About It*, *THE ATLANTIC*, Sept. 11, 2012, available at <http://www.theatlantic.com/health/archive/2012/09/the-289-billioncost-of-medication-noncompliance-and-what-to-do-about-it/262222/> (last visited June 3, 2016).

⁶ *Id.*

⁷ Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2015*, Div. of Health Interview Statistics, Nat'l Ctr. for Health Statistics, Centers for Disease Control and Prevention (Dec. 2015), available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201512.pdf> (last visited June 3, 2016), at 1.

⁸ *Id.* at 3.

populations are especially prone to use cell phones as their primary means of telephonic communication.⁹ Other means of outreach, such as mailings and calls to landlines, are not effective in reaching many consumers, especially young people and low-income groups.

Available data shows that a large majority of consumers desire access to programs that use telephonic contact for health care, recognizing there are concrete health benefits. A survey of commercially insured consumers found the highest acceptance for health management programs when they are mobile contacts.¹⁰ Additionally, telephonic outreach using automated technologies can save lives. For example, colon cancer is the number two cancer killer in the United States, with 52,000 fatalities annually.¹¹ In one patient health engagement outreach program, a telephonic campaign to a group of 400,000 Medicare beneficiaries encouraging recommended colorectal cancer screening resulted in identification of 299 cases, about half of which were in a stage of early detection.¹² This outreach saved lives through early detection – and in the process saved \$24,000 to \$34,000 per early cancer stage detected – resulting in significant avoidance of pain and suffering, as well as approximately \$9 million in monetary savings.¹³

Telephonic outreach via automated technology also has been shown to be successful in encouraging consumers to receive other important physician-recommended screenings, with improved rates found for diabetic glaucoma screenings (with 51.6% compliance among those receiving intervention versus 42.5% for those who do not), mammography (20.6% versus 10.7%), and cervical cancer screening (15% versus 8.9%).¹⁴ Telephonic outreach has been shown to reduce post-discharge hospital readmission rates, with a study showing that discharged patients receiving follow-up outreach had a readmission rate of 9%, as compared to 15% for patients not receiving outreach.¹⁵

⁹ Stockwell et al., *Text4Health: Impact of Text Message Reminder–Recalls for Pediatric and Adolescent Immunizations*, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3483980/>

¹⁰ Elizabeth Boehm, et al., *Mobile and Social Gain Ground in Wellness and Disease Management*, Forrester Research, available at

<https://www.forrester.com/Mobile+And+Social+Gain+Ground+In+Wellness+And+Disease+Management/fulltext/-/E-res58231>

¹¹ www.cdc.gov/cancer/colorectal/statistics.

¹² Ex parte Letter from S. Jenell Trigg, Counsel to Eliza Corp., to Marlene H. Dortch, Esq., Secretary, FCC (March 31, 2016) re: written ex parte presentation to Consumer Protection and Governmental Affairs Bureau on *Health Information Technology and Patient Health Engagement* (“PHE Ex Parte Presentation”), slide 8.

¹³ *See id.*

¹⁴ PHE Ex Parte Presentation, slide 16. *See also* Rebecca R. Ruiz, *F.C.C. Chief Seeks Broadband Plan to Aid the Poor*, N.Y. TIMES, May 28, 2015, at A1, available at <http://www.nytimes.com/2015/05/28/business/fcc-chief-seeks-broadband-plan-to-aid-the-poor.html>.

¹⁵ PHE Ex Parte Presentation, slide 15.

In addition the TCPA increases costs by focusing on the capability of the equipment used to deliver these healthcare messages rather than the actual use. The July 2015 Order clarifies the term “automatic telephone dialing system” includes equipment with the “capacity” to dial random and sequential numbers, which means the “potential ability” to perform these functions rather than the “present ability” to do so. Order at ¶¶ 15, 19; *see also* ¶ 16. This means whether the equipment is utilized as an autodialer or it is used in its normal manual-dial method is of no consequence. A health plan would need to purchase a separate dialer that is incapable of autodialing in order to comply with the current construct of TCPA. Nuances in the TCPA such as this unnecessarily drive up costs.

As I mentioned earlier, non-compliance with the TCPA carries the potential for large penalties. These penalties also drive concern and the need for reform. In addition to the regulations surrounding the capabilities of the equipment, the TCPA also permits one call to be made without liability after a telephone number is reassigned from the person who gave consent to another person who has not given consent. *Id.* at ¶ 72. Even if this call does not yield actual knowledge of the reassignment, the caller is deemed to have constructive knowledge, and will be liable for all calls placed thereafter. *Id.* at ¶¶ 72, 85. These penalties may have once been effective in deterring unwanted callers, but now may actually penalize those who desire the information the calls contain.

Providing health benefits to the most medically complex individuals is wrought with challenges, least of which is actually making contact with the member. Frequently, our members struggle with permanent housing and other financial challenges. It is not uncommon to have multiple phone numbers for a single member; often times an unintended recipient answers and informs us that either a wrong number has been dialed or the member no longer utilizes the phone number. Sometimes, however, the call goes unanswered. To import knowledge of a “reassigned phone number” based off one-unanswered phone call is to penalize the caller for attempting to comply with the mandate of providing information and education to its members in an efficient and cost effective manner.

Harmony between HIPAA and the TCPA

The FCC’s interpretations of the TCPA, including that of the *2015 Declaratory Order*, could erroneously be interpreted to provide that a Covered Entity, like WellCare, or a business associate cannot use protected health information (PHI) for automated outreach to a cell phone to deliver a health care message unless the calling party can also prove prior express consent – a requirement that the HIPAA Privacy Rule expressly does not require for good reason. These are the exact same calls that health care providers can make today, but the FCC is silent as to whether managed health care companies can make these same sorts of calls.

Congress passed HIPAA in 1996 to enhance health insurance portability, reduce waste in healthcare spending, and improve administrative efficiency.¹⁶ At the same time, Congress recognized that the expansion of electronic transactions required greater privacy and security protections for individuals’ health information. In passing HIPAA, Congress recognized the vital role that effective communication plays in ensuring effective, efficient, and personalized

¹⁶ Pub. L. No. 104-191, 110 Stat. 1936, pmb1 (1996).

healthcare, and Congress sought to ensure the promise of improving healthcare while decreasing its costs and preserving privacy. Consistent with this balancing, HIPAA comprehensively regulates insurance providers and managed health plans such as WellCare, including their relationships with and communications to members and patients.

HIPAA, and the Privacy Rule issued pursuant to HIPAA, authorize and regulate the use of PHI.¹⁷ Courts have held that PHI regulated by HIPAA includes telephone numbers.¹⁸ The Privacy Rule established a “foundation of Federal protection for personal health information, carefully balanced to avoid creating unnecessary barriers to the delivery of health care.”¹⁹ HIPAA applies to all Covered Entities, which includes not only health care providers, but also health plans, health care clearinghouses, and their business associates which are service providers to the Covered Entities that need access to PHI to perform their services.²⁰

The Privacy Rule draws careful distinctions between using and disclosing PHI for permissible health care related communications, which do not require specific prior authorization, and communications that do require prior written authorization. Covered Entities are permitted to make health care-related communications *without prior authorization* (or, in TCPA terms, prior express consent), for the purposes of treatment, payment, and health care operations under the Privacy Rule’s general rules.²¹ The Department of Health and Human Services (HHS) acknowledged the importance of “facilitat[ing] those communications that enhance the individual’s access to quality health care,”²² and “that some of these communications are required by State or other law.”²³ HIPAA requires Covered Entities to obtain a valid authorization before using an individual’s PHI for marketing purposes. The Privacy Rule authorizes non-marketing communications between Covered Entities, their business associates and their patients or members without prior authorization “[t]o avoid interfering with, or

¹⁷ PHI is “individually identifiable health information” that is “(i) Transmitted by electronic media; (ii) Maintained in electronic media; or (iii) Transmitted or maintained in any other form or medium.” See definition of “protected health information” at 45 C.F.R. § 160.103. “Individually identifiable health information” consists of health information, including demographic information, that identifies an individual or could be used to identify an individual, and includes information which “[r]elates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.” See *id.*

¹⁸ See *Baisden v. Credit Adjustments, Inc.*, 813 F. 3d 338, 346–47 (6th Cir. 2016); *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F. 3d 1110, 1125–26 (6th Cir. 2014).

¹⁹ HHS Use and Disclosure Guidance at 1.

²⁰ 45 C.F.R. § 160.103.

²¹ 45 C.F.R. § 164.502 (“Uses and disclosures of protected health information: General rules). And each Covered Entity is allowed to use and disclose PHI without prior authorization for its own treatment, payment and health care operations. 45 C.F.R. § 164.506(b)(1).

²² *Standards for Privacy and Individually Identifiable Health Information: Final Rule*, 67 Fed. Reg. at 53186.

²³ *Id.*

unnecessarily burdening communications about, treatment or about the benefits and services of health plans and health care providers,²⁴ while restricting the ability to use PHI for true marketing purposes.

HIPAA already provides for steep penalties, including criminal and civil penalties and robust enforcement by the Office of Civil Rights within HHS for privacy violations by HIPAA-covered entities and their business associates. State Attorneys General also are authorized to bring civil actions in Federal Court for HIPAA violations on behalf of harmed residents.²⁵ Civil penalties range from \$100 to \$50,000, with a cap of \$1.5 million for violations of the same provision.²⁶

I. Recommendations

The TCPA was intended to protect consumers from annoying and harassing phone calls never consented to by the recipient. In 1991, when the TCPA was first introduced, the consumer did not envision how information would be disseminated in 2016. Today, the consumer is more likely to receive an important health message via cellular phone call, text message and/or email as they would be by regular mail. As detailed, these health messages can mean the difference between obtaining a flu shot before one of the worst flu seasons, reminding a recently discharged hospital patient to change the dressing on a wound to avoid infection and readmission or even life or death. As part of any attempts to modernize TCPA, Congress should clarify that the provision of a phone number to a HIPAA-Covered Entity or business associate (as those terms are defined under HIPAA), whether by an individual, another Covered Entity, or a party engaged in an interaction subject to HIPAA, such as an employer or governmental entity, constitutes prior express consent for health care treatment, payment, and health care operations communications to that number. This clarification is necessary, consistent with court precedent,²⁷ and provides deference to the already-stringent HIPAA framework. The TCPA's protection of a consumer's

²⁴ *Standards for Privacy and Individually Identifiable Health Information; Final Rule*, 67 Fed. Reg. 53182, 53183 (Aug. 14, 2002).

²⁵ 42 U.S.C. § 1320d-5(d)(2).

²⁶ 45 C.F.R. § 160.401.

²⁷ See, e.g., *Baisden v. Credit Adjustments, Inc.*, 813 F.3d 338, 345-46 (6th Cir. 2016) (adopting the holding of *Mais* and finding that "consumers may give 'prior express consent' under the FCC's interpretations of the TCPA when they provide a cell phone number to one entity as part of a commercial transaction, which then provides the number to another related entity from which the consumer incurs a debt that is part and parcel of the reason they gave the number in the first place"); *Penn v. NRA Grp., LLC*, No. CIV. JKB-13-0785, 2014 WL 2986787, at *3 (D. Md. July 1, 2014) (finding "prior express consent" where plaintiff provided cell phone number to hospital in relation to medical services and received calls in reference to an unpaid debt from those services); *Hudson v. Sharp Healthcare*, No. 13-cv-1807-MMA, 2014 WL 2892290, at *6 (S.D. Cal. June 25, 2014) (finding plaintiff consented to receive calls when she orally provided her number and then signed an attestation form with the number); *Elkins v. Medco Health Sols., Inc.*, No. 4:12CV2141 TIA, 2014 WL 1663406, at *7 (E.D. Mo. Apr. 25, 2014) (finding plaintiff consented to receive calls from a pharmacy benefits specialist when she gave her cell phone number at the time of enrollment in a group health plan).

right to control unwanted calls would still be respected by allowing the consumer to revoke the consent.

Additionally, in modernizing the TCPA, Congress should look to the intent of the caller to impose liability. A HIPAA Covered Entity or their business associate calling to offer a flu shot or a reminder of an upcoming doctor's appointment should be afforded the ability to contact their members and offer their services without the creation of legal liability when the intended recipient has abandoned use of the called phone number. Similarly, if the goal is to provide cost effective health care to consumers, Congress should look to clarify the definition of autodialer, so as not to include devices with the capability to autodial. Finally, Congress should eliminate the FCC's strict liability interpretation (e.g., reassigned cell phone numbers) and clarify the prohibition relates to calls placed to the intended recipient. Companies should be held to having a reasonable compliance program in place consistent with best practices.

Thank you for your invitation to testify today, and I look forward to answering your questions.

Mr. WALDEN. Thank you, Ms. Turano. That was very helpful testimony as we look at this law and the consequences out in the real world.

We will go now to Mr. Shaun Mock, who is chief financial officer of the Snapping Shoals Electric Membership Corporation.

Mr. Mock, welcome. Thanks for being here. We look forward to your counsel.

STATEMENT OF SHAUN MOCK

Mr. MOCK. Thank you for the opportunity to address this committee regarding the impacts of the Telephone Consumer Protection Act on my electric cooperative, Snapping Shoals EMC. We are a nonprofit, consumer-owned co-op headquartered in Covington, Georgia, where we provide electric service to about 97,000 mostly residential members southeast of Atlanta.

Snapping Shoals has a proud tradition of member service and innovation. We constantly strive to improve our services not because of earnings targets but rather to improve the lives of our members.

Our members of the 21st century expect and demand uninterrupted electric service, along with a host of modern communication tools. In recent years, our ability to communicate with our members has been stymied by the uncertainty surrounding existing TCPA regulations. Like most complicated matters, the existing regulations are neither all good nor all bad.

We are absolutely in favor of protecting our members from unwanted communication. However, we are also in favor of removing undue liability found within the confines of the existing regulation. Our industry welcomed recent FCC rulings when the Commission recognized the importance of timely utility notifications. However, these orders did not go far enough in patching up the increasingly archaic regulations associated with existing law.

Beginning in 2010, Snapping Shoals offered a prepaid electric program that now serves over 11,000 residential members. This program allows members to take control of their electricity usage much the same pay-as-you-go manner as fueling up the family car. In addition, there are no up-front deposits and no disconnect or reconnect fees.

Upon consent, members are provided with low-balance and disconnect notifications. Most members establish a default low balance, which becomes the notification threshold once active. Timely information is vital to providing these members with a member-friendly program.

Since launching the program, we have learned that our prepaid membership needs are very different than traditional members. We have found that not only does the typical prepaid member use less electricity but will also pay towards their electric balance at least five times each month.

In short, prepaid members are more engaged with our co-op on a daily basis and require more up-to-date information than traditional members. We have found that our low-income populations are more likely to choose our prepaid billing option. This fact is especially relevant when we consider that liability concerns over current TCPA regulations prompted Snapping Shoals to discontinue all automated telephone notifications in June 2014.

In late 2013, Snapping Shoals faced legal action alleging improper unsolicited phone calls under the strict liability portion of the TCPA statute. Although the case has since been resolved, Snapping Shoals made substantial negative changes to our member notification offerings as a result of this complaint.

The mobile number at issue was provided by a prepaid member upon establishing service. The member provided consent and verified the phone number at least seven times through a series of member-initiated phone calls. Without our knowledge, sometime in late 2011, our member changed phone numbers but continued to receive electric service at the original address while also receiving almost daily email and phone low-balance notifications until disconnecting service in April of 2013. Daily notifications sound excessive but reflects the member's practice of paying small amounts, often daily, to maintain the lowest balance possible.

Unfortunately, our original automated phone system did not allow for the member to simply opt out from within the phone call. Our automated systems were in their infancy, and we acknowledged that these systems should be improved and have continued to work with our service providers to develop a more robust member solution.

The prepaid billion program at Snapping Shoals was certainly not the first within our industry, but the rapid growth of our program meant that we would be one of the first to experience the growing pains associated with reassigned phone numbers. At best, the FCC has offered a patchwork of best practices intended to protect members and reduce liability concerns. However, the strict liability provisions within the statute leave no room for reasonable application of the law that would reflect the modernization of communication.

By June of 2014, our co-op reluctantly made the unpopular decision to discontinue all automated phone notices. Every attempt was made to notify our members of the change in hopes of avoiding any unnecessary service interruptions. Despite our best efforts, we still receive numerous complaints from angry members that had grown to depend on these phone notifications.

The only remaining channel to safely and effectively communicate with our members is through email. Unfortunately, e-mail-only notifications can exclude a large portion of our membership who do not have Internet-connected devices or reliable Internet service. We need help from Congress and the FCC to mitigate concerns over costly and burdensome TCPA litigation for businesses like Snapping Shoals EMC.

This hearing is a great first step, and I look forward to taking your questions today and working with you to improve the TCPA moving forward.

[The prepared statement of Shaun Mock follows:]

Written Testimony of

Shaun Mock, CFO

Snapping Shoals Electric Membership Corporation

Before the Subcommittee on Communications and Technology

Modernizing the Telephone Consumer Protection Act

Electric Cooperatives and the Telephone Consumer Protection Act

Thank you for the opportunity to address this committee regarding the impacts of the Telephone Consumer Protection Act (TCPA) on Electric Cooperatives, and more importantly our 42 million consumer-members nationwide. Electric Cooperatives share a unique and proud history of bringing electricity to rural America during a time in which it was simply not financially profitable for traditional investor owned utilities to provide service. Since our inception, electric cooperatives have remained consumer-member driven organizations that strive to deliver best in class service at affordable prices. Through each generation and with each decade's passing electric cooperatives have been on the forefront of new technology. We constantly strive to improve our services, not because of earnings targets, but rather to improve the lives of the members that we serve.

Electric cooperatives are private, not-for-profit businesses owned and governed by their consumers (known as consumer-members). Two principles under which all co-ops, including electric co-ops, operate are democratic governance and operation at cost. Specifically, every consumer-member can vote to select local board members that oversee the co-op, and the co-op must return to consumer-members revenue above what is needed for operation. Under this structure, electric co-ops provide economic benefits to their local communities rather than distant stockholders. Nationwide, over 900 electric cooperatives provide power to 42 million Americans in 47 states covering three quarters of the nation's land mass¹.

¹ <http://www.nreca.coop/about-electric-cooperatives/co-op-facts-figures/electric-co-op-fact-sheet-2016-03/>

To say that new technology has changed the utility landscape, would be an understatement. Our consumer-members of the 21st century expect, and often times demand nearly uninterrupted electric service along with a host of modern tools that we all seem to expect in modern life. In recent years, our ability to communicate with our consumer-members has been stymied by the uncertainty surrounding the existing TCPA regulations. Like most complicated matters, the existing TCPA regulations are neither all good, nor all bad. We are absolutely in favor of protecting consumer-members from unwanted communications. We are in favor of providing choices in how we interact with our consumer-members. However, we are also in favor of removing undue liability and the ambiguity found within the confines of the existing TCPA regulations. Our industry welcomed the news of recent FCC Declaratory Orders² as one of our primary concerns was addressed when the commission recognized the importance of utility notifications. However, these orders do not go far enough in patching up the increasingly archaic regulations found in the TCPA.

Who is Snapping Shoals Electric Membership Corporation?

Snapping Shoals Electric Membership Corporation (SSEM) is a non-profit, consumer-owned electric cooperative headquartered in Covington, Georgia. We provide electric service to about 97,000 consumer-members along 6,200 miles of energized line in an eight-county area southeast of Atlanta. Snapping Shoals EMC's roots go back to the 1930s and the early days of America's rural electrification movement. Since that time, Snapping Shoals EMC has built a strong reputation for providing reliable power and excellent customer service. Through the efforts of our nearly 230 dedicated employees, many of whom are cooperative members themselves, SSEMC members boast some of the lowest electric rates in Georgia³.

Snapping Shoals EMC membership base is primarily residential. Approximately 94% or 91,000 residential accounts comprise the system. The remaining non-residential accounts consist of 4,000 small commercial

² FCC Declaratory Ruling and Order 15-72 (July 10, 2015)

FCC Declaratory Ruling 16-88 (August 4, 2016)

³ GA Public Service Commission 2016 Residential Rate Survey (All Providers Summer)

<http://www.psc.state.ga.us/electric/surveys/residentialrs.asp>

businesses, 1,800 Public Street and Highway lighting accounts, and 43 Large Commercial and Industrial accounts. Providing our consumer-members with reliable, affordable electric service is not just our goal; it is our only reason for existence. Through 78 years of service, SSEMC has provided affordable energy solutions to power our consumer-members through life's every day challenges. One such solution, known as prepaid metering, has become so successful that its impact to our consumer-members and Snapping Shoals EMC operations cannot be understated.

The Growth of Prepaid Metering

Prepaid metering was originally launched on a trial basis during the fall of 2010. Initially offered to new consumer-members only, the SSEMC prepaid program has grown to include over 11,000 residential consumer-members, which represents 12% of our total residential membership. Highlights of the prepaid program are as follows:

- No Deposit Required: Consumer-members are able to forego normal deposit requirements in exchange for paying for their electric service in advance.
- Daily Bill Calculation: Once a prepaid balance is established future energy consumption is calculated daily and deducted from the member's prepaid balance daily.
- No Minimum Balance Required: Consumer-Members can elect to receive automated notifications from SSEMC once their balance falls below a predetermined amount.
- Meter automatically disconnects once balance falls below zero-\$.
- Meter automatically reconnects once payment is received and prepaid balance is above zero-\$.
- Automated Low Balance Notifications Require Verbal Consent from the consumer-member.
- Originally, notification options included automated phone call, text, or email.
- Consumer-Members can verify prepaid balance twenty four hours a day via website, smartphone app, or manual inquiry via automated phone system.

We have learned in the six years since the program's inception that our prepaid membership's needs and expectations are very different than traditional residential members. Instinctively, the prepaid member tends to monitor electricity usage and balance information daily. To this end, we have found that not only does the typical prepaid member use less electricity; the average prepaid member will also pay towards their electric balance at least five times each month. In short, prepaid members are more engaged with our cooperative on a daily basis and require more up-to-date information than traditional consumer members. It is also noteworthy that although SSEM does not collect any income based demographic information of our membership, it is generally accepted that our low-income populations are more likely to choose our prepaid billing option. This fact is especially relevant when we consider that liability concerns over current TCPA regulations prompted SSEM to discontinue all telephone disconnect and low balance notifications in June 2014. Email notifications are still available, but many low-income and elderly consumer-members are less likely to own a smart phone or have daily access to email notifications.

An Introduction to the Telephone Consumer Protection Act

In late 2013, SSEM was the target of legal action alleging improper, unsolicited phone calls under the strict liability portion of the TCPA statute. Prior to this action, our industry viewed prepaid low balance phone calls as a member friendly service. We have no motivation to contact our membership except in the manner in which they request. Our automated systems were never used to sell any products, services, or debt collection. Although the case has since been resolved, SSEM made substantial negative changes to our member notification offerings as a result of this complaint. A summary of the facts and circumstances around this case is provided below:

- The mobile number at issue was provided to SSEM by a prepaid member upon establishing service in April 2011. The member also provided an email address for future communications.
- Member provided consent and verified phone number at least seven times through a series of consumer initiated phone calls to SSEM, the last of which occurred in September 2011.

- Unbeknownst to SSEMC, sometime in late 2011 our member changed phone numbers, but continued to receive electric service at the original service address. The member did not provide a new phone number, but continued to receive almost daily email prepaid low balance notifications until disconnecting service in April 2013.
- SSEMC continued to send almost daily automated prepaid low balance and/or disconnect notifications to the phone number at issue, unaware that the phone number had been reassigned to another individual, who was not a member of SSEMC.
- Daily notifications sound excessive, but reflects the member's practice of paying small amounts, often daily to maintain the lowest possible balance to maintain electric service.

Unfortunately, the original prepaid low balance phone notification system did not allow for the consumer-member to simply opt-out of future calls from a prompt within the phone call. However, additions or modifications to consumer notification preferences are available 24 hours a day through a live customer service agent. Even a non-member such as the plaintiff could have reached a live customer service agent to request the phone number be added to the do not call list. Our automated dialing system was also in its infancy and did not include a provision for opt-out or identifying reassigned phone numbers. We acknowledge that these systems should be improved and have continued to work with our service providers to develop a more robust member solution.

The prepaid billing program at SSEMC was certainly not the first within our industry, but the rapid growth of our program meant that SSEMC would be one of the first to experience such growing pains as associated with reassigned phone numbers. Larger utility providers, with much larger budgets, have no doubt struggled to find fool-proof means to avoid calling reassigned numbers. Third-party database "scrubbers" are just making their way into our industry, but remain expensive and less than perfect solution for matching names and phone numbers. At best, the FCC has offered a patch-work of best practices⁴ that *should* protect

⁴ FCC Declaratory Ruling and Order 15-72, para. 86

consumer-members and reduce TCPA liability concerns associated with timely identification of reassigned phone numbers. However, the strict liability tenets found within the statute leave no room for reasonable application of the law that would reflect the modernization of telecommunications and balance the member-benefit of phone notifications with cooperative best practices. In our case, the plaintiff received over 500 unsolicited phone calls. The only reason these phone calls stopped is that our member, who originally provided and consented to receive notifications, eventually disconnected service more than a year after changing phone numbers. After 500 phone calls and 13 months; would it be reasonable to assume that anyone acting in good faith would find a way to file a complaint with a nuisance caller at least once? Existing TCPA regulations do not allow for such common-sense questions and subsequent reasonable application of the law.

Impact to Consumer-Members

By June 2014 Snapping Shoals EMC management reluctantly made the unpopular decision to discontinue all automated phone calls, which includes prepaid low balance notifications and automated disconnect notices. The only remaining channel to safely and efficiently communicate with our members is through email. Unfortunately, email only options can exclude a large portion of our membership as access is simply not available for some of our low-income and elderly populations that are less likely to have access to computers, smartphones, and especially reliable internet access.

Every attempt was made to notify our members over multiple communication channels in hopes of avoiding any unnecessary service interruptions. Despite our best efforts to reach these vulnerable populations, our call center provided reports of numerous angry members that had grown to depend on the low balance and disconnect notifications. Our offer to update or add an email address for notifications was often met with more frustration as almost ten percent of our prepaid membership still do not have an email address on file, that is to say nothing of the member's desire to even access email on a daily basis. Our elderly and low-income members without a smartphone and/or computer with internet access are limited to traditional, less consumer friendly options. These traditional options can be cumbersome when managing a bare minimum

prepaid balance on a daily basis. To many people a daily phone call from their electric cooperative may sound ludicrous, but to our low-income and elderly populations these services were literally vital to keeping their homes warm in the winter and cool during the summer.

The lack of phone notifications impacted more than just our prepaid members. Again, because of the uncertainty surrounding automated phone calls and the particularly high standard pertaining to reassigned phone numbers; Snapping Shoals terminated all automated disconnect notices as well. Less than seventy percent of all SSEMC residential members have an email address on file. Discontinuing this service has also been met with numerous complaints. In one instance, a consumer-member of almost twenty years returned after an extended time away from home to find power disconnected, freezers thawed, and floors ruined. The gentlemen had left home in late May before receiving the May electricity bill. Before leaving the member had instead “paid a little extra” to cover the anticipated May and June power bill. Unfortunately, the member underestimated his electric usage and service was disconnected around the first of July. He returned home a few days later to find that the hot Georgia sun had not only spoiled groceries, but also thawed liquids from the freezers had leaked onto the surrounding floor. Ultimately, the price to replace groceries, freezers, and floor covering was in the thousands of dollars. Snapping Shoals would not have disconnected service had we have known the circumstances. Before June 2014, this member would have received a courtesy phone call a few days before the pending disconnection. Snapping Shoals EMC offers numerous electronic options that allow our consumer-members to pay bills, monitor usage, and report outages from anywhere in the world and around the clock. In the end, each member is unique in how they prefer to handle their own affairs. We hope to one day be able to again offer a simple phone call to conduct business, as the member referenced above would have preferred.

Future Development on Hold

Exciting times are ahead in the electric cooperative industry. For the first time in history we will have the ability to offer our consumer-members real-time usage information, pro-active outage updates with estimated restoration times, along with a host of communication preferences tailored to meet the

consumer-members needs across a multitude of channels. However, the FCC and Congress has not gone far enough in helping businesses like Snapping Shoals EMC mitigate concerns over costly and burdensome TCPA litigation. Given that we are owned by our members, we agree that consumer rights are of the utmost importance and every effort should be made to prevent excessive and bothersome phone calls from unsolicited vendors. However, legitimate business communication should not be hindered in the process. Some reasonable legislative changes, perhaps even new legislation, should be considered as we learn how to manage and adapt to ever-changing consumer communication preferences in the 21st century. This hearing is a great first step and I look forward to taking your questions today and working with you to improve the TCPA moving forward.

Thank you for allowing me to share our experiences.

Mr. WALDEN. Thank you, Mr. Mock. We appreciate the testimony, and sorry for what you all have gone through as a result of current status of this law.

We will go now to Mr. Spencer Waller, interim associate dean for Academic Affairs and professor at Loyola University Chicago and director of the Institute for Consumer Antitrust Studies.

Mr. Waller, thank you for being here. We look forward to your testimony.

STATEMENT OF SPENCER WEBER WALLER

Mr. WALLER. Thank you very much. Chairman Walden, Ranking Member Eshoo, and other members of the subcommittee, I appreciate the chance to be here today and discuss with you the important issues raised regarding the continued effectiveness of the TCPA and appropriate proposals for its reform. I thank you for also including our 2014 study of the TCPA in the record of these hearings.

The only thing I would emphasize is that I am here in my individual academic capacity and that our institute is nonpartisan. We don't take positions in individual cases.

As I said, my comments are drawn from that 2014 study, and as the committee is aware, in the late 1980s, spurred by advances in technology, the telemarketing industry began to aggressively seek out consumers by the hundreds of thousands. They were able to do so as a result of then-technological advances involving robocalls, prerecorded messages, automatic dialing, and the development of what was then the fax machine.

Consumers and businesses became overwhelmed with unsolicited telemarketing calls and fax advertisements. Calls for action grew louder. States enacted laws but could not reach the interstate aspects and international aspects of telemarketing. And after reviewing and debating 10 different pieces of legislation, Congress ultimately enacted the TCPA that we are here to talk about.

And the TCPA was borne out of abusive telemarketing practices, made more invasive by the technology of that time. And since 1991, Congress has enacted other statutes relevant to the discussion of the TCPA, some of which have already been mentioned today.

The original purpose of the TCPA was to regulate certain uses of technology that were abusive, invasive, and potentially dangerous and also to some extent cost-shifting to the consumers. And the TCPA effectively regulates those abuses by prohibiting certain technologies altogether, rather than focusing specifically on the content of the messages being delivered.

And the expansion of the TCPA into areas outside of marketing and new technologies such as text messaging and cell phones over the years is consistent with its original purpose.

On the enforcement side under the current scheme, private parties are largely responsible for the TCPA and have done so primarily through the class-action mechanism. This is in part due to the small statutory damages for any single plaintiff under the TCPA and the lack of statutory attorneys fees except through the class-action mechanism.

And while this aspect of private enforcement has drawn some criticism because of the potential for large total damages faced by

certain defendants, the threat of class actions has also provided significant direct and indirect deterrence to violators and is the only meaningful source of potential compensation to victims of TCPA violations.

Historically, the Federal Government, through the FCC, has only enforced the TCPA directly against violators to a limited extent, and yet the statute has been relatively successful in reducing the conduct it was enacted to regulate.

Obviously, technology continues to evolve rapidly, and there are a number of trends that are emerging. The number of entities that are operating in intentional disregard of the TCPA are growing, and they are using more sophisticated technology to evade detection and enforcement.

According to the Federal Trade Commission, about 59 percent of phone spam cannot be traced or blocked because the calls are routed through “a web of automatic dialers, caller ID spoofing, and voiceover-Internet protocols.”

Although the traditional scheme of TCPA enforcement, with its strong reliance on private rights of action, has been successful in the past, two main issues are becoming clear. The private right of action is limited in terms of its ability to deter actions of intentional violators, and FCC direct enforcement through forfeiture proceedings is limited by its slow processes, limited resources, and limited remedies.

So in order for the TCPA to continue to remain relevant and effective going forward, our report from 2014 makes the following recommendations: We recommended increasing government enforcement of the TCPA by providing State attorneys general with a larger incentive to bring TCPA cases and also authorizing the FTC to bring enforcement actions under the TCPA. It is involved in the enforcement of obviously portions of the laws relating to abusive telemarketing and is also the prime enforcer of most of our country’s consumer laws, and we think they are better able to tackle this problem in concert with the FCC.

We also recommended increased uniformity of the application of the TCPA by encouraging more frequent and quicker FCC rulemakings, focus more on the definition of terms and ambiguities in the law, less so with respect to carve-outs and exemptions for individual industries and actors.

We hope to continue to protect cell phones by requiring express prior consent for any communication by call or text made to a cell phone. And we have other recommendations relating to the junk fax portion of the TCPA, which may also be of interest to the committee.

We oppose efforts to remove or otherwise modify the private right of action in view of its importance in the enforcement of the statute, and we support placing increased restrictions both through law and through technology on entities that seek to manipulate caller ID.

These recommendations and other issues are discussed more fully in our report. And I thank you for your time, and I am happy to answer any questions.

[The prepared statement of Spencer Weber Waller follows:]

Statement of Spencer Weber Waller
Interim Associate Dean for Academic Affairs and Professor, Loyola University
Chicago School
Director, Institute for Consumer Antitrust Studies

Before the
Subcommittee on Communications and Technology
Committee on Energy and Commerce
U.S. House of Representatives
September 22, 2016

Chairman Walden, Ranking Member Eshoo, and other Members of the Subcommittee, I appreciate the opportunity to discuss with you today the important issues raised regarding the continued effectiveness of The Telephone Consumer Protection Act of 1991 (TCPA) and appropriate proposals for its reform.

I am the Interim Associate Dean and a Professor at Loyola University Chicago School of Law. I am also the Director of the Institute for Consumer Antitrust Studies at Loyola (Institute) which seeks to promote a more competitive consumer friendly economy. I have taught and published extensively on issues related to consumer protection, antitrust law, and related issues. I provide this testimony in my individual academic capacity.

My comments today are drawn from the published version of a 2014 comprehensive study of the TCPA published in *The Loyola Consumer Law Review*¹ and certain subsequent developments since the publication of that study.

This study of the TCPA was made possible through a cy pres distribution following the settlement of a class action in the United States District Court for the Northern District of Illinois which involved claims under the TCPA. Following the settlement of the litigation, Senior Judge Hart sought proposals for cy pres distributions. The Institute sought and received certain of the cy pres funds distributed from that case to undertake the first comprehensive study of the TCPA and the effect of new technology. I am not aware of any further published comprehensive studies of the TCPA since that time.

¹ Spencer Weber Waller, Daniel B. Heidtke & Jessica Stewart, *The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology*, 26 LOY. CONS. L. REV. 343 (2014).

I. Background

In the late 1980s, spurred by advances in technology, the telemarketing industry began aggressively seeking out consumers by the hundreds of thousands. Companies began using machines that automatically dialed consumers and delivered prerecorded messages (“robocalls”). Marketers also took advantage of another then new and increasingly available piece of technology known as the facsimile machine (“fax machine”). With the fax machine, marketers could send tens of thousands of unsolicited advertisements (“junk fax”) each week to consumers across the nation.

Consumers and businesses became overwhelmed with unsolicited telemarketing calls and fax advertisements. Calls for action grew louder. States enacted laws, but could not reach the interstate practices of telemarketers. After reviewing and debating ten different pieces of legislation, Congress enacted the TCPA.

II. The TCPA

The TCPA was born out of abusive telemarketing practices, made more intrusive by advances in technology. Originally, the TCPA imposed restrictions on the use of telephone lines for unsolicited advertising by telephone call and fax. The TCPA has since been expanded and adapted by administrative rule, judicial interpretation, and congressional amendment.

Since 1991, Congress has enacted other statutes relevant to the discussion of the TCPA. Despite common justifications and purposes, Congress determined that certain media would be regulated differently. For example, the TCPA originally banned the practice of sending “junk fax.” The justification for the ban was that the practice shifted the cost of advertising from the advertiser to the recipient. However, the practice of sending unsolicited commercial e-mail, which also shifts the cost of advertising from the advertiser to the recipient, was not banned but instead was regulated with certain “identification” requirements.

The original purpose of the TCPA was to regulate certain uses of technology that are abusive, invasive, and potentially dangerous. The TCPA effectively regulates these abuses by prohibiting certain technologies altogether, rather than focusing specifically on the content of the messages being delivered. The expansion of the TCPA into areas outside of telemarketing and new technologies over the years is consistent with its original purpose.

Private parties are largely responsible for the enforcement of the TCPA, and have done so primarily through the class action mechanism. This is in part because of the small statutory damages for any single plaintiff under the TCPA and the lack of statutory attorneys fees except through the class action mechanism. While this aspect of private enforcement has drawn some criticism because of the potential for large total damages faced by certain defendants, the threat of class actions has provided significant direct and indirect deterrence to violators and the only meaningful source of potential compensation to victims of TCPA violations. Historically the federal government has only enforced the TCPA to a limited extent, yet the statute has been relatively successful in reducing the conduct it was enacted to regulate.

Technology continues to rapidly change and a number of trends are emerging. The number of entities that are operating in intentional disregard of the TCPA are growing, and they are using more sophisticated technology to help evade detection and enforcement. According to the Federal Trade Commission (“FTC”), about 59% of phone spam cannot be traced or blocked because the phone calls are routed through “a web of automatic dialers, caller ID spoofing and voice-over-Internet protocols.” Although the traditional scheme of TCPA enforcement, with its strong reliance on the private right of action, has been successful in the past, two main issues are becoming clear. The private right of action is limited in both incentivizing lawsuits against, and deterring the actions of, intentional violators; and FCC enforcement is limited by its slow processes and limited remedies.

III. Recommendations for Keeping the TCPA Relevant and More Effective

In order for the TCPA to stay relevant after twenty-five years, certain modifications and improvements can be made. We recommend improving federal and state government enforcement efforts and increasing the uniformity of interpreting the statute. The FTC’s continuing work towards a technical solution to robocalls is commendable, and should be followed with respect to other types of media currently exposed to unsolicited commercial messages such as text messages and e-mail. FCC rule making procedures have in some way been helpful in applying the TCPA to new technologies and in other instances unnecessarily broadened exemptions to the application of the TCPA, particularly in the area of collection of student loan debt by government entities and their contractors.

In order for the TCPA to continue to remain relevant and effective going forward, the 2014 Institute report makes the following recommendations:

- Increase government enforcement of the TCPA by providing State Attorneys General with a larger incentive to bring TCPA cases and authorizing FTC enforcement actions under the TCPA;
 - Increase uniformity of application of the TCPA by encouraging more frequent and quicker FCC rulemaking procedures;
 - Continue to protect cell phones by requiring prior express consent for any communication (call or text) made to a cell phone;
 - Place a time limit on the Junk Fax Established Business Relationship;
 - Create incentives for fax broadcasting companies to determine whether the faxes they are sending on behalf of clients are in violation of the TCPA;
 - Rebuff efforts to remove or otherwise modify the private right of action;
- and
- Place additional restrictions on entities that enable caller ID manipulation.

These recommendations and other issues are discussed more fully in the Institute's 2014 Report as published in the Loyola Consumer Review which I would request be entered in the record for this hearing. Thank you for your time. I am happy to answer any questions.

Mr. WALDEN. Thank you very much for your testimony.

I will now go to our final witness, Mr. Richard Shockey, principal at Shockey Consulting. We are delighted to have you here, sir. Please go ahead.

STATEMENT OF RICHARD SHOCKEY

Mr. SHOCKEY. Chairman Walden—

Mr. WALDEN. Be sure to push the button on your microphone there. There we go.

Mr. SHOCKEY. There we go. Chairman Walden, Ranking Member Eshoo, and members of this committee, thank you for the opportunity to speak with you today.

My name is Richard Shockey, and I am a consulting telecommunications engineer by profession advising telecommunications companies, their supplier community, the investment community, and actually other national governments on any number of issues related to our communications networks.

I am also the chairman of the board of the SIP Forum. SIP, or the Session Initiation Protocol, is the fundamental Internet building block by which all modern voice communications networks in the United States are designed around, including those deployed by cable, enterprises, including the Congress I might add, and advanced residential networks.

I am only speaking for myself here and none of the other members of the SIP Forum, et cetera, et cetera.

I have been a working member of the Internet Engineering Task Force for over 15 years, and I currently serve on the FCC's North American Numbering Council, and I have previously served on the FCC's Communications Security, Reliability, and Interoperability Council.

I am here to discuss many of the technical issues involving TCPA, robocalls, caller-ID spoofing, which are interrelated with each other and inter-tangled with each other. This committee is clearly aware of the new Robocall Strike Force. Though I am not a member of the strike force, I am intimately aware of the work the engineering community is contributing to that effort and happy to share it with you.

I look forward to answering your questions.

[The prepared statement of Richard Shockey follows:]

Prepared Statement to the U.S House of Representatives
Energy and Commerce Committee
Communications and Technology Subcommittee
Modernizing the Telephone Consumer Protection Act (TCPA)

By

Richard Shockey
Shockey Consulting LLC

September 22, 2016

Chairman Walden, Ranking Member Eshoo and members of the Committee, thank you for the opportunity to speak with you today. My name is Richard Shockey and I am a telecommunications engineer by profession and the principal of Shockey Consulting LLC, a firm specializing in communications technologies, especially those involving the voice networks. In addition, I am Chairman of the Board of the SIP Forum. SIP, or the Session Initiation Protocol¹, is the fundamental Internet technology which all modern voice networks in the United States are designed around. Disclaimer: I am only speaking for myself here and my views may or may not be the same as those member companies of the SIP Forum.

We are all aware of the plague of Robocalls and Caller-ID spoofing. The two problems are linked. Many of us in the engineering community have been actively looking at this problem for many years now. Although there is no “Silver Bullet” here, better engineering can help and, in my humble opinion, there is engineering consensus on a path forward.

The “spoofing” problem, in which callers alter the calling party number information transmitted with their calls, is a key challenge for two reasons. First, any blocking or filtering tool that identifies unwanted calls based on the calling party number can be bypassed by bad actors who can simply spoof numbers not on the blacklist. This means that any particular blacklist-based blocking or filtering tool can be defeated by robocallers. And the more widely deployed a particular blacklist becomes, the greater the incentive robocallers have to find ways to bypass it. Unfortunately, some of the recipients of the robocalls with spoofed legitimate numbers will report the legitimate number as associated with the robocall. The innocent customer to whom the number is assigned can find himself or herself on a blacklist and, thus, subject to having his/her calls blocked. We have seen this problem in e-mail SPAM remediation

¹ <https://www.ietf.org/rfc/rfc3261.txt>

where a user's domain is blacklisted and the domain owner has no way of finding out who put them on a blacklist and, worse, no information on how they can get off a blacklist. I have personally dealt with that problem in the past.

Part of the overall solution involves applying modern Public Key Infrastructure (PKI) to cryptographically "sign" every signaling message for calls and, ultimately, text messages in the United States in a process we define as Call Validation. Some of these concepts have come out of the Internet Engineering Task Force (IETF), and its STIR working group, and the SIP Forum/ATIS Joint Task Force on Network to Network Interfaces.²

Second, we envision service providers could develop and eventually leverage modern data analytics technology and algorithms to attempt to determine if a call is a robocall or if it has been spoofed. This is the same class of data technology that the financial service industry uses to detect credit card fraud among others applications. On the basis of this data, we also envision that we could signal the consumer's telephone, or "user agent" as we call it, to display the results of this Call Validation Technology and empower the consumer to act accordingly.

We also want to offer businesses and individuals the option to enhance the identification information contained in the call presentation (what you see when you are asked to answer a call). We believe there is enormous value in having a trusted, validated identification accompany a call or message. This is especially important for both National Security, as well as Emergency Preparedness (NS-EP) applications.

This Committee is also aware that the robocall problem has an international dimension. Many of us in the engineering community believe that these Call Validation solutions may be adopted by other National Regulatory Authorities in a coordinated effort to combat the problem.

² http://www.prweb.com/releases/2014/SIPForum_NNI-TF/prweb12315811.htm

We know that much of the malicious traffic is coming from outside our borders and I believe these techniques can, and indeed must, be applied to international call/messaging gateways as well.

For those consumers that do not have modern mobile smartphones or internet protocol (IP) based desktop phones or have access to modern SIP networks, what do we do? I am trying to speak to the problem of, "What about Grandma?", "What about Aunt Phoebe?". This is a more complicated problem.

I believe Call Validation technology has positive benefits for our Law Enforcement Agencies that need effective "Track and Trace" mechanisms in the call signaling to track down the bad guys and shut them down.

I wish to emphasize that none of these technical solutions would inhibit a consumers legitimate desire to enable privacy options in call display (Anonymous) that are currently in place.

The Robocall Strike Force called by Federal Communication Commission Chairman Wheeler and Randall Stephenson, the Chairman of AT&T, is working on this engineering solution. Both Chairman Wheeler and Mr. Stephenson should be congratulated for this initiative, as well as all the companies that have agreed to participate. It is an extraordinary group of dedicated professionals. I am not a member of that Strike Force, but I am intimately aware of the technical inputs that the Strike Force is considering. Long ago the engineering community realized that part of the problem was that our voice communications system was a hybrid of classic Time Division Multiplexing/Signaling System 7, which is an ancient, decaying 30- to 40-year-old technology, and modern SIP technologies. This mix has contributed to weaknesses in the core voice network itself that have, in part, exacerbated the robocall spoofing problem.

Although there is no “Silver Bullet” here, better engineering can help. Implementing those solutions will require leadership from service providers, their suppliers, Congress and the Federal Communications Commission.

I understand the natural frustration that members of this Committee have with why these solutions have taken so long. It is complicated stuff. We have had to develop technologies that can be applied in the network while, at the same time, insuring the Security, Reliability, Integrity and Interoperability of the existing system. Though this is not exactly changing the tires of an airplane at 30,000 feet, there are elements that are similar. In addition, the telephone network is undergoing a “Technology Transition” from classic TDM/SS7 to SIP based networks that has been the subject of ongoing discussions at the Federal Communications Commission and here in Congress. I wish to emphasize that that Technology Transition needs to move forward with “all deliberate speed”, since many of the solutions the engineering community proposes cannot be fully applied to legacy networks.

This Committee is specifically looking at revising the Telephone Consumer Protection act (TCPA) to reflect modern realities, but the TCPA itself is not the only piece of legislation that is in desperate need of revision. The Truth in Caller-ID Act also needs to be revised. Robocalls are being facilitated because the call identification cannot be trusted. You cannot fix one problem without attacking the other. I am pleased to see H.R 2566 and H.R 2669 put forward. This is a fine start. In particular, H.R 2566 has proposed to require intermediate telephone call transit providers register with the FCC. I am deeply concerned that efforts to block robocalls do not complicate the ongoing problems of Rural Call Completion that this Committee is also concerned about.

The most important thing I can suggest to the Committee is that it express its intent to the FCC and our Law Enforcement Agencies with absolute clarity. The Commission should be authorized to investigate the feasibility of enabling new databases such as “Do Not Originate” and further rules that create indicators in the National Numbering Databases on when a number has been disconnected and when it could be available for reissuance. I would also like to see the FCC take further action on a proposal on what is often referred to as National Number Portability or the ability to take a telephone number and essentially keep it for life within the United States. 12 % of the US population moves every year and often have to disconnect a number when they move.³ This would dramatically cut down on the volume of numbers being pulled out of service and subject to reassignment.

This is just another one of the issues in the voice network Technology Transition that are interrelated and interconnected.

I also note that the FCC made several recommendations in 2011, including regulating 3rd party spoofing services. I would suggest that Congress consider revisiting some of those recommendations as well.⁴

The engineering community is capable of giving the industry and our regulators the tools they need to combat this problem, but this Committee needs to make sure that they can use these tools under appropriate “Safe Harbor” provisions. We need to protect those industries that alert consumers with various messages that affect our financial security and personal health. Legislation needs to give protection to those businesses that act “In Good Faith” to contact their

³ <http://www.census.gov/newsroom/press-releases/2015/cb15-tps99.html>

⁴ https://apps.fcc.gov/edocs_public/attachmatch/DA-11-1089A1.pdf

customer without the endless threat of nuisance suits or endless regulatory burdens that require more and more lawyers to create ever more complicated exemptions.

I am pleased to answer any and all questions and assist this Committee now and in the future.

Mr. WALDEN. All right. Thank you very much. And you win the prize for the shortest testimony. We appreciate all our panelists here and for what you have shared.

I have got a couple of questions that came my way. Obviously, we all don't want the unwanted robocalls, the spoofing, all of those things, but I keep getting asked what is a robocall? What is an auto-dial call? And, Mr. Waller, maybe you can help because I haven't been able to get a definitive answer that if I pick up this device called a mobile phone and in the address book push a number, it auto-dials. Some would argue that constitutes an auto-dial, a robocall. If I manually dial the number, some would argue, well, that gets around it, but others say not necessarily because the device is capable of doing that. Do you believe there is clarity in the law on this matter, and if so, which is it?

Mr. WALLER. Mr. Chairman, it is a good question. I would have to go back and look carefully, particularly at the 2015 FCC omnibus rulings to see what their current position is and I don't have that at the tip of my tongue.

Mr. WALDEN. All right.

Mr. WALLER. I would certainly take the position, I think, that manual-dial call on a device is a manual-dial call and would not be captured by the auto-dial—

Mr. WALDEN. Because one of the other issues that comes up is if you have a list of customers in a system and you need to communicate with them, does it really in today's technology make sense that you have to hire people to manually punch in a number that otherwise could come down and mechanically be dialed. That is treated as a robocall because it is auto-dialed, right?

Ms. Turano, you seem to be agreeing with me on this point. Is this something you all have run into? Mr. Mock?

Ms. TURANO. You are right. I am nodding over here.

Mr. WALDEN. Why?

Ms. TURANO. I appreciate the question and I think there is an important distinction is because frankly of the cost related to those types of calls. For us to hire an employee to make manual phone calls, depending on the length of the call, it could be anywhere between \$6 to \$10. If it were an auto-dialed call, it could be anywhere between 35 to 65 cents. And so those are funds that could otherwise—

Mr. WALDEN. And you are allowed to make that call one way or the other, right? If you have permission into the cell phone and to use a cell phone number, then you can do the auto-dial? You could use technology like we all do with our—anybody have an address book with phone numbers? Anybody really know phone numbers anymore? Do you still go around in the wheel? I don't think so, right?

Ms. TURANO. Right, the—

Mr. WALDEN. But this antiquated law makes you do that, doesn't it?

Ms. TURANO. It distinguishes between a landline and a cell phone, yes.

Mr. WALDEN. All right. Mr. Mock, what have you run into in that respect?

Mr. MOCK. Well, certainly, from Snapping Shoals' standpoint, we operate at cost for our members, and any additional manual processes that are added ultimately would have to be passed along through our electric rates onto our members.

Just to give the committee an idea of volume and our issue with prepaid—

Mr. WALDEN. Right.

Mr. MOCK [continuing]. Particularly highlights the volume of phone calls. But Snapping Shoals' 11,000 prepaid consumers in August of 2011 received in excess of 220,000 low-balance notifications. That is 23 notifications per member per month.

Mr. WALDEN. Now, some people might say that is too much; I don't want that.

Mr. MOCK. I would absolutely agree, but we are dealing with a population that will quite literally pay \$5 and \$10 towards their electric account every single day. And so as we maintain, say, a \$20 minimum balance and as that balance goes below \$20, the member pays \$10, that may only buy them a few days. In some cases with the lower payments, these members are receiving phone calls day after day after day and to have a small business such as ours place that volume of phone calls just simply is not feasible cost-wise or—

Mr. WALDEN. Are these calls your consumers actually want?

Mr. MOCK. Absolutely. Since—

Mr. WALDEN. What happens if they fall behind? Does their power get cut off? And what does that cost them if that happens?

Mr. MOCK. Because they are a prepaid member, there are no additional fees. At this point, once the balance falls below zero, the meter automatically disconnects. Once they make a payment, automatically comes on.

Mr. WALDEN. All right.

Mr. MOCK. Outside of the prepaid program, we have also experienced some difficulty with our regular consumers. Just a simple phone call for a member of 20 years goes out of town for 5 or 6 weeks, forgot to pay the bill before he left—

Mr. WALDEN. Right.

Mr. MOCK [continuing]. Paid a little extra as a matter of fact but not quite enough, he comes home to a house with thawed freezers, ruined floors, and in conversations, he simply wanted a phone call. Prior to June of 2014, he would have received a phone call.

Mr. WALDEN. But because of the class-action lawsuits or whatever else—

Mr. MOCK. Absolutely, and—

Mr. WALDEN [continuing]. You have backed off doing that?

Mr. MOCK. We have a strong practice of verifying phone numbers at every opportunity.

Mr. WALDEN. Right.

Mr. MOCK. And for us, the issue of reassigned phone numbers and the volume particularly that can stack up with a reassigned phone number is really where our—

Mr. WALDEN. All right.

Mr. MOCK [continuing]. Material concern is.

Mr. WALDEN. I wish I had more time. I would pursue that course because that is the next—

Mr. MOCK. Thank you.

Mr. WALDEN [continuing]. Big issue on my list. But we will go now to the gentlelady from California, Ms. Eshoo.

Ms. ESHOO. Thank you, Mr. Chairman, and thank you to the witnesses.

I think what I would like to do is just ask a straightforward question of three out of the four of you. Mr. Waller, you made recommendations of what you thought we should do, and that is most helpful. So one or two sentenced, Ms. Turano. What do you recommend that we do to address what we are here for?

Ms. TURANO. Sure. Thank you.

Ms. ESHOO. What is your top recommendation, quickly?

Ms. TURANO. Thank you. My top recommendation has to do with a reconciliation comparing the language within TCPA and certain language within HIPAA. They are both statutes that govern this practice and the Medicare Advantage and Medicaid programs. However, there is a disconnect—

Ms. ESHOO. I have it. I got it. OK.

Ms. TURANO. Thanks.

Ms. ESHOO. Thank you. Mr. Mock?

Mr. MOCK. Thank you. I think our top recommendation simply would be to introduce some measure of reasonability in application into the law. Additional exemptions—

Ms. ESHOO. But something specific. I understand everybody will say here, even if they disagree with each other, that they are all reasonable, so be specific.

Mr. MOCK. Thank you. The definition of called party at this particular point in time leaves absolutely no liability on the called party, and in our case, whenever the called party is not the intended, the reasonable application that might ask a—

Ms. ESHOO. Well, I understand—

Mr. MOCK [continuing]. Called party—

Ms. ESHOO [continuing]. What you are talking about, but in your written testimony, if I read it correctly, you all made 500 calls over, I think, 13 months to a reassigned number. I mean, 500 calls and you want to put the burden on the person that receives the call? Is that what you are saying?

Mr. MOCK. Five hundred phone calls absolutely sounds excessive. Again, these—

Ms. ESHOO. Well, it is excessive.

Mr. MOCK. These are members that have requested these daily notifications. If a member does not receive a notification, their power is out. In this particular case a reasonable application of the law might have looked at this case and just asked the question would it be reasonable—

Ms. ESHOO. Well, I understand reasonable, and I don't know how we do this, but we can't reshape TCPA based on your co-operative. We are going to have to look for something that is going to help you, but it is a very unusual, in my view, business model.

Mr. SHOCKEY?

Mr. SHOCKEY. These are policy questions, and I defer to the other witnesses—

Ms. ESHOO. So ask the engineer and consultant? You don't have even one—

Mr. SHOCKEY. Well, I think you can't look—

Ms. ESHOO [continuing]. Recommendation for us?

Mr. SHOCKEY. There are a number of things I would bring up. The number one thing I would like you can't look at TCPA in isolation. We are going to have to look at the Truth in Caller ID Act specifically. The act is creating a great deal of the problems with robocalls because the way it is constructed.

Ms. ESHOO. But tell us the fix. Everybody is telling us the problems. We know what the end result of the problems. What do you recommend we fix? How would you do it? You are the expert. That is why you all came here to testify.

Mr. SHOCKEY. There are issues involving what I would consider adding safe harbor, as well as—

Ms. ESHOO. Safe harbor for whom?

Mr. SHOCKEY. Safe harbor for the entity making the calls. And the telecommunications companies really do need to safe harbor. It is also in good-faith provisions that in good faith here for these entities such as a co-operative and health care providers and financial institutions that if they are trying to do this in good faith, they should have some reasonable protection from unwarranted lawsuits.

Ms. ESHOO. And what is—

Mr. SHOCKEY. What is in good faith?

Ms. ESHOO. Are there limits to what they do or are there—I mean, is it you just enter a safe harbor and then do whatever you want?

Mr. SHOCKEY. No, that I think can be worked out—

Ms. ESHOO. There are financial institutions but then there are some that abuse. They never stop calling to market their goods. Is that considered safe harbor in your view?

Mr. SHOCKEY. No, but safe harbor I would say there is a difference between marketing and also financial protection, which is I get occasionally both telephone calls as well as text messages when I make a purchase, say, for instance, over \$500. I need that. I want that. And within reason I am willing to accept a certain amount of marketing materials one way or the other. It is a fine line. It is discretionary.

However, I think that the problem we have seen in the act, in TCPA, is it has been unreasonable. And especially for smaller firms. It is one thing for AT&T or Bank of America or Dominion Resources to be able to protect themselves. It is another for a relatively small firm or manufacturing firm or a small electric co-operative to defend themselves against these kinds of class-action suits.

My belief is we have to look at this as a larger machine. There is TCPA, there was the Truth in Caller ID Act. I believe the telecommunications firms are committed to injecting cryptographically secure material into the networks itself that begins to reduce the problem of spoofing and robocalls at its source.

Mr. WALDEN. We need to—

Ms. ESHOO. Yes. I am waiting for him to finish. Mr. Chairman, can I just ask unanimous consent to place Electronic Privacy Information Center's letter—

Mr. WALDEN. Sure. Oh, absolutely.

Ms. ESHOO [continuing]. In the record? Thank you.

Mr. WALDEN. Yes, without objection.

[The information appears at the conclusion of the hearing.]

Mr. WALDEN. And I thank you for your answer.

I will now go to the gentleman from New York, Mr. Collins, for questions.

Mr. COLLINS. Thank you, Mr. Chairman.

I think we are here today really talking about unintended consequences. And there is no perfect solution. There can never be a perfect solution. And certainly I appreciated Mr. Shockey's comments about safe harbor, common sense, and really small businesses—I am a small business guy—who really live in fear of some of these class-action lawsuits and in some cases might be withholding the information that somebody—like Mr. Waller saying, if somebody is going to—for every purchase over \$500 I would like to know it just in case, things of that sort.

But my question, Ms. Turano, is in your business—in fact, health care today, patients come in, they are treated, they may have a high deductible plan. They may not even realize that. After they have come, they have gone, they are treated, I would have to expect sometimes left with people owing substantial money. And you are in business and have to stay in business based on cash flow and collecting money. And you are not a telemarketer, but I have to expect you worry about and are frustrated by making a follow-up call to someone who, you know, through ObamaCare or some other reason is stuck in a high deductible plan. They could owe you thousands of dollars.

You need that money to stay in business and provide your service, and yet, under the TCPA what are you? Are you a collection firm, which you are not, or are you just trying to protect the financial interests for all your other patients, and unfortunately, having to call folks to say you owe us some money, based on your insurance plan and high deductible, others, could you just maybe comment on some of those unintended consequences relative to you providing health care, something we all know we need?

Ms. TURANO. Sure. Thank you. And actually, the law provides that we do not make these types of phone calls to cell phones about payment. We make automated phone calls with consent for health-related purposes. So we are not behaving like a collections agency. In fact, we are only making calls, sharing health care information with the members.

Mr. COLLINS. So what can you or can't you do relative to try to collect money that is owed to you by a patient that has come in, been treated, and now they owe you money?

Ms. TURANO. Well, I would assume use traditional other methods, whether that be sending them a bill in the U.S. mail or we certainly have the ability to, if there were a landline available, we could use that. But using an auto-dialer to a cell phone or using an auto-dialer to text a cell phone is not something that we would do to attempt to collect—

Mr. COLLINS. Which, again, as the chairman noted in his opening comments, as many as half of Americans now don't even have a landline.

Ms. TURANO. Correct.

Mr. COLLINS. Well, thank you very much. Again, it is the unintended consequences—I think really we all want the same thing. No one wants the annoying calls, trying to sell something but, where does the fine line come? And with the fear of litigation, at what point do good phone calls stop or reasonable phone calls?

Mr. SHOCKEY. Congressman, I think what a lot of people are struggling with here are what are genuinely legitimate calls from people who have a prior business relationship. And what some of us are worried about, which is the really fraudulent calls that are attacking vulnerable populations, the aged one way or the other, those of us such as myself and the engineering community, we would like to crush the fraudulent calls immediately. Hang them, please.

But these issues that you are bringing up, Congressman, there are fine lines here, and I certainly understand the frustration of small business owners that they are getting entrapped with a lot of ambulance-chasers—let's put it bluntly—who are using TCPA to extract—it is fraudulent in its own sense to a certain extent.

I am just a poor, dumb engineer here. It is very hard for me to distinguish issues involving policy versus issues involving engineering, but I certainly understand your concern.

Mr. COLLINS. And I think this hearing is really an informational hearing to bring some of these issues forward. We are not going to solve the issues today, but your testimony is certainly much appreciated. And, Mr. Chairman, I think it is a very timely committee, and my time has run out so I yield back.

Mr. WALDEN. The gentleman yields back.

Ms. Turano, just before I go to Mr. Pallone, when you talk about sharing health care information, is that the results of a blood test? Is that what you are talking about?

Ms. TURANO. Those are the types of calls I am talking about, yes. It could be a reminder to fill a prescription, to pick up your prescription. It could be a reminder to receive or to seek out preventative tests or screenings. It is those types of calls that I am—

Mr. WALDEN. OK.

Ms. TURANO [continuing]. Talking about.

Mr. WALDEN. All right. Thank you.

Mr. Pallone.

Mr. PALLONE. Thank you. I wanted to ask Mr. Shockey, in your written testimony you note that Congress can be helpful in ensuring that consumers benefit from the various technological solutions that can help reduce robocalls. Can you just tell me more specifically what technological steps you think Congress could take to better protect consumers and stop the robocalls?

Mr. SHOCKEY. Thank you, Congressman, for your excellent question there. The technological solutions that we are proposing, the engineering community, basically looks upon the fraudulent robocall problem as essentially a form of cybersecurity attack. Therefore, we need to go into the core of the voice communications network and use modern cryptographic methodology such as public infrastructure to basically sign the caller ID, sign the CNAME data, potentially make more information about the call party available to the consumer.

One of the things that we are working very diligently on on a technology side is in those cases where there is a clear prior business relationship allowing for more information to be displayed to the consumer. We are looking at some things like a green check box which is this call has been validated, a big red check box, no, this is not really the IRS involved, some kinds of other form of visual indicators that the call, at least from the network's perspective, has been authenticated from the called party, and we can do better things like track and trace one way or the other.

Those are the technological solutions that we have. As for whether or not Congress needs to further enhance the existing portions of title 47, I am not sure at this particular point. The relevant sections of the act that I know of, which are 251(e)(1), which is plenary authority over the numbering plan. The Commission already has that. They use that for numbering plan administration, local number portability.

I believe, at least in my own—I am not a lawyer and I don't play one on TV so I can't answer that question, but I think they actually have sufficient authority to act if other aspects of the statutes are clear as to what the true intent of Congress is.

Mr. PALLONE. OK. Rather than fraudulent calls, I wanted to talk about telemarketers that we never want or we never asked for. And, Professor Waller, you note in your written testimony that Congress should require that telemarketers receive express consent from consumers before they call their cell phones. Can you explain why you think strong consent is so important for consumers?

Mr. WALLER. Yes. Thank you. I think that the requirement of consent has been a core provision of the TCPA from the very beginning, and I would urge that it be strengthened if anything.

The situation that Chairman Walden referred to with respect to text messaging, making temporary job opportunities available is a perfect illustration of how valuable it is when the consumer has consented and how it is simply unwelcome—perhaps not harassing but simply unwelcome and invasive in their lives if they have not consented.

And some of the examples and many of the horror stories that are presented are really about consent, and services are valuable if the consumer has consented and services are unwelcome and telemarketing is unwelcome when they haven't, and that is a critical component of the act.

Now, some of the other horror stories that have been presented are not about consent but about reassigned numbers and reaching out to people who perhaps they intended to get someone who had given consent but they didn't reach someone, and in that case, the person they reached has not consented. There are still cost consequences to the 75 million consumers who have some form of prepaid cell phones. These calls are unwelcome. And it is the caller or the people they use who are the best cost-avoiders in that circumstance using currently available databases and some of the things that are in development that Mr. Shockey has talked about.

Mr. PALLONE. Let me just ask quickly. The FCC has been issuing more rulings on the TCPA recently. Do you think this recent uptick in FCC action has been beneficial for consumers?

Mr. WALLER. I think it has. I think the 2015 omnibus ruling has been helpful by focusing on certain definitions, in particular, this reassigned number issue, the question of vicarious liability and the definition of auto-dialers that Chairman Walden was asking about. I think rulemaking by its very nature is a lengthy process and I commend the FCC for doing the best job it can, but it is really hit with a flood of petitions over and over again by the firms or industry seeking special treatment.

Mr. PALLONE. Thank you. Thank you, Mr. Chairman.

Mr. WALDEN. OK. The gentleman's time is expired.

I now go to the vice chair of the subcommittee, Mr. Latta.

Mr. LATTA. Well, thank you, Mr. Chairman, and thanks to our panel for being here this morning, appreciate it.

Ms. Turano, if I could start with you, in your testimony you stated that health care-related texts and calls lead to more engaged patients, better patient outcomes, and lower health care costs for consumers. It seems obviously that public health and safety notifications, along with individual health reminders, are helpful and important. Under current law, am I right to believe that these types of notifications are underutilized due to liability risks?

Ms. TURANO. Yes, sir, I believe that is accurate.

Mr. LATTA. Let me follow up then. How can we better update then the TCPA to ensure that actors with good intentions are able to reach the consumers and patients to better serve them?

Ms. TURANO. Sir, currently, there is an exemption within the TCPA that is extended to health care providers to make these types of phone calls that I have been referring to. Unfortunately, that is a vague term. Within the HIPAA statute, however, there is language that could be imported that is far more clear and has a much more specific definition, and that is a term called HIPAA-covered entity. If that language were to be imported within the TCPA, that would make things much more clear for companies like WellCare, and that would allow us to make these types of phone calls.

Mr. LATTA. Well, I was going to follow up on that. And let me ask you this because under HIPAA is it more clear for landlines than it is for cell phones?

Ms. TURANO. Is it more clear within HIPAA for landlines—

Mr. LATTA. Right, is that—

Ms. TURANO [continuing]. Or cell phones? HIPAA covers all health care communications. It does not make a distinction between cell phones and landlines from my understanding.

Mr. LATTA. OK. But is there any type of confusion out there today for folks out there then—

Ms. TURANO. Operate—

Mr. LATTA [continuing]. If you are looking on the cell phone side?

Ms. TURANO. No.

Mr. LATTA. There isn't? So there is not a problem then for people that—especially for you all to go to contact folks on that and then—

Ms. TURANO. Well, if we were operating under HIPAA guidelines, those are very clear, and it is very prescriptive about what we can say, whom we can contact, how, and why. If those types of guidelines were transferred over to be consistent with the TCPA, it

would be much more straightforward with us. There would be no gray area in terms of who we can contact, whether it is a landline or a cell phone.

Mr. LATTA. OK. Thank you.

Ms. TURANO. Thanks.

Mr. LATTA. Mr. Waller, I am wondering, how many of the complaints—and maybe if you might know this, how many of the complaints that the FCC and FTC receive are from the same numbers, any idea? Do we have any kind of knowledge out there as to who the bad actors are out there that are making a lot of these calls that people receive? Is there a way to find that out?

Mr. WALLER. It is my understanding that the way the FCC tracks complaints on this issue that they accumulate complaints with respect to specific numbers and senders when they can identify them. So I believe the FCC can provide that information. I am not clear on how the FTC tracks robocall complaints, but I am aware that they receive between 200,000 and 300,000 per month.

Mr. LATTA. All right. Thank you.

Mr. SHOCKEY. Congressman, can I address some of that because—

Mr. LATTA. Yes. Yes.

Mr. SHOCKEY [continuing]. It is slightly tactical?

Mr. LATTA. Yes.

Mr. SHOCKEY. It is correct that the way that the FCC and the FTC track this is via the number, but the number is inaccurate because it has been spoofed—

Mr. LATTA. Right.

Mr. SHOCKEY [continuing]. In most of the cases.

Mr. LATTA. And as the chairman mentioned in his opening statement that we just passed out of full committee—

Mr. SHOCKEY. Correct.

Mr. LATTA [continuing]. The bill especially on the spoofing end, correct, yes.

Mr. SHOCKEY. And they are coming in through intermediary providers and the current legislation, which was passed yesterday, that requires intermediary transit providers to identify themselves with the FCC makes a great deal of sense.

What we do know anecdotally, by the way, is that the number of actors creating particularly the fraudulent robocalls is in fact relatively small. They are quite sophisticated and I might add I have done consulting work for the CRTC in Ottawa and Ofcom in the United Kingdom, and on a per capita basis the problem in Canada and in the United Kingdom is in fact worse. And the technical solutions that we are looking at deploying may actually have international implications as well and offer United States leadership to our friends, allies, and partners, on this area as well.

One of the things that I know law enforcement is concerned about is this track-and-trace issue and the call validation technology that we want to interject into the network should be able to provide law enforcement with considerably better tools than what they have now.

Mr. LATTA. Yes. Thank you very much, Mr. Chairman. My time is expired and I yield back.

Mr. WALDEN. I thank the gentleman. And we have a list for the committee at some point here of the conflicts in statute that require people to make calls that then put them in conflict with TCPA. We do have that, too, as part of our discussion.

Mr. Doyle.

Mr. DOYLE. Thank you, Mr. Chairman.

Mr. Waller, I want to follow up on Mr. Pallone's questions about expressed consent. I want to ask you if you think we need to reexamine the rules about prior express consent through an intermediary because it seems to me recent court cases seem to affirm the notion that debt collectors can harass consumers even when they have not explicitly been given consent to do so.

So I am concerned that this practice of consent through a third party sometimes leads to loopholes where consumers are harassed by debt collectors or advertisers in situations that they haven't expressly consented to. What problems do you see in this practice and how would we deal with that?

Mr. WALLER. I share your concern. Consent should mean express consent expressed in a reasonable fashion that is part of the TCPA. There is growing amount of case law, plus the notion of reasonableness as an accepted standard throughout consumer protection law, most of American law. Third-party consent I think should be extremely limited or simply abolished whenever humanly possible.

The area that you talked about particularly with debt collection is one of the top areas of consumer complaints. I think it is unfortunate that there was a carve-out for debt collection from the Federal Government or its contractor recently in the Budget Reconciliation Act.

So I think the number of people who are now exposed to those calls are certainly greater. It is 60-some million people depending on which debt programs you are talking about. So I would like to see a return to the definitions that were used when consumers directly consented, whether it is in writing or some other fashion that can be legitimately recorded by the sender so they get the information they want and simply not be deemed to consent by the actions of a third party.

Mr. DOYLE. Thank you. Let me ask you, historically, phone carriers have had an obligation to connect all phone calls, but recently, when the FCC loosens this restriction in order to promote the development and deployment of robocall-blocking technologies, I want to ask you, do you think the common carrier exemption should be reexamined as there will be an onus on carriers to connect the right calls? What safeguards are necessary to ensure that carriers aren't overzealous in their call-blocking?

Mr. WALLER. I think in some ways Mr. Shockey may be better able to answer that than I do, but I do think it is a combination of legal and technological solutions, so the gold standard would be a single rule that applies across all technology platforms, whether it is landlines, whatever is left of fax machines, cell phones, and whatever is yet to come—and e-mail obviously—where a consumer can opt out and be done with it where we would be, in my view, aiming for a universal do-not-contact register, not just do not call, and that obviously involves a sensible drafting of interaction of legal and technological requirements.

Mr. DOYLE. Mr. Shockey, do you want to answer?

Mr. SHOCKEY. I agree with Mr. Waller completely, Congressman. I have serious problems with blacklists. We have problems with blacklists in the past in this country in one way or the other. The problem in getting on a blacklist is how do you get off of it, and I have personally run into this problem myself trying to send email to this committee because my domain, Shockey.us, was thrown into your junk mail pile and how do I get off.

Ms. ESHOO. And look it, you got here.

Mr. SHOCKEY. I got here, yes. I had to use my Gmail account. But these are the kinds of things that concern me about blacklisting, which is why those of us in the engineering community have tried to look at this from a much more holistic point in the core of the network, namely, that the originating call is cryptographically signed by the call originating network, it is authenticated and verified by the terminating network, and that the call detail records and the call routing records reflect that so that we have got appropriate track-and-trace mechanism here.

And recourse in the event that you are thrown into a black hole has to be somehow constructed either possibly through regulation, hopefully by best current practices among the service providers one way or the other. If we march down this road, we are very, very concerned about that and we know where the problem is.

Mr. DOYLE. Thank you. Mr. Chairman, thank you.

Mr. WALDEN. Thank you, Mr. Doyle.

We will now turn to Mr. Long from Missouri.

Mr. LONG. Thank you, Mr. Chairman.

And, Mr. Shockey, I hear from constituents about robocalls, as everyone else does, and we all find them extremely annoying, I believe. Finding a solution, of course, is very important so my question is this: This issue seems to involve all segments of telecom, including the carriers, equipment-makers, standard-setting bodies, cable, voiceover-Internet protocol providers, basically everyone.

Mr. SHOCKEY. Yes.

Mr. LONG. You are nodding your head. So is it important to have these groups involved in finding a solution to stopping these unwanted calls? Is it important to have all these different folks at the table and involved?

Mr. SHOCKEY. Well, thank you, Congressman. The answer to your question is absolutely. And in fact I personally have been involved in this for the last 4 years with our nation's service providers. I have been involved in the tactical standards work directly involving all of this. Of course it is difficult to get all of these people to consensus. We are much like any other group of professionals in one way or the other. It is hard to get agreement, which is why it has taken so long.

But I believe we have a general outline of a plan, and that is where we hope—and I believe the Robocall Strike Force, when it reports on October the 17th, can at least outline a plan. And this committee and the FCC can move forward with all deliberate speed in implementing those recommendations.

Mr. LONG. OK. Thank you. But my point is that everyone needs to be involved in this process.

Mr. SHOCKEY. And everyone is, sir.

Mr. LONG. Yes, OK.

Mr. SHOCKEY. I guarantee you that.

Mr. LONG. Ms. Turano, the types of calls that WellCare is making to its clients, you have mentioned it a few times but can you kind of just give an encapsulated what your company does, what these calls are?

Ms. TURANO. Certainly. Thank you.

Mr. LONG. Can you pull that a little closer to you? It has got a long cord on here. Pull her up. There you go.

Ms. TURANO. Is that better?

Mr. LONG. You bet.

Ms. TURANO. OK. Thank you. The types of phone calls that we are referring to really are about health care reminders—

Mr. LONG. And that is something somebody would want to hear about?

Ms. TURANO. One would think so, yes.

Mr. LONG. OK.

Ms. TURANO. Our members tend to be vulnerable older Americans, disabled Americans, or folks that have less access to resources, less access to an infrastructure, a support core if you will. And so we feel it is important to be able to make these calls to them. They increasingly rely on cell phones. We want to be able to help them with their health care, and this is an efficient and effective way of doing that.

Mr. LONG. OK. Well, I think I agree and most reasonable people would agree that those are the type of calls that folks are anxious to have, glad to have prescription reminders, whatever they may be. But has the FCC's order impacted WellCare's calling practices, and if so, how?

Ms. TURANO. Yes, absolutely. Currently, we do not make auto-dialer calls or texts to cell phones. That is a practice that there—

Mr. LONG. You mean you can still talk on a cell phone? You can still call?

Ms. TURANO. We could call you on your cell phone—

Mr. LONG. Really? I didn't even know you could talk on these anymore. I tell everyone to text me, and you are not allowed to text.

Ms. TURANO. I would be happy to text you a reminder to go pick up—

Mr. LONG. You could even call me.

Ms. TURANO [continuing]. Your prescriptions but—

Mr. LONG.. I haven't talked on a phone in so long—

Ms. TURANO [continuing]. I am currently not allowed to do that.

Mr. LONG. All right. Especially being from Mizzou, you know.

Ms. TURANO. Yes, sir.

Mr. LONG. Get that in there. So these patients will potentially not be able to get the information that they need for their health care, correct?

Ms. TURANO. If they are relying on a cell phone, I am—

Mr. LONG. Which everyone does.

Ms. TURANO [continuing]. Extremely hampered from being able to contact them.

Mr. LONG. OK. I have another question here for you. In your testimony you highlight the importance of using cell phones to reach

all these—and you just now mentioned how important it is. Why not just communicate with mail or landlines?

Ms. TURANO. Well, sir—

Mr. LONG. Do you know what a landline is?

Ms. TURANO. I do, thank you. In fact, I think I might still have one. Because when you are talking about the members that we typically have, I think I mentioned that in many cases they have unstable housing, and therefore, they might not have a consistent home address so U.S. mail is not going to be an effective way to reach them.

Relatedly, they might not have a consistent landline if they are not in stable housing, so therefore, those two methods can't be guaranteed to be an effective way of reaching them.

Mr. LONG. OK. Thank you. As they say, the commonsense problem is it is not common, and I think that some of these things we are looking at, a little common sense would help with the FCC.

Ms. TURANO. Thank you.

Mr. LONG. So, Mr. Chairman, I yield back.

Mr. WALDEN. The gentleman yields back.

The chair recognizes the gentleman from California, Mr. McNerney.

Mr. MCNERNEY. Wow, what a great hearing, Mr. Chairman. Thank you. And I thank—

Mr. WALDEN. You got it.

Mr. MCNERNEY [continuing]. The panelists.

Mr. SHOCKEY, I was really thrilled to hear that public-key cryptography is used to authenticate caller ID.

Mr. SHOCKEY. It will be.

Mr. MCNERNEY. Oh, it will be? OK. That was my next question. How widely adopted is that technology? Or when is it going to be adopted in a wide fashion?

Mr. SHOCKEY. As Congressman Long pointed out, there are a lot of people here involved, obviously: Our nation's carriers, the equipment suppliers, the Congress potentially, but certainly the Federal Communications Commission. We have what we believe is the outline of a plan and how long that plan will take to implement I would choose not to speculate about.

Mr. MCNERNEY. OK.

Mr. SHOCKEY. However, it is reasonable—public-key cryptography is used all over our economy. The electric meter on the side of your house uses PKI, your credit card uses PKI, obviously the Web browsers when you buy something from Amazon use PKI. This is proven, well-understood technology.

We have the standards now pretty much ready to go. All they need is testing. They need to be put into the actual kit that our nation's carriers have. We are very concerned that we don't break what we already have. We need to maintain the security, the reliability, and the interoperability of at least what we have today when we inject this new technology in there, but we can do this.

Mr. MCNERNEY. Well, thank you. I understand that another potential solution to unwanted and fraudulent calls is malicious call tracing. Can you describe that a little bit?

Mr. SHOCKEY. Well, malicious call tracing is in fact partially solved by this call validation technology using PKI because the

basic concept—and I will just try and walk you through it. Basically, when you place a phone call from any access network—that would be cable or mobile or traditional landline or enterprise from within this building, the service provider would actually sign the underlying call signaling that says, yes, I am, well, AT&T and I want this other carrier to terminate the call.

So it signs what is known as the SIP invite. It sends it along its merry way, and somewhere along the line level 3 gets the call. It uses PKI to verify that AT&T was sending this call and then terminates the call in the normal manner. So we actually now have an origination and a termination, cryptographically sound methodology for track and trace.

Now, beyond that, we could actually display to the consumer validated, good to go. We could also display to the consumer such as on your mobile device, on your enterprise phone here in the Congress or on your television set if you are using advanced network, you know, more information about whether or not this call has been trusted or if it is valid or not. So empowering the consumer is one of the key advantages of trying to deploy this technology and give enforcement in law enforcement that are track-and-trace.

Mr. MCNERNEY. So the trace back is another form of this technology is that—

Mr. SHOCKEY. Yes.

Mr. MCNERNEY [continuing]. Right?

Mr. SHOCKEY. Yes.

Mr. MCNERNEY. And then I guess the last thing is the do-not-originate. And again, they sound like they are all sort of based on the same technology, those three methods.

Mr. SHOCKEY. Do-not-originate is a little bit different.

Mr. MCNERNEY. Is it?

Mr. SHOCKEY. That is going to require, I think, a little bit of study. I know the public safety folks are extremely concerned about do-not-originate because of the various phishing attacks on public safety institutions one way or the other. It is certainly worth investigation, and people are actively talking about it. And I certainly want to wait and see what the final report of the strike force is before making a determination, but it is technologically feasible. Let's put it that way.

Mr. MCNERNEY. What is the most effective thing we can do here then is to—

Mr. SHOCKEY. Clarity. Again, as has been discussed by better policy experts than I am, having clarity in the legislation. I think you also have to look at the Truth in Caller ID Act. You also have to look at some other aspects of current legislation. Truth in Caller ID Act is bound to the problem with TCPA. If we can't secure the identity of the calls themselves, we can't fix the problem.

Mr. MCNERNEY. Mr. Chairman, I need another 5 minute but I will yield back anyway.

Mr. WALDEN. Thank you. We will have more time later on probably to talk about this issue.

But we will now, let's see, go to the gentleman from Florida, Mr. Bilirakis.

Mr. BILIRAKIS. Thank you, Mr. Chairman. I thank the Ranking Member Eshoo as well for holding this very important hearing.

Modernizing the 1991 TCPA statute has long been a goal of mine, and I am glad the subcommittee is holding this informational hearing today. I appreciate it so much.

Ms. TURANO—and I apologize if these questions were already asked. I understand that WellCare filed a petition with the FCC seeking clarity on the TCPA provisions. Can you briefly outline the basis for WellCare’s petition, please?

Ms. TURANO. Certainly. Thank you. WellCare and others filed a petition asking for clarity around some of the language within the 2015 declaratory order. That order uses the term health care provider, which is basically undefined. And there is quite a bit of vagueness around what entities fall within that definition.

What we have asked for instead is a reconciliation between the language in the TCPA and the language in HIPAA, which is our governing statute for health care communications from Health and Human Services. If FCC were to import the language and use the term “HIPAA-covered entity,” that would clear up a lot of confusion around who falls within that definition, what rules govern that communication, and that would go a long way towards clarifying the guidance.

Mr. BILIRAKIS. OK. In your opinion, how long are petitions pending with the FCC before receiving a response?

Ms. TURANO. Well, we filed our petition—WellCare and others filed our petition July 28 of this year. My understanding of FCC’s process is that there is a comment period for 30 days. Then, there are additional comment periods that stack up on top of that. However, my understanding is that there is no deadline or time frame within which the FCC has to respond. Therefore, we wait.

Mr. BILIRAKIS. Wow. How would the failure—

Ms. ESHOO. We can help you with that.

Mr. BILIRAKIS. Excuse me.

Mr. WALDEN. We have a bill to fix that.

Ms. TURANO. Thanks.

Mr. BILIRAKIS. Let’s fix it. How would the failure to receive a timely answer hurt your patients? That is the bottom line.

Ms. TURANO. Certainly. As we wait, the way our consumers are being impacted is that we are hindered from being able to use an efficient and effective means of communication with them. So that means for those of our members who rely on cell phones, we are not making calls or we are not using the auto-dialer technology to make calls to remind parents about getting their children vaccinated. We are not using the most efficient technology to remind members to get preventative health screenings.

And in what I think is a very significant example, if we were to have a member—and we frequently do have a member—being discharged from the hospital, as I have said a couple of times already, if we have a member who doesn’t have a strong support system around them, which is frequently the case, we feel like we take on some responsibility for assisting them in the care provided after their discharge. So we would want to be able to contact them using this technology via cell phone to remind them to get their medications, to remind them to take them as the doctor prescribed them, to remind them about proper wound care and follow-up care.

If we are able to do all that, it is only going to help their outcome versus if they are without those types of reminders. You are looking at a potential for infection, you are looking for a potential for a hospital readmission, which is a problem for the whole system, which is something we are hoping to avoid.

So as we wait, we are severely hampered in our ability to be able to do that in the most efficient and effective way possible.

Mr. BILIRAKIS. Thank you. To the panel—and you know I submitted questions to FCC Commissioner O’Rielly asking if he supports expediting petitions to provide clarity on obligations under the TCPA pending any congressional action. The commissioner expresses support for such efforts. Is this something that members of the panel can support since we don’t know how long it will take for Congress to act? But we will act. And I wanted to ask the panel. We will start with Ms. Turano, please.

Ms. TURANO. Yes, sir. That is certainly something we would support.

Mr. BILIRAKIS. Please, sir.

Mr. MOCK. I think I can say absolutely we would support more timely response from the FCC. In our particular case there were facts within the lawsuit we were faced with that, had definitions been more clearly defined, the situation might have turned out very different, so absolutely.

Mr. WALLER. Congressman, we are on record in supporting expedited review, but sometimes you don’t always get the answer you want.

Mr. BILIRAKIS. Thank you.

Mr. SHOCKEY. The answer is yes, that would be perfect.

Mr. BILIRAKIS. Very good. Thank you very much. I yield back, Mr. Chairman.

Mr. WALDEN. The gentleman yields back.

The chair recognizes the gentlelady from Tennessee, the vice chair of the full committee, for 5 minutes.

Mrs. BLACKBURN. Well, thank you, sir. And I am so pleased that we have the hearing today, that it is on the agenda. And sorry that I was late. We have had other hearings that we are dealing with this morning, and since our main room is under construction, we have to go to the Capitol and use a room there.

Mr. Mock, I want to come to you. When we were preparing for this hearing and talking with some folks that are in the health care space and all, I was struck by how trial lawyers have seemed to use this as a piggy bank with the lawsuits. And looking at from 2010 to 2015 there was a 940 percent increase in the lawsuits under the TCPA. And the average payout for an attorney filing one of those suits was \$2.4 million. I mean, this is just unbelievable. That tells us something is terribly wrong with this process.

So the Snapping Shoals experience, and you had said in your testimony although the case has since been resolved, Snapping Shoals made substantial negative changes to our member notification offerings as a result of the complaint. So I want you to elaborate just a little bit if you will for the record on your experience of being sued and how that movement, you know, how you followed through to that movement. I know you articulated the changes that you

made, but talk a little bit about that experience. Just one minute will suffice.

Mr. MOCK. Well, thank you very much for the question.

In our example, we really felt like these were communications that were requested by our member. At any time those notifications could be discontinued, numbers could be changed, and certainly as we have looked to the future, our goal is to provide more flexible notifications.

I should say that over the last few years it has been a more-common-than-I-would-like practice to maybe see a 1-800 ad late at night for any unwanted communications. In our experience I really felt like it would have been a very reasonable thing for someone to have received 500 phone calls to complain at least once. And so I think that is where the good-faith provisions and safe harbor provisions—

Mrs. BLACKBURN. Got it.

Mr. MOCK [continuing]. For small businesses—

Mrs. BLACKBURN. Yes.

Mr. MOCK [continuing]. Like Snapping Shoals would be very important.

Mrs. BLACKBURN. OK. Got that.

Mr. SHOCKEY, just a little bit on reassignment and the difficulty of these reassigned numbers and tracking that. Listening to all of this today makes you wonder why there isn't a way to track reassignment more carefully or more easily so that companies can determine when there has been reassignment of a number. Do you have anything to add to that?

Mr. SHOCKEY. Well, actually, there is one thing I would like to add. The problem of reassigned numbers is real. We do have numbering databases that are currently deployed. Obviously, the number portability database is one of them. These have been altered from time to time. They could be repurposed to be able to add some sort of a field in the databases on when they would have been modified in some way, shape, or form. I don't think we necessarily need a new database.

The other thing is one of the issues that is actually personal to me and I think is also relevant is I also am a big believer in national number portability, which is why can't we just have one telephone number and keep it, basically whenever you move? Twelve percent of the entire United States population moves very single solitary year, and that is actually creating the churn in the system because even if you go from the west side of New York to the east side of New York, you actually have to change your phone number because you have actually moved out of a boundary. And that is actually pretty ridiculous for the consumer if you sort of ask me.

So we in the North American Numbering Council have actually recommended to the Commission that they consider a notice of proposed rulemaking on national number portability, which could reduce the churn that we see in the numbering plan quite a bit and increase the size of the North American Numbering Plan by 20 percent virtually overnight so that we don't have the kinds of problems in 408 area code for constantly splitting and splitting and splitting one way or the other.

So it needs a little bit of study. I don't necessarily want to recommend that in advance of where the strike force could be reporting on that in the middle of October, but it certainly needs active consideration.

Mrs. BLACKBURN. OK. I appreciate that. And as we wrap up, I would like for each of you to send me the three things you think we need to make certain we change as we look at the updates on the TCPA. I would just love to see that in writing.

And with that, I yield back. Thank you.

Mr. LATTA [presiding]. Thank you very much. The gentlelady yields back.

And seeing no other members to ask questions, I have a letter from the American Health Insurance Plans, their comments that they submitted before the FCC and also the Credit Union National Association. And I ask unanimous consent that these letters be inserted in the record.

[The information appears at the conclusion of the hearing.]

Mr. LATTA. And on behalf of the gentleman from Oregon, the subcommittee chair; the gentlelady from California, the ranking member; and myself, we thank you all for participating in this panel today. It has been very informative and we appreciate it.

And if there is nothing else to come before the subcommittee, we stand adjourned.

[Whereupon, at 12:38 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

PREPARED STATEMENT OF HON. FRED UPTON

Today's hearing will focus on a topic that unfortunately most of us have dealt with on a personal level: pesky robocalls. Many constituents have contacted my office in search of a solution to stop the unwanted calls, and I am sure the same is true for my colleagues. Unfortunately, there just doesn't seem to be a current solution that is entirely up to the task. Registering your number on the Do-Not-Call List simply isn't enough these days, and it is time we begin a thoughtful dialogue on providing our consumers with relief.

I'd like to thank Ranking Members Pallone, Eshoo, and Schakowsky for their letter requesting a hearing on this issue of modernizing the Telephone Consumer Protection Act and for adding their voices to the growing chorus for this outdated law to be updated to meet the challenges of the 21st century. The FCC, experts in industry and the business community, and folks back home are all in agreement that it is time to bring this outdated law into the 21st century. Our consumers no longer feel protected under the law; and with seemingly relentless attempts at fraud occurring over the phone, who can blame them?

The TCPA is failing on two fronts. First, the number of bad actors who are intentionally disregarding the TCPA is growing, and until the act is modernized, consumers will be under siege by unwanted pre-recorded messages and solicitations. Second, recent reform attempts have instead captured unintended good actors in the crosshairs, who as a result, face litigation for non-compliance with the TCPA despite their good faith.

While we are all probably familiar with the frustration that robocalls are causing us on the receiving end of the call, what some of us might be less familiar with are the challenges faced by legitimate businesses who have been inadvertently caught in the crosshairs of the TCPA. As bad actors increasingly flaunt the TCPA to gain access to millions of consumers' phone lines, it is important that we recognize that there is a legitimate use of auto-dialing technology that doesn't fall under the same malicious category.

Unlike the well-known "Rachel from Card Services" scam, you can put a face on the folks operating in good faith—they look like your kid's school, or maybe your doctor's office, or even your local credit union. Businesses using auto-dialers often have good intent when contacting their customers, and moreover, their subscribers have come to expect and rely on these types of calls.

An update to the TCPA will do more to prevent unwanted calls and provide clear rules of the road for our legitimate businesses who are operating in good faith. We ought to have a holistic approach towards finding a solution that our constituents can rely on to protect them from unwanted calls, and that legitimate businesses can navigate without hiring an army of attorneys to ensure they are within the letter of the law just to be in touch with their customers. As you will hear, this is no easy task, but today's discussion will be an important first step towards crafting a modern law that protects consumers.



STATE OF INDIANA

OFFICE OF THE ATTORNEY GENERALINDIANA GOVERNMENT CENTER SOUTH, FIFTH FLOOR
302 WEST WASHINGTON STREET • INDIANAPOLIS, IN 46204-2770
www.AttorneyGeneral.IN.govTELEPHONE: 317.232.6201
FAX: 317.232.7979**GREG ZOELLER**
INDIANA ATTORNEY GENERAL

Hon. Greg Walden
Chairman
Communications and Technology Subcommittee of the
House Energy and Commerce Committee

Re: September 22, 2016 Hearing on
Modernizing the Telephone Consumer Protection Act

Dear Chairman Walden and members of the Subcommittee:

Preventing unwanted and harassing calls to peoples' phones has been a priority for attorneys general across the country, and particularly for me. I have spent my tenure as Attorney General working to strengthen Indiana's Do Not Call laws and prosecute violators. Unwanted calls and robocalls are by far the most common complaint received by my office, with more than 14,000 complaints received last year – half of which were specifically about robocalls. My office receives new Do Not Call and robocall complaints at a rate of nearly 50 complaints per day. If this rate continues, the number of Do Not Call and robocall complaints could exceed 18,000 in 2016. The YouMail National Robocall Index estimates that more than 80 million scam or fraudulent calls are made to U.S. consumers and businesses each month, resulting in annual losses of \$8.6 billion.¹

Twenty-four of my fellow Attorneys General and I support S. 2235, the HANGUP Act (House version: H.R. 4682), which would eliminate a recently enacted TCPA exemption allowing federal debt collectors to robocall cell phones. The HANGUP Act is intended to stop the barrage of debt collection robocalls that harass and frustrate our citizens who pay for such calls to their cellular numbers.

Legitimate businesses should recognize that consumers are barraged with unwanted calls and scams every day, and they do not want to receive unsolicited calls and texts. There are many ways to ensure their customers do indeed want their calls. In Indiana, companies are expected to

¹ Source: <https://www.youmail.com/phone-lookup/robocall-index/2016/august>



STATE OF INDIANA

OFFICE OF THE ATTORNEY GENERAL

INDIANA GOVERNMENT CENTER SOUTH, FIFTH FLOOR

302 WEST WASHINGTON STREET • INDIANAPOLIS, IN 46204-2770

www.AttorneyGeneral.IN.gov

TELEPHONE: 317.232.6201

FAX: 317.232.7979

GREG ZOELLER
INDIANA ATTORNEY GENERAL

comply with the requirement that customers must opt in to receiving such calls and texts. This is a courtesy to their customers who have made it known up front that they do or do not wish to receive such calls.

Some sellers are urging you to create a safe harbor to protect them from the bad acts of telemarketers calling on their behalf or generating leads. This is because courts have imposed strict liability on the sellers in several cases. In Indiana, there is no "safe harbor" for those who hire telemarketers or buy leads to sell their products. Our legislature clearly stated that liability extends not only to those who make calls, but also to those who cause them to be made.

A process that reduces or eliminates calls and texts to people who do not want to receive them, while minimizing the potential for fines and statutory damages for businesses that make good faith efforts to comply, should be encouraged. However, sellers should never be permitted to enjoy the fruits of non-lawful calls while ignoring the bad acts of their agents and lead generators. That is why I am urging you not to water down the TCPA by approving any amendment that lets sellers off the hook.

Unwanted calls are a huge annoyance to our citizens. It's frustrating when the federal government weakens state efforts aimed at protecting and serving our citizens. I urge Congress to stop allowing loopholes that legitimize robocalls and open citizens up to a barrage of unwanted or misplaced calls.

Respectfully,

Gregory F. Zoeller
Indiana Attorney General



3138 10th Street North
Arlington, VA 22201-2149
P: 703.522.4770 | 800.336.4644
F: 703.524.1082
nafcu@nafcu.org

National Association of Federal Credit Unions | nafcu.org

September 21, 2016

<p>The Honorable Greg Walden Chairman Committee on Energy and Commerce Subcommittee on Communications and Technology United States House of Representatives Washington, D.C. 20515</p>	<p>The Honorable Anna Eshoo Ranking Member Committee on Energy and Commerce Subcommittee on Communications and Technology United States House of Representatives Washington, D.C. 20515</p>
--	---

Re: Credit Union Issues with the Telephone Consumer Protection Act

Dear Chairman Walden and Ranking Member Eshoo:

On behalf of the National Association of Federal Credit Unions (NAFCU), the only trade association focusing exclusively on federal issues affecting the nation's federally-insured credit unions, I write today regarding tomorrow's hearing on modernizing the *Telephone Consumer Protection Act* (TCPA).

In a world of ever evolving communication methods, the TCPA presents an antiquated approach to communications regulations. Although once intended to protect consumers from pestering telemarketers, the Act now prevents consumers from receiving the valuable information they need. After 25 years, it has become clear that it is time for Congress to enact legislation to update the TCPA. Specifically, the TCPA does not take in to account membership-based businesses or the compliance burden that regulations place on small businesses. The intent of the TCPA is to ensure that all egregious offenders are grouped together. However, such grouping has inadvertently included good actors as well. NAFCU applauds Chairman Walden and Ranking Member Eshoo for their efforts to present a more nuanced approach to updating the TCPA that takes in to account the needs of membership-based businesses.

NAFCU appreciates the FCC's initiatives to clarify and modernize its regulations. Nonetheless, NAFCU believes that the FCC has hindered consumers' ability to receive important notifications and timely updates about financial developments that have the potential to impact their existing accounts, on both mobile and residential phone lines. The time has come to rewrite the provisions of the TCPA to account for the modern era of telecommunication. Unfortunately, the FCC's updated TCPA Order does not go far enough and will make it more difficult for credit unions and other financial institutions to contact their members about potential identity theft or data breaches. NAFCU has urged the Commission to reconsider its action relative to credit unions and is pleased that the same concerns were also raised in the report language accompanying the FY '17 Financial Services and General Government Appropriations bill in the House.

As we mentioned in our letter, dated September 11, 2015, along with five other financial services organizations, the FCC's Order is detrimentally impacting consumers. NAFCU continues to engage the FCC with the concerns of our member credit unions and would like to share NAFCU's July 16, 2015, letter to the FCC as well as subsequent letters, dated August 31, 2015, and May 2, 2016, regarding the FCC's Order. Attached please find those letters.

NAFCU | Your Direct Connection to Advocacy, Education & Compliance

On behalf of our nation's credit unions and their nearly 105 million members, NAFCU would like to thank you for holding this important hearing. NAFCU looks forward to working with you to bring positive changes to the TCPA. If my staff or I can be of assistance to you, or if you have any questions regarding this issue, please feel free to contact me, or NAFCU's Associate Director of Legislative Affairs,

[REDACTED]

Sin [REDACTED]

Brad Thaler
Vice President of Legislative Affairs

cc: Members of the House Committee on Energy and Commerce, Subcommittee on Communications and Technology



National Association
of Federal Credit Unions
3138 10th Street North
Arlington, VA 22201-2149

NAFCU | Your Direct Connection to Education, Advocacy & Advancement

July 16, 2015

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street SW,
Washington, DC 20554

RE: Response to the Commission's Declaratory Ruling and Order on the Telephone
Consumer Protection Act

Dear Chairman Wheeler:

On behalf of the National Association of Federal Credit Unions (NAFCU), the only national trade association focusing exclusively on federal issues affecting the nation's federally insured credit unions, I am writing to you regarding the Federal Communications Commission's (FCC) July 10, 2015 Declaratory Ruling and Order (the Order) to clarify its interpretations of the Telephone Consumer Protection Act (TCPA). While NAFCU and our members appreciate the FCC's effort to clarify and modernize its regulations, the FCC must do more to ensure that consumers are able to receive important notifications and timely updates about financial developments that will impact their existing accounts, on both mobile and residential phone lines. Unfortunately, the FCC's Order will make it more difficult for credit unions and other financial institutions to contact their members about identity theft or data breaches.

NAFCU recognizes that the Commission adopted an exemption for "free end user calls" made by financial institutions, specifically for the purpose of: (1) calls intended to prevent fraudulent transactions or identity theft; (2) data security breach notifications; (3) measures consumers may take to prevent identity theft following a data breach; and (4) money transfer notifications. However, the Order creates technical questions that may be impossible for a credit union to resolve such as whether or not the member will be charged for such texts or calls by their plan provider, or if they will count against their plan limits. NAFCU believes that the FCC should provide more flexibility to the prescriptive requirements for financial institutions using this exemption, especially because this exemption meant to apply in exigent circumstances to protect consumers.

NAFCU is very concerned about the FCC's expansive treatment of the term "automatic telephone dialing system" (auto-dialers). The FCC's Order defines auto-dialers to include broadly any equipment even if it "lacks the 'present ability' to dial randomly or sequentially" but can be modified to provide those capabilities. This interpretation is very troublesome since it

Federal Communications Commission
July 16, 2015
Page 2 of 3

remains unclear what type of technology is actually covered. NAFCU and our members believe that the vague standard for what qualifies as an auto-dialer, and the vague definition of commercial purpose will ultimately stop credit unions from making important communications to their members about their financial accounts for fear of violating the regulation and possibly incurring substantial liability.

Furthermore, NAFCU has serious concerns about the Commission's antiquated regulations that create distinctions between mobile and residential phones. An increasing number of consumers do not have a traditional home phone lines. As cell phones replace landlines, credit union members expect to receive the same service from their credit union as they would if they had a residential telephone number listed. For mobile phone lines, the FCC requires prior express written consent for all automated calls regardless of the purpose of the call, while calls to a residential phone line can be made for informational purposes without prior consent. As the use of mobile and online technologies have largely replaced residential phone lines as the most pervasive mechanism of communication between financial institutions and their consumers, the FCC must ensure that its regulations do not have the unintended consequence of reducing consumers' access to vital information about their financial accounts. To prevent this, NAFCU believes that the FCC must remove the distinction between residential and mobile phone lines as it applies to making automated informational calls to consumers about their existing accounts.

Additionally, the Order creates an overly vague standard for revoking previous consent by stating that a consumer may revoke their prior express consent to receive autodialed and prerecorded calls through "any reasonable means." The order prohibits a financial institution from controlling how the consumer may revoke consent in a reasonable manner. The FCC Order thus creates a system where the question of whether a consumer's revocation is reasonable becomes a subjective issue, opening up financial institutions to insurmountable liability.

Finally, with regard to the portability of wireless numbers from one consumer to another, the Commission's Order does not provide enough flexibility to credit unions with regards to these situations. Instead, the Order places a strict burden on credit unions when a consumer's phone number is reassigned because after only one call to a reassigned number, callers are deemed to have "constructive knowledge" that the number was reassigned. However, this does not take into consideration whether the call actually resulted in any information that would indicate the number was reassigned. For example, not all consumers choose to personalize their voice mail messages, so one phone call may not yield any information relating to the reassignment. Credit unions could make one call to a reassigned number and still have no reason to believe that consent is no longer valid, yet incur substantial liability even when acting in good faith.

NAFCU looks forward to continuing a dialogue with you and your staff on modernizing the FCC's implementation of the TCPA to ensure that it continues to allow consumers to have unhindered access to important financial information. Should you have any questions or if you would like to discuss these issues further, please feel free to contact me by telephone at [REDACTED] or Kayitha Subramanian, NAFCU's Regulatory Affairs Counsel at [REDACTED] or [REDACTED].

Federal Communications Commission
July 16, 2015
Page 3 of 3

Sincerely,

A solid black rectangular redaction box covering the signature of Carrie R. Hunt.

Carrie R. Hunt
Senior Vice President of Government Affairs and General Counsel

cc: The Honorable Mignon Clyburn, FCC Commissioner
The Honorable Jessica Rosenworcel, FCC Commissioner
The Honorable Ajit Pai, FCC Commissioner
The Honorable Michael O'Rielly, FCC Commissioner



National Association
of Federal Credit Unions
3138 10th Street North
Arlington, VA 22201-2149

NAFCU | Your Direct Connection to Education, Advocacy & Advancement

August 31, 2015

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street SW,
Washington, DC 20554

RE: Letter in Support of the American Bankers Association Petition for
Reconsideration on the FCC's Rules and Regulations Implementing the
Telephone Consumer Protection Act

Dear Chairman Wheeler:

On behalf of the National Association of Federal Credit Unions (NAFCU), the only national trade association focusing exclusively on federal issues affecting the nation's federally insured credit unions, I am writing to you regarding the American Bankers Association (ABA) Petition filed on August 8, 2015 with the Federal Communications Commission's (FCC or the Commission). This Petition requests reconsideration of the July 18, 2015 Declaratory Ruling and Order (the Order), which sought to clarify its interpretations of the Telephone Consumer Protection Act (TCPA). NAFCU strongly supports the ABA's request for clarification on the FCC's exemption for "free end user calls" made by financial institutions. NAFCU and our members, like the ABA and other industry stakeholders, believe that the exemption as written will still not allow financial institutions to make time sensitive communications to their consumers about identity theft or data breaches.

In the Order, the FCC adopted an exemption for financial institutions to contact consumers, specifically for the purpose of: (1) calls intended to prevent fraudulent transactions or identity theft; (2) data security breach notifications; (3) measures consumers may take to prevent identity theft following a data breach; and (4) money transfer notifications. However, these four kinds of calls and texts will only be exempt from the TCPA if the message is free to the consumer. The Order creates technical questions that may be impossible for a credit union to resolve such as whether or not the member will be charged for such texts or calls by their plan provider, or if they will count against their plan limits. Furthermore in order to meet the exemption, these calls and texts must (1) be made to the number provided to the financial institution by the member, (2) state the name and contact information of the financial institution, and (3) are strictly limited in purpose, i.e. no telemarketing, cross-selling, or similar component. The financial institution also cannot initiate more than three messages per event over a three-day period and must offer members "an easy means to opt out" of the messages immediately. NAFCU believes that the

Federal Communications Commission
August 31, 2015
Page 2 of 3

FCC should provide more flexibility to the prescriptive requirements for financial institutions using this exemption, especially because this exemption meant to apply in exigent circumstances to protect consumers.

Unfortunately, the FCC's Order will make it more difficult for credit unions and other financial institutions to contact their members about identity theft or data breaches. As the ABA outlines in its Petition, this exemption improperly limits the exempted calls to those sent to customer-provided mobile contact numbers. The condition limiting this exemption to mobile phone numbers significantly reduces the value of this exemption, since consumers can already receive urgent text messages on a non-free-to-end-user basis, if prior express consent has been granted. The FCC must do more to ensure that consumers are able to receive important notifications and timely updates about financial developments that will impact their existing accounts, on both mobile and residential phone lines.

NAFCU and our members strongly urge the FCC to reevaluate the purpose of this "provided number restriction," as it will greatly diminish to ability of credit unions and other financial institutions from making fraud prevention calls to customer contact numbers. The FCC's Order explicitly states that the exempted calls and texts to be sent only to "the wireless telephone number provided by the customer of the financial institution." This restriction unnecessarily impedes a financial institution's ability to send customer notifications in the event of an exigent circumstance, especially if there is doubt as to when the financial institution received the mobile phone number from the consumer.

NAFCU firmly believes that the provided-number restriction undermines the ability of institutions to prevent or reduce harm to as many customers as possible. As the ABA aptly notes in its Petition, this restriction will prevent financial institutions from sending messages to mobile numbers that customers provided in the course of a telephone call or face-to-face conversation with an employee of the financial institution. This restriction implicitly imposes a strict record-keeping requirement on financial institutions to prove when the phone number was furnished directly by their customers. Because of the serious threat of litigation to calling a mobile number without proper documentation, financial institutions will not be able to notify customers of fraud and identity theft risks in a timely fashion.

NAFCU has serious concerns about the Commission's antiquated regulations that create distinctions between mobile and residential phones. An increasing number of consumers do not have a traditional home phone lines. As cell phones replace landlines, credit union members expect to receive the same service from their credit union as they would if they had a residential telephone number listed. As the use of mobile and online technologies have largely replaced residential phone lines as the most pervasive mechanism of communication between financial institutions and their consumers, the FCC must ensure that its regulations do not have the unintended consequence of reducing consumers' access to vital information about their financial accounts. NAFCU believes that the FCC must remove the distinction between residential and mobile phone lines as it applies to the "free end user call" exemption for financial institutions.

Federal Communications Commission
August 31, 2015
Page 3 of 3

NAFCU looks forward to continuing a dialogue with you and your staff on modernizing the FCC's implementation of the TCPA to ensure that it continues to allow consumers to have unhindered access to important financial information. Should you have any questions or if you would like to discuss these issues further, please feel free to contact me by telephone at [REDACTED] or Kavitha Subramanian, NAFCU's Regulatory Affairs Counsel at [REDACTED] or [REDACTED]

Sincerely,

[REDACTED]

Carrie R. Hunt
Senior Vice President of Government Affairs and General Counsel

cc: The Honorable Mignon Clyburn, FCC Commissioner
The Honorable Jessica Rosenworcel, FCC Commissioner
The Honorable Ajit Pai, FCC Commissioner
The Honorable Michael O'Rielly, FCC Commissioner

Enclosure: NAFCU's July 16, 2015 Response to the Commission's Declaratory Ruling and Order on the Telephone Consumer Protection Act



National Association
of Federal Credit Unions
3138 10th Street North
Arlington, VA 22201-2149

NAFCU | Your Direct Connection to Education, Advocacy & Advancement

May 2, 2016

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street SW,
Washington, DC 20554

RE: Response to CG Docket No. 02-278

Dear Ms. Dortch:

On behalf of the National Association of Federal Credit Unions (NAFCU), the only national trade association focusing exclusively on federal issues affecting the nation's federally insured credit unions, I am writing to you regarding the Federal Communications Commission's (FCC) public request for comment on the petition for declaratory ruling filed by Todd C. Bank (Bank) asking the Commission to clarify whether a telephone line in a home that is used for business purposes can be considered a "residential" line under the Telephone Consumer Protection Act (TCPA). *See Petition for Declaratory Ruling to Clarify the Scope of Rule 64.1200(a)(2)*, CG Docket No. 02-278, filed by Todd C. Bank on Mar. 7, 2016 (Petition). While NAFCU and our members appreciate the FCC's effort to clarify and modernize its regulations with respect to the TCPA, we are deeply concerned that the FCC's distinction between mobile and residential lines creates a discrepancy in the law. As a growing number of consumers use their mobile phone as their primary phone line, NAFCU urges the FCC to develop a common sense interpretation of "residential" line to ensure that consumers are able to receive important notifications and timely updates about developments from their financial services providers on both mobile and landline residential phone lines.

NAFCU and our members have serious concerns that the Commission's dated regulations related to the treatment of mobile phones will create significant risks for credit unions that wish to contact their members via telephone. In general, the TCPA regulates the way credit unions may use automatic telephone dialing systems, prerecorded voice message systems or "robocalls," messages sent to fax machines, and abandoned calls. The FCC treats advertisement and telemarketing calls differently from calls with another "commercial purpose." The regulation still states that a phone call may not be made using an automatic telephone dialing system for telemarketing purposes unless the credit union has the "prior express written consent" of the member, unless the call is made for "a commercial purpose but does not include or introduce an advertisement or constitute telemarketing." *See 47 CFR 64.1200 (a)(3)*. However, for mobile

Federal Communications Commission
May 2, 2016
Page 2 of 2

phone lines, the FCC requires prior express written consent for all automated calls regardless of the purpose of the call. This distinction is problematic for many credit unions because more and more consumers today do not have landline home phones anymore, but still expect to receive the same service from their credit union as they would if they had a landline residential telephone number listed. Additionally, this situation can be even more complicated because the credit union may not know if the telephone number that the consumer has provided is for a residential landline or a cell phone. NAFCU urges the FCC to remove this antiquated distinction that does not adequately reflect the way consumers use telephone services today.

As the use of mobile and online technologies have largely replaced residential phone lines as the most pervasive mechanism of communication between financial institutions and their consumers, the FCC must ensure that its regulations do not have the unintended consequence of reducing consumers' access to vital information about their financial accounts. In 2013, the FCC amended some of its rules relating to telemarketing, including removing a previously-existing "established business relationship" for certain kinds of calls. However, the FCC has chosen to apply a different standard to mobile phone lines, and does not distinguish between calls for telemarketing and informational purposes to a mobile number. NAFCU strongly urges the FCC to further modernize its regulations to ensure that credit unions and other financial institutions are able to provide essential and timely information to consumers through mobile and texting channels about their existing financial accounts.

NAFCU understands that the TCPA is a consumer protection statute. As the use of mobile and online technologies have become the most pervasive mechanism of communication between financial institutions and their consumers, the FCC must ensure that its regulations do not have the unintended consequence of reducing consumers' access to vital information about their financial accounts.

NAFCU looks forward to continuing a dialogue with you and your staff on modernizing the FCC's implementation of the TCPA to ensure that it continues to allow consumers to have unhindered access to important financial information. Should you have any questions or if you would like to discuss these issues further, please feel free to contact me by telephone at [REDACTED] or [REDACTED] or Kavitha Subramanian, NAFCU's Regulatory Affairs Counsel at [REDACTED] or [REDACTED].

Sincerely,

[REDACTED]
Carrie R. Hunt
Executive Vice President of Government Affairs and General Counsel

September 21, 2016

The Honorable Greg Walden, Chairman
The Honorable Anna Eshoo, Ranking Member
Subcommittee on Communications and Technology
Energy and Commerce Committee
United States House of Representatives
Washington, D.C. 20510

Dear Chairman Walden and Ranking Member Eshoo:

The undersigned non-profit organizations, representing millions of consumers, write to express our strong support for your interest in improving protections against unwanted robocalls. As you know, unwanted robocalls are currently the top consumer complaint to the Federal Communications Commission (FCC), and were the source of over 2 million complaints to the Federal Trade Commission (FTC) in 2015.

We agree that more tools need to be brought to bear in the battle against the millions of unwanted, harassing, and illegal robocalls to which consumers continue to be subjected. In particular, we support the ROBOCOP Act, legislation introduced by Representative Jackie Speier (D-CA) (H.R. 4932) and Senator Charles Schumer (D-NY) (S. 3026). This legislation would provide important new incentives for carriers to provide consumers with call-blocking technologies and to eradicate caller-ID spoofing, which we believe is critical to addressing the runaway robocall problem.

At the same time, we are concerned that some proposals being put forward for discussion, such as altering the definitions of “autodialer” and “consent” under the Telephone Consumer Protection Act (TCPA), would seriously undermine the enforcement power of this fundamental law. Altering the definition of autodialer would have the effect of creating dangerous gaps in the law; the current definition reaches all of the telemarketing technologies used today. And altering the definition of consent would eliminate important incentives currently in place for callers to ensure that they actually have the consent of the called party. There are many technologies already in place that provide callers with data on whether the person from whom they have consent is still the current owner of the phone. Changing these definitions would be unfortunate steps backward, and would hurt consumers.

Some in the calling industry evidently want to be able to make robocalls without the consent of the consumers called, and without liability for making even repeated and widespread mistakes. We urge the Committee to take utmost care not to make changes to the TCPA that

would subject American consumers to tens of millions more unwanted, and currently illegal, robocalls.

We would be happy to work with the members of the Committee on stronger protections to guard against unwanted, disruptive, and at times harassing, even fraudulent, robocalls. Please feel free to contact Margot Saunders of the National Consumer Law Center at msaunders@nclc.org or Maureen Mahoney of Consumers Union at mmahoney@consumer.org for further information.

Sincerely,

Consumer Action
Consumer Federation of America
Consumers Union
National Association of Consumer Advocates
National Consumer Law Center
Public Knowledge

cc: Honorable Fred Upton, Chairman, House Energy & Commerce Committee
Honorable Frank Pallone, Jr., Ranking Member, House Energy & Commerce Committee
Members, House Energy & Commerce Committee

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](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 from 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. Rec. 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 attorney²³ 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.

September 21, 2016

The Honorable Greg Walden, Chairman
 The Honorable Anna Eshoo, Ranking Member
 U.S. House of Representatives Committee on Energy and Commerce
 Subcommittee on Communications and Technology
 2125 Rayburn House Office Building
 Washington, DC 20515

RE: Hearing on “Modernizing the Telephone Consumer Protection Act”

Dear Chairman Walden and Ranking Member Eshoo:

We write to you regarding the upcoming hearing on “Modernizing the Telephone Consumer Protection Act.”

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,¹ one of the most important privacy laws in the United States.² We have provided numerous comments to both the Federal Communications Commission (“FCC”) and the Federal Trade Commission (“FTC”), and maintain online resources for consumers who seek to protect their rights under the TCPA.³ Nonetheless, we recognize the significant changes in technology and business practices over the past 25 years and agree with the Chairman and others that the TCPA needs to be updated for the 21st century. 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.

¹ 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).

² 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).

³ 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/>.

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.⁴ The Act also provided for the creation of what would become the National Do Not Call Registry.⁵

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.⁶ 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.⁷

Despite the success of the TCPA, consumers continue to be plagued by unwanted robocalls and text messages. The transition from land lines to mobile phones⁸ 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. For low-income consumers who often rely on pay-as-you-go, limited-minute prepaid wireless

⁴ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(12), 105 Stat. 2394, 2394 (codified at 47 U.S.C. § 227).

⁵ 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).

⁶ See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES L406 (2012), <http://www.census.gov/library/publications/2011/compendia/statab/131ed/elections.html> (reporting that 131 million total votes in the 2008 election).

⁷ 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).

⁸ More than 92% of American adults own at least one cell phone and 79% own smartphones. Monica Anderson, *Technology Device Ownership: 2015*, Pew Research Ctr. (Oct. 29, 2015) <http://www.pewinternet.org/2015/10/29/technology-device-ownership-2015/>; *comScore Reports November 2015 U.S. Smartphone Subscriber Market Share*, comScore (Jan. 7, 2016) (reporting 92% cell phone ownership), <https://www.comscore.com/Insights/Market-Rankings/comScore-Reports-November-2015-US-Smartphone-Subscriber-Market-Share> (reporting 79% smartphone share). Nearly 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, January–June 2015*, at 5 (Dec. 1, 2015), <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201512.pdf>.

plans,⁹ these unwanted calls and texts are particularly harmful. Because we carry our phones with us everywhere,¹⁰ 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 for the 21st century. 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,¹¹ 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.

The Subcommittee notes the fact that 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 are able to 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 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

⁹ 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).

¹⁰ 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>.

¹¹ 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).

companies are already looking at the popular WhatsApp service for commercial solicitations.¹² 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.¹³ 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 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 is in need of 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,

Marc Rotenberg
EPIC President

Claire Gartland
Director, EPIC Consumer Privacy Project

James Graves
EPIC Law and Technology Fellow

cc: The Honorable Fred Upton, Chairman, House Energy and Commerce Committee
The Honorable Frank Pallone, Jr., Ranking Member, House Energy and Commerce Committee

¹² 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.

¹³ WhatsApp Blog, *Looking Ahead for WhatsApp* (Aug. 25, 2016), <https://blog.whatsapp.com/10000627/Looking-ahead-for-WhatsApp>.

**America's Health
Insurance Plans**

601 Pennsylvania Avenue, NW
South Building
Suite Five Hundred
Washington, DC 20004

202.778.3200
www.ahip.org



September 21, 2016

The Honorable Fred Upton
Chairman
House Energy and Commerce Committee
2125 Rayburn Building
Washington, D.C. 20515

The Honorable Frank Pallone
Ranking Member
House Energy and Commerce Committee
2322A Rayburn Building
Washington, D.C. 20515

The Honorable Greg Walden
Chairman
House Energy and Commerce Subcommittee
on Communications and Technology
2185 Rayburn Building
Washington, D.C. 20515

The Honorable Anna Eshoo
Ranking Member
House Energy and Commerce Subcommittee
on Communications and Technology
241 Cannon Building
Washington, D.C. 20515

Dear Chairmen Upton and Walden and Ranking Members Pallone and Eshoo:

On behalf of America's Health Insurance Plans (AHIP), I am submitting the attached letter for the official record of your September 22 hearing on "Modernizing the Telephone Consumer Protection Act."

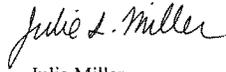
Our letter urges the Federal Communications Commission (FCC) to align the Telephone Consumer Protection Act (TCPA) with HIPAA regulations applicable to all covered entities (providers, health plans, and clearinghouses) and their business associates. This would recognize that all HIPAA covered entities and their business associates could make non-marketing, health care-related telephone calls without prior consent.

Our letter also discusses the use and importance of non-marketing telephonic communications by health plans in fostering quality of care and improving health outcomes for enrollees. Our comments support a joint petition filed by various parties, including Anthem and WellCare, requesting that the FCC clarify and modify its prior 2015 TCPA Omnibus Declaratory Ruling and Order to: (1) clarify that the provision of a phone number to a "covered entity" or "business associate" (as those terms are defined under HIPAA) constitutes prior express consent for non-telemarketing calls allowed under HIPAA for the purposes of treatment, payment, or health care operations; and (2) modify the prior express consent clarification and the non-telemarketing health care message exemption in its 2015 Order to include HIPAA "covered entities" and "business associates."

Thank you for considering our views on these important issues.

September 21, 2016
Page 2

Sincerely,

A handwritten signature in cursive script that reads "Julie L. Miller". The signature is written in black ink and is positioned above the typed name.

Julie Miller
General Counsel

Enclosure

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
The Joint Petition of Anthem, Inc., Blue Cross)	
Blue Shield Association, WellCare HealthPlans,)	
Inc. and the American Association of Healthcare)	
Administrative Management for Expedited)	
Declaratory Ruling and/or Clarification of the)	
2015 TCPA Omnibus Declaratory Ruling)	
and Order)	CG Docket No. 02-278
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	

**COMMENTS BY AMERICA'S HEALTH INSURANCE PLANS IN SUPPORT OF
ANTHEM, INC., BLUE CROSS BLUE SHIELD ASSOCIATION, WELLCARE
HEALTHPLANS, INC. AND THE AMERICAN ASSOCIATION OF HEALTHCARE
ADMINISTRATIVE MANAGEMENT JOINT PETITION FOR EXPEDITED
DECLARATORY RULING AND/OR CLARIFICATION OF THE 2015 TCPA
OMNIBUS DECLARATORY RULING AND ORDER**

Julie Simon Miller
Thomas M. Palumbo
AMERICA'S HEALTH INSURANCE PLANS
601 Pennsylvania Avenue, N.W.
South Building, Suite 500
Washington, D.C. 20005
(202) 778-3200
jumiller@ahip.org
tpalumbo@ahip.org

Counsel for America's Health Insurance Plans

September 19, 2016.

I. Introduction and Summary

America's Health Insurance Plans ("AHIP") submits the following comments in support of the Joint Petition for Expedited Declaratory Ruling and/or Clarification of the 2015 TCPA Omnibus Declaratory Ruling and Order filed by Anthem, Inc., Blue Cross Blue Shield Association, Wellcare Health Plans., Inc., and the American Association of Health Management ("Joint Petition").

AHIP is the national trade association representing the health insurance community. AHIP's members provide health and supplemental benefits through employer-sponsored coverage, the individual insurance market and public programs such as Medicare and Medicaid. Our members have broad experience working with hospitals, physicians, patients, employers, state governments, the federal government, pharmaceutical and device companies, and other healthcare stakeholders to ensure that patients have access to and are fully utilizing needed treatments and medical services. AHIP strongly supports initiatives to improve the health and wellbeing of individuals, including important health care communications made to patients and enrollees in health plans offered by our members.

The provision of health insurance includes more than issuing and administering a policy; it entails proactively engaging with enrollees on a wide variety of related coverage issues and coordinating the effective utilization of benefits. This includes care management and coordination services as well as engaging in outreach and education activities intended to maximize enrollee health outcomes. These efforts often include conducting health care-related telephone contacts to ensure that enrollees are, among other things: adhering to treatment plans; picking up necessary prescriptions; scheduling necessary appointments; provided with timely and accurate information regarding scheduled treatments; have access to pre-operative, post-

treatment and homecare instructions; and are fully utilizing covered benefits and services. These, as well as other kinds of telephone contacts detailed in our comments, play an essential role in improving health outcomes and promoting wellness among enrollees.

Accordingly, AHIP strongly supports petitioners' request that the Federal Communications Commission ("FCC") interpret its Telephone Consumer Protection Act ("TCPA") 2015 Omnibus Declaratory Ruling and Order (the "2015 Declaratory Order" or "Order") in a manner that is consistent with previous TCPA rules and related FCC decisions by continuing to allow consumers to receive non-telemarketing calls allowed by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). AHIP submits that the FCC should, consistent with petitioners' request, issue a ruling and/or clarification of the 2015 Declaratory Order clarifying that: 1) the provision of a phone number to a "covered entity" or "business associate" constitutes prior express consent for non-telemarketing calls allowed under HIPAA for the purposes of treatment, payment, and health care operations; and 2) the prior express consent clarification in paragraph 141 and the non-telemarketing health care message exemption granted in paragraph 147, both in the 2015 Declaratory Order, be clarified to include HIPAA "Covered entities" and "business associates." Specifically, each use of the term "health care provider" in these paragraphs should be clarified to encompass "HIPAA covered entities and business associates".

II. Background

Telephonic communications play an essential role in supporting the innovative strategies through which health insurance plans are working to improve health outcomes for their enrollees.

Health plans, as HIPAA covered entities,¹ engage in a wide variety of critical health care communications to individuals, including prescription refill and physician office visit reminders, care coordination messages, the provision of home healthcare information, and pre- and post-operative instructions all of which are intended to help improve health outcomes. These are precisely the kinds of non-marketing healthcare communications designed to improve quality of care and health care outcomes that health plans have focused on developing innovative strategies around in an effort to improve enrollee health and wellness.

As requested in the petition, we urge the FCC to align its 2015 Declaratory Order with the HIPAA Privacy Rule's long-standing understanding of what is permitted as treatment, payment, and operations. The HIPAA Privacy Rule does not require covered entities to obtain an individual's written authorization or consent prior to using or disclosing protected health information for treatment, payment, or health care operations.² The United States Department of Health and Human Services ("HHS") has also made clear that wellness programs, disease management programs, and the like are not marketing activities requiring separate authorization to use protected health information.³ We urge the FCC to recognize the HHS policy goals that support such programs through the long-standing HIPAA rule and align across all modes of communication – whether e-mail, text, cell call, land-line, or mail – to permit HIPAA covered entities to engage in these important health outreach activities.

Further, AHIP recognizes and appreciates the considerable efforts the FCC undertook in developing the standards for communications in situations where consumers have previously given consent to be contacted by providing their telephone number to a covered entity,

¹ See 45 C.F.R. § 160.103.

² See 45 C.F.R. § 164.506(b).

³ See, e.g. *HHS HIPAA FAQs for Professionals*, December 2002, available at: <http://www.hhs.gov/hipaa/for-professionals/faq/280/what-programs-fall-under-hippa-definition-of-marketing/index.html>.

particularly those standards enumerated in the 2015 Declaratory Order. However, AHIP shares Petitioners' concern that the 2015 Declaratory Order may inadvertently limit the benefit of non-marketing healthcare communications by referencing only health care providers, and not other HIPAA covered entities and business associates. Interpreting the Order in such a manner risks discouraging and burdening important health care communications that are otherwise allowed by the more specific HIPAA regulation, and encouraged by federal and state public health policies.

At the outset, it is important to note that in the case of health insurance plans, an individual's telephone contact information is typically received as part of the enrollment process, which is then utilized to engage in various non-marketing, care management communications that previously may have been performed by health care professionals. These are the same type of messages identified in the 2015 Declaratory Order, specifically:

“...calls for which there is exigency and that have a healthcare treatment purpose, specifically: appointment and exam confirmation and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home healthcare instructions.”

Order at ¶146. Non-marketing telephone contacts, such as those at issue here, play an important role in efforts by health insurance plans to improve health outcomes for enrollees. This is consistent with the FCC's prior decisions acknowledging the same. In 2012, the FCC accepted the principle that autodialed prerecorded health-care related calls have an important role to play in our health care system. In exempting from several requirements applicable to prerecorded calls all health-care related calls to residential landlines subject to HIPAA, the FCC concluded that such calls “serve a public interest purpose: to ensure continued consumer access to health

care-related information” and do not “tread heavily upon the consumer privacy interests” that the TCPA was intended to protect.⁴

However, the 2015 Declaratory Order could be misconstrued so as to limit the scope of exempted calls to voice call or text messages “made *by or on behalf of a healthcare provider*” and thus risks a too narrow interpretation that would exclude all other relevant HIPAA covered entities other than “healthcare providers” (itself a term the Order leaves undefined), including health insurance plans and their contracted business associates which themselves increasingly serve a similar role in facilitating and managing the care of Americans. Order at ¶147 (emphasis added). We believe this is an unintended result which could expose health plans to potential regulatory enforcement action by the FCC, civil litigation and could lead to the curtailment of innovative non-marketing healthcare communications health plans engage in as a means of improving health outcomes for their enrollees.

III. Health Plans’ Use of Telephone Contacts for Improving Health Outcomes

Telephone contacts, such as those at issue here, play an important role in efforts by health insurance plans to improve health outcomes for enrollees. Health plans have a long history of developing innovative tools and strategies to ensure that enrollees receive health care services on a timely basis, while also emphasizing prevention and providing access to disease management services for their chronic conditions. Using systems of coordinated care, health plans work to ensure that physician services, hospital care, prescription drugs, and other health care services

⁴ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, -- 27 FCC Rcd 1830 ¶¶ 60, 63 (2012); see *id.* ¶ 60 n. 176 (noting that AHIP supported creation of such an exemption “because the exemption would allow the continuation of important communications by health care providers and health insurance plans such as prescription refills, immunization reminders, and post hospital discharge follow-up.”).

are integrated and delivered with a strong focus on preventing illness, improving health status, and employing best practices to swiftly treat medical conditions as they occur – rather than waiting until they have advanced to a more serious level. These initiatives frequently coordinate services and data (including contact information such as phone numbers) in both directions between different types of HIPAA covered entities.

Timely and cost-effective communication with health plan enrollees is essential to the success of the innovative strategies health plans have developed to improve health care quality and outcomes. This includes, for example, telephonic communications that remind enrollees to schedule appointments with their doctor and refill prescription drugs. In other cases, these messages provide information that can promote adherence with treatment regimens, encourage healthy activities, and improve the management of chronic conditions. Non-marketing telephonic communications are also an essential component of health plan efforts to improve and report on health care quality, and involve a wide range of activities including case management, identification of target populations with specific health care needs, and counseling. Telephone contacts are one of the tools utilized by health plans to promote engagement by individuals with their health and to meet quality requirements. These tools play a critical and recognized role in promoting health.

Indeed, not only are such enrollee communications essential in developing improvements to care quality and health outcomes, but in the case of government-funded programs such as Medicaid and Medicare (including Medicare Advantage health plans (“MA Plans”)), these communications are in fact required or encouraged. For example, plans are required under their contracts with the Centers for Medicaid and Medicare Services (“CMS”) to engage in enrollee care coordination and case management activities, which in many instances are conducted

through telephonic communications with enrollees. In particular, Medicare Advantage Special Needs Plans (“SNPs”)⁵ are required to conduct Health Risk Assessments (“HRAs”) of new enrollees within 90-days of the beneficiary’s effective enrollment date and thereafter reassess enrollees annually.⁶ Both initial HRAs and subsequent annual reassessments are expressly permitted to be conducted telephonically.⁷ As part of their annual reporting requirements, SNPs must document that they made at least three call attempts and sent a follow-up letter in efforts to contact an SNP enrollee both within 90-days of the effective enrollment date as well as in connection with annual reassessments.⁸

In addition, CMS requires each MA Plan to maintain a Quality Improvement Program (“QIP”) and conduct a Chronic Care Improvement Program (“CCIP”) as part of their required QIP. Again, telephonic communications with beneficiaries play an important role in delivering effective case management services, including among other things maintaining early and direct contact with beneficiaries post discharge.⁹ Similarly, managed care organizations that contract with state Medicaid agencies to administer Medicaid benefits are required to engage in telephonic communications with members for a variety of purposes, including the provision of disease prevention information, care management services, appointments, compliance with care regimens and other wellness program related services.

⁵ SNPs are Medicare Advantage plans that limit membership to people with specific diseases or characteristics, and tailor their benefits, provider choices, and drug formularies to best meet the specific needs of the people they serve.

⁶ See, e.g. CMS, *Medicare Part C Plan Reporting Requirements Technical Specifications Document: Contract Year 2016*, July 25, 2016, available at: <https://www.cms.gov/Medicare/Health-Plans/HealthPlansGenInfo/Downloads/2016-Part-C-Reporting-Requirements-Tech-Specs7252016-v02.pdf>

⁷ Id.

⁸ Id.

⁹ See, e.g. CMS, *Medicare Advantage CCIP Open Door Forum Presentation*, March 6, 2013, available at: <http://optimalsolutionscloud.com/OpenDoorForum/CCIP-v2.pdf>

The positive effects of non-marketing health care communications in driving improvements in both the quality of care delivered as well as healthcare outcomes is well documented. Healthcare plans are at the forefront of developing and utilizing innovative strategies that rely on such communications as a means of improving care for enrollees. Numerous clinical studies support the benefits of non-marketing healthcare communications and underscore the benefits of enacting policies that allow health plans (and all HIPAA covered entities) to innovate around the same.¹⁰ For example, a recent analysis by the Commonwealth Fund noted the growing adoption of cell phone interventions by community health centers and clinics for chronic disease management.¹¹ Studies have demonstrated that health care interventions using cell phone voice and text messaging can be an effective approach to improve health and manage care.¹² Telephone interventions have been shown to improve adherence with controlling blood pressure in patients with hypertension¹³ and for prompting women to participate in follow-up regimens after abnormal pap smears.¹⁴

¹⁰ *The Effectiveness of Mobile-Health Technologies to Improve Health Care Service Delivery Process*, PLOS Medicine, January 2013, available at: <http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1001363>

¹¹ *Mobile Health and Patient Engagement in the Safety Net: A Survey of Community Health Centers and Clinics*, The Commonwealth Fund, May 2015 available at: <http://www.commonwealthfund.org/publications/issue-briefs/2015/may/mobile-health-and-patient-engagement-in-the-safety-net>

¹² See Santash Krishna and Suzanne Austin Boren, *Healthcare via Cell Phones: A Systematic Review*, Telemedicine and e-Health, April 2009 available at: <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0027335/>

¹³ Teresa Harrison, Timothy Ho, Joel Handler, Michael Kanter, Ruthie Goldberg, and Kristi Reynolds, *A Randomized Controlled Trial of an Automated Telephone Intervention to Improve Blood Pressure Control*, Official Journal of the American Society of Hypertension, Inc., September 2013, available at: <http://onlinelibrary.wiley.com/doi/10.1111/jch.12162/pdf>

¹⁴ Suzanne Miller, Siu-kuen Hui, Kuang-Yi Wein, John Scarpato, Fang Zhu, Joanne Buzaglo, and Enrique Hernandez, *Tailored Telephone Counseling to Improve Adherence to Follow-up Regimens after an Abnormal Pap Smear Among Minority, Underserved Women*, Patient Education Counseling, August 2013, available at: <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3852173/>

In addition, a May 2014 report¹⁵, commissioned by the Department of Health and Human Services (“HHS”), identifies five categories of mobile health programs that use text messaging to communicate with consumers, health care professionals, and others:

- Health Promotion and Disease Prevention – delivering health information and prevention messaging to promote healthy behaviors or referrals to services;
- Treatment Compliance – providing patient reminders to take drugs or attend medical appointments to improve management of asthma, diabetes, or other conditions;
- Health Information Systems and Point-of-Care Support – offering clinical support for health professionals and community health workers through telemedicine;
- Data Collection and Disease Surveillance – obtaining real-time data on disease outbreaks from community health workers, patient self-reports, or clinic and hospital records; and
- Emergency Medical Response – maintaining alert systems that disseminate information in an emergency or during disaster management and recovery.

Health plans have demonstrated strong leadership in this area. For example, some health plans initiate phone calls or send text messages to remind members of upcoming appointments, home visits, or other notifications aimed at improving their health. These communications include:

- Case management communications to members with helpful instructions on processes such as post-discharge follow-up and medication adherence;
- Preventative care communications for screenings, vaccinations, and available services; and
- Health plan benefits communications regarding provider/benefit changes, plan enrollment reminders, and even weather emergencies affecting an upcoming appointment.

Health plans have implemented innovative measures, designed around and dependent on an enrollee’s voluntary consent to participate (and corresponding ability to withdraw such consent at any time), to promote the health and well-being of their enrollees. In many cases, these efforts

¹⁵ *Using Health Text Messages to Improve Consumer Health Knowledge, Behaviors, and Outcomes: An Environmental Scan*, prepared for the U.S. Department of Health and Human Services by the Mathematica Policy Research and Public Health Institute, May 2014, available at: <http://www.hrsa.gov/healthit/txt4tots/environmentalscan.pdf>

are conducted through non-marketing healthcare communications with a plan's enrollee. Plans have developed programs that encourage providers to identify enrollees that can benefit from care management or other wellness program services already covered under an enrollee's plan, but which the enrollee may not be aware are otherwise available. These care management and wellness services include, among others, behavioral health programs, condition management services, maternity and lifestyle improvement programs and shared decision making services. In a typical case, after a provider has identified a covered program or service that an enrollee would benefit from receiving, it is often incumbent upon health plans to proactively communicate with the enrollee to ensure they are following through with their enrollment in such programs, scheduling necessary appointments, engaging with the appropriate program providers as well as provide those enrollees with corresponding reminders and transmitting related care management information.

In addition, health plans invest significant resources to ensure their communications are relevant and valuable to each of their enrollee's unique health status and situation. This allows plans to identify individuals that may benefit from participating in covered benefits and services related to an enrollee's specific health condition and conduct related wellness outreach efforts. For example, this may include notifying an enrollee who suffers from diabetes that their plan offers certain weight management or dietary programs they may otherwise be unaware are available and are covered under their respective plan. In all instances, an enrollee's decision to utilize such benefits and services is voluntary, and if undertaken, can be discontinued by an enrollee at any time. However, as a result of such wellness outreach efforts, and because these are services and benefits already available to and covered by an enrollee's existing plan, it is no surprise that health plans report an extremely high enrollee participation rate in such programs. This indicates

enrollees view and appreciate these kinds of proactive, individually tailored outreach efforts by health plans as a positive and constructive means of engaging in available healthcare services, and do not associate such communications with undesired “telemarketing” efforts that would otherwise merit preclusion under the TCPA.

The 2015 Declaratory Order, by referencing only providers, risks curtailing precisely these kinds of innovative efforts being undertaken by health insurance plans and other HIPAA covered entities to promote and foster the health and well-being of their respective enrollees.

IV. Conclusion

AHIP agrees with Petitioners’ position that the TCPA rules should be clarified to ensure that they are interpreted in a way that is harmonized, consistent with the FCC’s prior decisions and HIPAA, to allow consumers to receive necessary and vital non-telemarketing calls allowed under HIPAA. Accordingly, we support Petitioners’ request that the FCC revise its 2015 Declaratory Order to clarify that: 1) the provision of a phone number to a “covered entity” or “business associate” constitutes prior express consent for non-telemarketing calls allowed under HIPAA for the purposes of treatment, payment, and health care operations (as suggested by Petitioners in Exhibit A to their Joint Petition); and 2) that the prior express consent clarification and the non-telemarketing health care message exemption be clarified to include HIPAA “Covered entities” and “business associates” (as suggested by Petitioners in Exhibit B to their Joint Petition).



Jim Nussle
President & CEO

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

Phone: 202-508-6745
Fax: 202-638-7734
jnussle@cuna.coop

September 21, 2016

The Honorable Greg Walden
Chairman
Subcommittee on Communications and
Technology
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

The Honorable Anna Eshoo
Ranking Member
Subcommittee on Communications and
Technology
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Walden and Ranking Member Eshoo:

On behalf of America's credit unions, I am writing regarding tomorrow's hearing entitled "Modernizing the Telephone Consumer Protection Act." The Credit Union National Association (CUNA) represents America's credit unions and their more than 100 million members. Thank you for the opportunity to comment on this hearing.

Credit unions understand the importance of consumer protection and support efforts to rein in those abusing or taking advantage of consumers. Since their inception they have played a unique role in the financial services marketplace as not-for-profit financial cooperatives, owned by their members. They provide credit at more affordable rates than most others in the financial services marketplace and take their role in providing financial education seriously.

Communication with credit union members is an essential consumer protection function; members need and want to hear from their credit union in a timely and efficient manner when an issue arises with their account. Communicating with credit union members can help prevent identity theft and stolen data, mitigate the harm once such events have occurred, and give consumers the chance to receive other important information about their accounts, such as the ability to avoid late payments.

Unfortunately, the Federal Communications Commission's (FCC) July 2015 Omnibus Declaratory Ruling and Order ("Order") for the Telephone Consumer Protection Act (TCPA) was problematic and has impacted credit unions' ability to communicate with their members about pertinent account information. We support the concept of preserving consumers' rights to privacy on their cell phones and protecting financial information; however, the FCC's Order goes far beyond the scope or purpose of the TCPA, which was enacted in 1991 when a cell phone was considered a luxury item and smartphones were still years away from production.

The Order Had an Immediate Adverse Impact, Causing Disarray and Exposing Credit Unions to Frivolous Litigation

When the FCC, on a party-line vote, issued the Order over a year ago, it immediately went into effect without having been put out as a proposed rule subject to public comment. 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 FCC recognized the importance of communications between financial institutions and consumers, and did provide certain exemptions, the Commission's ruling created obstacles to credit unions' ability to communicate with their members. For small financial institutions, with resources already stretched thin on an unprecedented number of new regulatory burdens, the resource draining of complying with unclear, outdated, and in some cases largely impossible guidance is particularly problematic.

Congress could not have intended to arbitrarily limit communications between credit unions, which are not-for-profit, member-owned financial cooperatives, and their members when it enacted the TCPA several decades ago. The confusion created by the TCPA Order has not only increased the regulatory burden that credit unions are facing, but it will place additional limits on their ability to provide the safest and most affordable products and services to consumers.

The consequences of the Order extend beyond the credit unions' ability to communicate with members because the TCPA carries with it a private right of action. Predictably, the Order has attracted the attention of law firms seeking to profit from the exorbitant attorneys' fees and statutory damages associated with TCPA lawsuits. Frivolous class action litigation has proven costly and detrimental, when credit unions are simply seeking to serve their members in the way they always have, and to continue to provide products and service offerings at competitive rates. We believe that class action litigation against a credit union makes very little sense in general given the member-owned, cooperative structure of the credit union; it makes even less sense when the litigation is based on actions the credit union is taking to protect its members from harm.

The Exemption for Financial Institutions Provides Minimal Relief

In its Order, the FCC recognized the importance of receiving information from financial institutions. It provided an exemption for calls concerning: (1) transactions and events that suggest a risk of fraud or identity theft; (2) possible breaches of the security of customers' personal information; (3) steps consumers can take to prevent or remedy harm caused by data security breaches; and (4) actions needed to arrange for receipt of pending money transfers.

However, the conditions that must be met to qualify for these exempted calls are difficult, if not impossible, to meet. The Order requires that the exempted calls must be free-to-end-user calls; in other words, there can be no charge of any kind to the consumer. This requirement places an unreasonable burden on financial institutions to ensure that notifications do not count against a recipient's minutes or texts plan. The technology and resources needed are not readily available to the majority of credit unions, particularly smaller credit unions.

Other conditions to qualify for this exemption apply as well. For example, a credit union must initiate no more than three messages (whether by voice call or text message) per "event" over a three-day period for an affected account; must offer recipients within each message an easy means to opt out of future messages; and must honor opt-out requests immediately. The technicalities associated with each of these requirements creates many unanswered questions, such as what constitutes an "event." Additionally, the exemption only allows calls and text messages to be sent to wireless numbers provided by the customer of the financial institution.

The Expansion of What is Considered an Autodialer is Problematic

Another concerning aspect of the Order is the expansion of what is considered an automated telephone dialing system (autodialer). Credit unions need the FCC to define clearly what constitutes an autodialer because informational calls using an autodialer to a consumer's cell phone requires either oral or written prior express consent. Notably, dissenting FCC Commissioner Ajit Pai expressed concern that the language about what is considered an autodialer in the Order is so expansive it could even cause a device like a smartphone to now be considered an autodialer.

Currently, credit unions are not even able to interpret from the Order whether the calling system they use qualifies them to be subject to the TCPA. As a result of this ambiguity, some credit unions have limited their communications or have been forced to revert to manually dialing calls to members. The FCC in its Order leaves it wide open for courts to interpret the autodialer definition. This muddled guidance and lack of certainty is not helpful for credit unions and consumers looking for certainty in the law.

Other Issues that Could Stifle Communication with Credit Union Members

Additionally, the FCC creates ambiguity about how consumers can revoke consent for autodialed calls by stating it can be done at any time and in any reasonable manner. This onerous language is problematic because consent could be revoked in almost any manner including through oral conversations with an employee at any level of a credit union. Since it is not clear what is a "reasonable" way of revoking consent, credit unions theoretically have to monitor all communications in every manner with every member and every employee.

Furthermore, the Order increases the possibility of being liable under the TCPA when calling a reassigned number that the credit union has previously been given consent to call. The Order makes clear that callers can make only one call under a safe harbor before they are considered to have actual or constructive knowledge that the number was reassigned. The one call safe harbor does not account for the dozens of reasons it may not be possible to connect with the new holder of the number in one attempt. The Order indicates that it does not matter whether the phone is answered; the caller is still considered to be on notice. For credit unions serving working families who may switch jobs, move, or simply can no longer afford one type of wireless carrier plan over another, it makes no sense to penalize either the credit union or a member seeking information for switching numbers.

CFPB Statements Have Conflicted with the FCC's Order

Other federal regulators and consumer groups share CUNA's views about the benefits of communicating with consumers on their cell phones. Mobile technology is often the preferred method of communication for consumers, and for many younger and lower-income consumers it may be their only method to receive communications. This is also the same demographic of consumers that can benefit the most when credit unions are able to intervene early to provide financial education or counseling. The CFPB, in particular, appears to recognize this benefit of increased communication.

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the CFPB has the charge of promoting financial education, researching developments in markets for consumer financial services and products, and providing information, guidance, and technical assistance regarding the offering and provision of consumer financial products or services to traditionally underserved consumers and communities. In this regard, the CFPB has provided the public information about how it believes the financial services marketplace should be communicating with consumers on mobile devices. In one such recent publication, the CFPB noted,

“Major development in the consumer financial services market over the past few years has been the increasing use and proliferation of mobile technology to access financial services and manage personal finances....Using a mobile device to access accounts and pay bills can reduce cost and increase convenience for consumers. 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.”

Again, this reasoning directly conflicts with FCC policies that are making it more difficult to communicate with distressed consumers. Notably, credit unions with over \$10 billion in assets are supervised by the CFPB, and others operate in compliance with numerous consumer financial laws

that the CFPB has jurisdiction over. As such, conflicting guidance from the CFPB makes it very difficult to make compliance decisions concerning communication efforts.

Congress Should Express Appropriate Oversight Authority

Decades old, the TCPA has become severely outdated and obsolete in the face of new technologies and forms of communication. It is imperative that Congress take action to eliminate the negative consequences the FCC's Order is having on both financial institutions and consumers, and consider what actions can be taken to assure communication between the two can continue.

The FCC continues to ignore the input of industry, consumers, Congress, and even the President of the United States. It has far exceeded the scope of the authority Congress granted it and also, as noted, the FCC did not provide an opportunity for notice and comment on the Order. We urge you to address this overreach and take action to hold the FCC accountable to provide more transparency to those seeking to comply with laws under its jurisdiction.

Conclusion

On behalf of America's credit unions and their more than 100 million members, we thank you for your attention to this important matter and we look forward to working with Congress and the Administration to create a rule that protects the consumer, while ensuring credit unions can freely communicate with their members.

Sincerely,


Jim Nussle
President & CEO

FRED UPTON, MICHIGAN
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115
Majority (207) 226-2927
Minority (202) 226-2541

October 12, 2016

Ms. Michelle Turano
Vice President, Government Affairs and Public Policy
WellCare Health Plans
8735 Henderson Road
Tampa, FL 33634

Dear Ms. Turano:

Thank you for appearing before the Subcommittee on Communications and Technology on September 22, 2016, to testify at the hearing entitled "Modernizing the Telephone Consumer Protection Act."

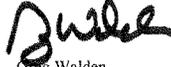
Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

Also attached are Member requests made during the hearing. The format of your responses to these requests should follow the same format as your responses to the additional questions for the record.

To facilitate the printing of the hearing record, please respond to these questions and requests with a transmittal letter by the close of business on Wednesday, October 26, 2016. Your responses should be mailed to Greg Watson, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, DC 20515 and e-mailed in Word format to Greg.Watson@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,



Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna G. Eshoo Ranking Member, Subcommittee on Communications and Technology

Attachments



October 21, 2016

Greg Watson
Legislative Clerk
Committee on Energy & Commerce
2125 Rayburn House Office Building
Washington, DC 20515-6115
Email: greg.watson@mail.house.gov

Dear Mr. Watson:

Thank you again for the opportunity to appear before the House Energy and Commerce Subcommittee on Communications and Technology regarding the Telephone Consumer Protection Act. Please find attached my responses to the Questions for the Record from the hearing "Modernizing the Telephone Communication Act," held on September 22, 2016.

If you have any questions, please do not hesitate to contact me.

Respectfully,



Michelle G. Turano

The Honorable Greg Walden

- 1) **The FCC's July 2015 Declaratory Ruling and Order contains a provision allowing one call to a phone number where the caller believes they have consent, when the number may have been reassigned to someone who had not given previous consent. However, this "safe-harbor" has been questioned as the recipient isn't required to inform the caller of the reassigned number or even answer the call for the rule to take effect. Has the FCC's safe-harbor provision been helpful to your business operations?**

The safe-harbor provision is not helpful to a business with a designated membership, such as WellCare Health Plans, Inc. (hereinafter "WellCare"). WellCare's outreach is to current members and does not include phone calls to non-members. During outreach to a member, there are multiple outcomes that may occur during any given call. For example, not all phone numbers have voicemail or an answering machine and even some phone numbers with voicemail or an answering machine do not identify the party that utilizes the number. Frequently, a phone call to a member will ring continuously with no answer. However, in each of those outcomes, despite any evidence a wrong or reassigned number was dialed, the safe harbor provision would be triggered and the next phone call would violate the Telephone Consumer Protection Act (hereinafter "TCPA"). See July 10, 2015, FCC Declaratory Ruling and Order ¶¶ 71-72. As pointed out in the question, many recipients fail to notify our business that they have reassigned a number, which inhibits our ability to comply with our communication obligations with our members. Thus, our business and contractual requirements may be hampered if we are unable to reach a live individual, and open ourselves to liability if we try to speak in person with someone over the phone as a follow up to a missed call. We believe that with some minor tweaks, such as requiring the recipient to inform us that the number has been reassigned and ensuring it doesn't go into effect until we speak with the new owner of the number directly, the safe-harbor provision would be much more helpful to us.

- 2) **In an August Reuters article, Allison Frankel discusses "'Professional' robocall plaintiffs and the 'zone of interest' defense," specifically pointing out businesses started by individuals to profit off of filing TCPA lawsuits. When the law was enacted, do you believe its intent was to encourage these plaintiffs and the businesses that benefit from them?**

WellCare believes that Congress had the best of intentions when originally passing the TCPA with the goal of protecting consumers from unsolicited and unwanted communications. Managed health care, telecommunications and the way consumers receive information has changed and developed significantly since the TCPA's passage. Consumers now rely heavily on communications from their health plans in order to maintain their health and administer their health care. It is regretful that these companies are taking advantage of a law implemented to protect consumers from unwanted calls and causing consumers to potentially miss out on the benefits health care outreach can provide.

- 3) **The Do Not Call Section of the TCPA states: "It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent communications in violation of the regulations prescribed under this subsection." Do you believe this affirmative defense should also be applied to the Private Right of Action section? Why or why not?**

The TCPA provides a private right of action for violations and statutory damages in the amount of \$500 for each violation and up to \$1,500 for each willful violation. When multiplied against a large number of

calls, text messages, or fax transmissions, potential damages in these cases can be significant. As stated previously, WellCare is outreaching its membership. WellCare is heavily regulated by HIPAA and other state and federal regulations in its communications with its membership. In large part due to those regulations and best business practices, WellCare strives to implement robust safeguards along with comprehensive policies and procedures to ensure Compliance. Plaintiffs filing class actions, typically and strategically file broad, generic and all-encompassing lawsuits in order to achieve greater likelihood of success in their outcomes. The challenge for businesses such as WellCare is keeping up with the pace of the ever-changing TCPA litigation landscape. TCPA cases are time consuming and expensive to defend, even though the defendant may be in compliance with the law and forward-thinking safeguards. A safe-harbor affirmative defense is in the best interest of companies who follow the law and implement safeguards to do so.

The Honorable Marsha Blackburn

1) In your opinion, what are the three things Congress makes certain we change in the TCPA when updating the Act?

The FCC should clarify and confirm the regulation of the use of health plan member telephone numbers under the TCPA with the regulation of the same use under the Health Insurance Portability and Accountability Act (HIPAA). They should do this by ruling that the provision of a phone number of a "covered entity" or "business associate" (as those terms are defined under HIPAA) for the purposes of treatment, payment, or health care operations as well as declaring that the prior express consent clarification and the non-telemarketing health care message exemption in the agency's 2015 Declaratory Order be clarified to include "HIPAA covered entities" and "business associates."

These changes should be expedited because it affects the messaging of critical health care decisions and information that helps consumers become engaged in their own positive health decisions. In accordance with HIPAA, such messaging is used to notify consumers about health care services that are included in an existing plan of benefits.

The TCPA permits one call to be made without liability after a telephone number has been reassigned from the person who gave consent to another person who has not given consent (such as a family member or caregiver) to receive communications. Even if this call does not yield actual knowledge of the reassignment, the caller is deemed to have constructive knowledge, and will be liable for all calls thereafter. The FCC should update its policy regarding reassigned phone numbers by allowing appropriate health care related calls to reassigned numbers so that beneficiaries are not deprived of vital health care communications that they want and need.

FRED UPTON, MICHIGAN
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115
Majority (202) 225-2327
Minority (202) 226-3841

October 12, 2016

Mr. Shaun W. Mock
Chief Financial Officer
Snapping Shoals Electric Membership Corporation
14750 Brown Bridge Road
Covington, GA 30016

Dear Mr. Mock:

Thank you for appearing before the Subcommittee on Communications and Technology on September 22, 2016, to testify at the hearing entitled "Modernizing the Telephone Consumer Protection Act."

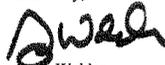
Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

Also attached are Member requests made during the hearing. The format of your responses to these requests should follow the same format as your responses to the additional questions for the record.

To facilitate the printing of the hearing record, please respond to these questions and requests with a transmittal letter by the close of business on Wednesday, October 26, 2016. Your responses should be mailed to Greg Watson, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, DC 20515 and e-mailed in Word format to Greg.Watson@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,



Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna G. Eshoo Ranking Member, Subcommittee on Communications and Technology

Attachments

Additional Questions for the Record
 Modernizing the Telephone Consumer Protection Act
 September 22, 2016

Mr. Shaun Mock
 Chief Financial Officer
 Snapping Shoals Electric Membership Corporation

The Honorable Greg Walden

1. *The FCC's July 2015 TCPA Declaratory Ruling and Order contains a provision allowing one call to a phone number where the caller believes they have consent, when the number may have been reassigned to someone who had not given previous consent. However, this "safe-harbor" has been questioned as the recipient isn't required to inform the caller of the reassigned number or even answer the call for the rule to take effect. Has the FCC's safe-harbor provision been helpful to your business operations?*

The "one-call" safe-harbor provision is appreciated, but bewildering and ineffective. We strongly believe that adding meaningful safe-harbor provisions to the TCPA will be at the center of unraveling the cumbersome regulations that have stifled legitimate business communication to date. Chief among these difficulties is the particularly high standard to which businesses like Snapping Shoals EMC must operate with regard to reassigned phone numbers and the corresponding definition of "called party". Unfortunately, the "one-call" safe-harbor provisions granted within FCC Order 15-72 underestimate the complexity and real-world cost required to meet the "one-call" standard. The FCC asserts¹ that prudent best practices and existing technology in the marketplace should be enough to protect genuine small-business callers. We at least agree in principal that best practices and technology will play a major role in limiting business callers' risk, while also protecting consumers from unwanted phone calls. Yet, the FCC fails to acknowledge the very real probability that a legitimate business caller who places millions of automated phone calls will most likely place an errant phone call even with the most comprehensive business practices and best available technology that money can buy. That is to say nothing of the many small businesses trying to offer competing services with much more constrained budgets. Even worse, by not acknowledging some basic responsibility on the part of the consumer, the FCC fails to acknowledge that a consumer acting in bad-faith could engineer an enormous windfall by simply ignoring one of these errant phone calls.

2. *In an August Reuters article, Alison Frankel discusses "'Professional' robocall plaintiffs and the 'zone of interest' defense", specifically pointing out "businesses" started by individuals to profit off of filing TCPA lawsuits. When the law was enacted, do you believe its intent was to encourage these plaintiffs and the businesses that benefit from them?*

At its core, the basic premise of the TCPA is to protect the American consumer from receiving unwanted, burdensome communications from an unwanted third-party.

¹ FCC Order 15-72 para. 72

Additionally, Congress recognized that even the best legislation should have limits and acknowledged that the TCPA was not intended to prohibit legitimate business communications. I suspect that very few Americans' would disagree with these basic tenets of the original legislation of 1991. In absence of any provisions to the contrary, we can infer that the original TCPA legislation broadly assumed that only unscrupulous callers would be subject to its regulations. In today's reality even organizations with the best of intentions, who are seeking to provide critical consumer driven information, have gotten caught up in a web of unscrupulous plaintiff attorneys that have managed to take advantage of the strict liability provisions found within the statute. These increasingly outdated statutes do not allow for even basic affirmative defenses of good-faith and subsequent reasonable interpretation of the law. It is fair to assume that the original authors of the TCPA never imagined a world in which consumers would not only ask for, but demand constant communication from their service providers. It is also fair to assume that these original authors did not intend to line the pockets of those individuals or organizations that would inevitably seek to build an ill-gotten fortune from within the well intentioned TCPA legislation.

3. *The Do Not Call Section of the TCPA states: "It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent communications in violation of the regulations prescribed under this subsection." Do you believe this affirmative defense should also be applied to the Private Right of Action section? Why or why not?*

The addition of a common-sense, "good faith" defense to Private Rights of Action litigation would provide substantial protection and clarity for the American business community. In lieu of a common sense, "good-faith" affirmative defense many businesses realize that 100% compliance is not probable or realistic. As noted above, we believe that in *MOST* cases a strong system of compliance, coupled with further development and integration of emerging tech solutions should provide protection to both the American consumer and legitimate business communication. Unfortunately, even the best procedures and technology will not prove effective in ALL situations.

For example; my small utility could easily place two million low-balance notifications phone calls to our prepaid members in a year. These courtesy notifications were provided at member request based on a low balance threshold amount of their choosing. Hypothetically, let's assume that all best practices are implemented and no expense has been spared to ensure compliance. Even with world-class equipment and procedures, at best our automated phone calls reach the intended "called party" 99.9% of the time. That small one tenth of one percent uncertainty could generate 20,000 potential TCPA violations at \$500 per phone call, or \$10,000,000. In absence of a reasonable affirmative defense; such risks are unreasonable and the reason that Snapping Shoals EMC discontinued all automated phone notification programs in June 2014.

The Honorable Gus Bilirakis

1. *According to your testimony, your company had to discontinue what you deemed to be an important customer service because of the risks associated with litigation under the TCPA. Some businesses have opted to ensure compliance with TCPA by implementing rigorous monitoring of independent third parties with whom they contract. Unfortunately, with this oversight comes vicarious liability concerns and businesses must weigh the costs of TCPA driven oversight against the potential for litigation.*
 - a. *If the TCPA were modified so an affirmative defense could be available for organizations who adopt a rigorous compliance program, would you be more likely to invest in these types of programs?*

Businesses like Snapping Shoals EMC have no desire to place unnecessary or unwanted phone calls to our members. Our programs are designed to bring value and convenience to those members that we serve. We agree that the business community should do our part in taking reasonable steps to insure that consumer privacy is protected and communication lines remain open. The FCC has outlined numerous best practices² that it believes should protect consumers and offset any business liability concerns. These suggestions could be a great first step towards compliance and would likely greatly reduce any unwanted, errant phone calls. However, even combining this patch-work of best practices cannot and will not result in 100% compliance. As mentioned in earlier testimony, even a success rate of 99.9% could leave my small utility exposed to 20,000 potential TCPA violations annually. That is 20,000 violations at \$500 per violation regardless of the time and money that we invested to prevent unwanted phone calls. For most small businesses, the risks do not outweigh the reward.

In my opinion, providing an affirmative defense, which acknowledges the good-faith efforts of legitimate business callers, would be the single most effective measure to reducing undue liability and protecting consumer interest. TCPA compliance is a large, complicated affair to which no single silver bullet solution exists. Even a combination of best practices and technology will leave large gapping sources of potential liability. For example, third-party “scrubbing” services are frequently cited as a means for business callers to ensure compliance. However, even these “scrubbers” acknowledge that their databases will never be 100% accurate. One such service boasts that it contains over 80% of all mobile records. 80% compliance is a great starting point, but for my utility that still leaves potentially hundreds of thousands of potential violations on the table. Further, these scrubbing services are far from the panacea that some have described. Even phone numbers contained within their databases leave much ambiguity to be resolved, often through expensive, manual processes. Most services provide a confidence score that indicates their ability to match a phone number against a confirmed active user. Inconclusive matches are common place and must be manually resolved. Again, no silver bullet exists so that simply writing a check will ever erase all liability concerns.

² FCC Declaratory Ruling and Order 15-72, para. 86

Attachment 2-Member Requests for the Record

During the hearing, Members asked you to provide additional information for the record, and you indicated that you would provide that information. For your convenience, descriptions of the requested information are provided below.

The Honorable Marsha Blackburn

1. In your opinion, what are three things Congress make certain we change in the TCPA when updating the Act?

Encourage the Use of Technology: Technology could one day be developed that would prove many of our more nuanced disagreements over jargon and lexicon irrelevant and outdated. True meaningful improvement to a problem as large and complex as stopping unwanted phone calls, and by extension updating any TCPA legislation, should acknowledge that technology will always evolve outside the original scope of any updated legislation. The TCPA should enable and encourage big solutions to such a big problem. Proactive solutions aimed at thwarting unscrupulous callers at the origin of the phone call, coupled with more robust do-not-call technology built into our smart phones and networks will be a critical element in our campaign to protect consumer interest, while encouraging legitimate business communication.

Improve Number Reassignments: Number reassignments can be difficult to identify after the fact which is confounded further by varying procedures between phone carriers. Some carriers will reassign a phone number in as few as 30 days, while others wait 60 or even 90 days. Although, new technologies are far from perfect and expensive, they will have to be part of the solution. One small step that could be implemented in the near term would be to extend and standardize the holding period between reassigning phone numbers. The benefits would be twofold: 1) Additional time would allow phone carriers the opportunity to establish a reassigned phone registry. This registry should require a number to be held at least 90 days before reassignment. 2) Additional time would allow business callers time to implement additional quality control processes aimed at detecting number reassignments without fear of inadvertently flagging active accounts.

Affirmative Defense: It is simply not reasonable to ask American businesses to invest millions into new technology and processes without some assurance that they will be given an opportunity to defend themselves against the inevitable errant phone call. Put simply, the risk does not out weight the reward; all the while many American consumers that have grown to depend on timely phone notifications are left quite literally in the dark regarding their business affairs. The FCC has repeatedly suggested that various best practices should protect consumers and limit liability, yet offer no relief to those companies that follow their guidelines and still find themselves confronted with litigation.

In considering language for any potential "safe-harbor" provisions; Congress should avoid codifying specific best practices given the ever changing nature of telecommunications. Broad

language that speaks to a caller's culture of compliance and willingness to respond to consumer wishes would prove more meaningful in the future. Additionally, Congress should consider providing language that would seek to balance compliance with over burdensome, expensive solutions that American small businesses cannot afford.

FRED UPTON, MICHIGAN
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115
Majority (269) 225-2927
Minority (126) 225-3041

October 12, 2016

Mr. Spencer W. Waller
Director
Institute for Consumer Antitrust Studies
Loyola University Chicago
1032 West Sheridan Road
Chicago, IL 60660

Dear Mr. Waller:

Thank you for appearing before the Subcommittee on Communications and Technology on September 22, 2016, to testify at the hearing entitled "Modernizing the Telephone Consumer Protection Act."

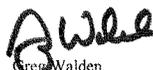
Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

Also attached are Member requests made during the hearing. The format of your responses to these requests should follow the same format as your responses to the additional questions for the record.

To facilitate the printing of the hearing record, please respond to these questions and requests with a transmittal letter by the close of business on Wednesday, October 26, 2016. Your responses should be mailed to Greg Watson, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, DC 20515 and e-mailed in Word format to Greg.Watson@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,



Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna G. Eshoo Ranking Member, Subcommittee on Communications and Technology

Attachments



School of Law
Water Tower Campus
Phillip H. Corboy Law Center
25 E. Pearson Street | Chicago, Illinois 60611
Phone 312.915.7120 | Fax 312.915.7201 | LUC.edu/law

October 24, 2016

Mr. Greg Watson
Legislative Clerk
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Re: Additional Questions for the Record, Hearing on Modernizing the Telephone
Consumer Protection Act, September 22, 2016

Dear Mr. Watson:

Enclosed please find my responses to the Additional Questions for the Record and Member Request for the Record submitted by the Honorable Greg Walden and the Honorable Marsha Blackburn. As with my written statement and my testimony, I provide these responses in my individual capacity as a teacher and scholar in the area of consumer protection law. It was an honor to testify before the Subcommittee on Communications and Technology in this matter. Please contact me if the Subcommittee needs anything further regarding this important consumer protection issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Spencer Weber Waller".

Spencer Weber Waller
Interim Associate Dean for Academic Affairs
Professor and Director
Institute for Consumer Antitrust Studies
Loyola University Chicago School of Law

Attachment 1-Additional Questions for the Record

The Honorable Greg Walden

1. In an August Reuters article, Alison Frankel discusses "Professional robocall plaintiffs and the 'zone of interest' defense", specifically pointing out "businesses" started by individuals to profit off of filing TCPA lawsuits. When the law was enacted, do you believe its intent was to encourage these plaintiffs and business that benefit from them?

Although I have not extensively researched the zone of interest defense referred to in the Frankel article, the article appears to conflate three different issues. The first is the question of constitutional standing that was presented, but not resolved, in the Supreme Court's *Spokeo* decision. The second issue is statutory standing under the TCPA. The final issue is whether the statute was violated in a particular case and whether a particular plaintiff can be deemed to have consented to the communications in question. The cases referred to in the Frankel article seem to conflate these very different considerations and thus do not present a coherent zone of interest defense.

I have the further concern that such a zone of defense conflicts with the plain meaning of the TCPA and does not appear to have been contemplated by Congress in creating the TCPA and its dual system of public and private enforcement. The TCPA establishes a requirement of prior consent for robocalls and certain fax messages and sets out a system of public and private enforcement for violations.

The TCPA is designed as a deterrent to non-consensual telephone calls, and inevitably led to a system of primarily class action enforcement because damages are limited to \$500 (\$1500 for a willful violation) without the statutory availability of attorneys fees for successful plaintiffs as is the case in many other consumer protection statutes. Class actions inevitably arose in order to pool large numbers of small claims and to provide the possibility of seeking judicial approval as to what constitutes a reasonable attorney fees under Rule 23 of the Federal Rules of Civil Procedure. Thus I do not believe that a zone of interest defense was contemplated by Congress in passing the TCPA nor represents an appropriate reading of the TCPA as drafted.

The TCPA does not prohibit consensual telephone calls, texts, and faxes. It may be appropriate in an individual private action under the TCPA to consider whether the named plaintiff "consented" in word or deed to the robocalls in question and whether such a plaintiff would be an appropriate

named plaintiff in a particular class action. Aside from consent, I do not believe a zone of interest defense is appropriate, regardless of whether Congress did or did not consider how many non-consensual robocalls a particular person might receive and bring to the Courts.

2. The Do Not Call Section of the TCPA states: "It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent communications in violation of the regulations prescribed under this subsection." Do you believe this affirmative defense should be applied to the Private Right of Action section? Why or why not?

I do not support creating such an affirmative defense in connection with the private right of action section of the TCPA. In creating the affirmative defense for public enforcement, Congress appeared to assume that there would be robust public enforcement by the Federal Communications Commission which typically has not been the case for a variety of reasons. In creating a separate private cause of action Congress created a strict liability cause of action, but limited statutory damages and did not include the right to attorneys fees. Another affirmative defense in private litigation would create unhealthy incentives for marketers to argue that systems that have failed to prevent unwanted robocalls should none the less relieve them of liability for violations of the law. It would also create unwelcome incentives for sellers to utilize third party service provider to violate the law for their pecuniary interest, and allow both the sellers and the third party service provider to argue that each had an appropriate system in place and that any violation was the responsibility of the other party.

Attachment 2-Member Requests for the Record

The Honorable Marsha Blackburn

1. In your opinion, what are three things Congress make certain we change in the TCPA when updating the Act?

The most important thing that Congress could do in updating the TCPA is to create a Do Not Contact system that operates across all devices and technologies to protect consumers from unwanted marketing contacts. Such a system should differ from the existing Do Not Call Registry, in that it would apply to informational as well as telemarketing calls.

As set forth in the 2014 published version of the report on the TCPA by the Institute for Consumer Antitrust Studies, I would also recommend increasing public enforcement by creating greater incentives for State Attorneys General to enforce the law (through the availability of

attorneys fees and increased penalties) and to empower the United States Federal Trade Commission to bring suit under the TCPA.

With respect to private enforcement, cellular telephone companies should be required to participate in a database that would keep track of recycled cell phone numbers. This would allow callers to utilize the database before they make robocalls, avoiding calling reassigned numbers, and the liability that comes with this situation. A revised TCPA also should clearly state that callers and sellers have an affirmative obligation to (a) obtain and document consent from the called party as to the subject matter of the call *before the call is made*, and (b) keep records of the calls they make.

FRED UPTON, MICHIGAN
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115
Majority: (202) 225-2927
Minority: (202) 225-3641

October 12, 2016

Mr. Richard D. Shockey
Principal
Shockey Consulting
Silver Fox Lane
Reston, VA 20191

Dear Mr. Shockey:

Thank you for appearing before the Subcommittee on Communications and Technology on September 22, 2016, to testify at the hearing entitled "Modernizing the Telephone Consumer Protection Act."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

Also attached are Member requests made during the hearing. The format of your responses to these requests should follow the same format as your responses to the additional questions for the record.

To facilitate the printing of the hearing record, please respond to these questions and requests with a transmittal letter by the close of business on Wednesday, October 26, 2016. Your responses should be mailed to Greg Watson, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, DC 20515 and e-mailed in Word format to Greg.Watson@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,



Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna G. Eshoo Ranking Member, Subcommittee on Communications and Technology

Attachments

SHOCKEY CONSULTING LLC

Richard D. Shockey, Principal
2427 Silver Fox Lane
Reston, Virginia 20191
+1 (703) 593-2683 Voice
richard@shockey.us
rshockey101@gmail.com
www.shockey.us

October 25, 2016

Honorable Greg Walden
Chairman
Subcommittee on Communications and Technology
Committee on Energy and Commerce
House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

RE: *"Modernizing the Telephone Consumer Protection Act"*

Dear Chairman Walden:

Thank you once again for the honor and privilege of permitting me to testify before your subcommittee on Communications and Technology in the matter of Modernizing the Telephone Consumer Protection Act (TCPA) on September 22, 2016.

We are all aware of the problem of robocalls and Caller ID spoofing. It has certainly lead to what some of us in the technology industry have referred to as "security fatigue".¹ Our fellow citizens are simply frustrated that nothing has been done to stop the *illegal* robocalls and businesses are frustrated that they are being unfairly punished for initiating *legal* automated communications.

Mr. Chairman, the TCPA and the laws in general in this area are, in fact, out of date and do not reflect the clear intent of Congress to both protect the privacy of the American people while allowing reasonable automated communication necessary for the safeguard of public health, safety and property.

In my opinion, the problem needs to be addressed on both sides of the equation — both the problems of legal automated communications and the more vicious problem of clearly illegal automated communications.

I wish again to restate my belief that both the TCPA, as well as the Truth in Caller ID Act, need to be revisited *at the same time* if there is going to be progress in this matter. TCPA has gone

¹ <https://www.nist.gov/news-events/news/2016/10/security-fatigue-can-cause-computer-users-feel-hopeless-and-act-recklessly>

too far in punishing legitimate businesses and the Truth In Caller ID act has not done enough to dissuade illegal actors.

Tomorrow, October 26, 2016, should be a significant day in the evolution of solutions to these problems as the industry-led Strike Force will report to the FCC. I am very aware of some of the technical solutions that will be proposed and I support this effort.

Permit me then to answer some of the additional questions posed by you and the Honorable Marsha Blackburn.

If you have any questions or require any additional information relative to these issues and the Strike Force report, or if I may be of further service to your Committee, Congressional Staff or the American people in this matter, please do not hesitate to contact me.

Very truly yours,

SHOCKEY CONSULTING LLC

A handwritten signature in black ink, appearing to read "Richard D. Shockey". The signature is fluid and cursive, with the first name "Richard" being the most prominent part.

Richard D. Shockey

Principal

Response to Questions for the Record
Questions from the Honorable Greg Walden

Question #1: In an August Reuters article Allison Frankel discusses “Professional robocall plaintiffs and the “zone of interest” defense specifically point out “businesses” started by individuals to profit off of filing TCPA lawsuits. When the law was enacted do you believe its intent was to encourage these plaintiffs and the businesses that benefit from them?

Response: Obviously not. The clear intent of Congress has been subverted.

In addition, I have recently noted several other articles that may have relevance on your ongoing deliberations. Ms Frankel has also noted another recent case from the Supreme Court on the definition of “injury-in-fact” which has relevance to TCPA.^{2 34} It might be useful for potential plaintiff’s to actually demonstrate actual harm before going before the Courts. The current state of affairs has created a bizarre form of regulatory entrapment.

Question #2: The Do Not Call section of the TCPA states: “It shall be an affirmative defense action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent communications in violation of the regulations prescribed under this subsection.” Do you believe this affirmative defense should also be applied to the Private Right of Action Section? Why or Why not?

Response: Yes! I would go even further in looking at well understood legislative language surrounding “Safe Harbor” as well as “In Good Faith” provisions that better protect businesses that by accident or inadvertently contact consumers. The clear example of this is contact that occurs when the telephone number has been reassigned.

² <http://blogs.reuters.com/alison-frankel/2016/05/20/early-spokeo-fallout-privacy-defendants-try-to-capitalize/>

³ <http://www.jdsupra.com/legalnews/spokeo-inc-v-robins-and-the-tcpa-the-21119/>

⁴ <https://www.mcguirewoods.com/Client-Resources/Alerts/2016/8/Court-Finds-Spokeo-Closes-Door-TCPA-Claim.aspx>

Member Requests for the Record
Questions from the Honorable Martha Blackburn

Question #1: In your opinion, what are the three things Congress make certain we change in the TCPA when updating the Act?

Response: The problem of robocalls and the TCPA cannot be viewed in isolation. There are two basic problems. First is the issue of perfectly legitimate automatic communications by legitimate businesses with clear prior business relationships. This problem was highlighted by the other panelists in the health care, financial services and utility industries, and even public/private school officials, that need to get timely information of vital importance to consumers.

The second problem is the obvious illegitimate businesses that have no prior business relationships with consumers that are illegally targeting consumers with unsolicited robocalls and fraudulent solicitations.

My three suggestions are:

1. It is highly recommended that Congress revisit the Truth in Caller ID Act at the same time that it reviews TCPA. The Truth in Caller ID Act carried a fatal flaw in that it required "proof of intent to defraud" as the test for actions under the Act. Proof of intent is notoriously difficult to prove and the result of this seemingly innocent clause was to virtually legalize illegal robocalls and spoofing.
2. It is also clear that TCPA and the Truth in Caller ID act need to more formally incorporate different types of tests that the courts can apply in judging the activity in question. It is not clear that either Act carries sufficient "Safe Harbor", "In Good Faith" or "Proof of Injury-In-Fact" that would give businesses some protection from the clearly frivolous suits that are plaguing legitimate businesses.
3. I am not a lawyer, but it is clear that recent court decisions involving the FCC and other regulatory agencies have often centered on Authority to Act. In the absence of clear guidance from Congress, Courts will be forced to apply the "Chevron Deference" standard. What the American people and businesses need is clarity. "Yes you can do this.", "No you cannot do that." Ambiguity only breeds court cases; therefore it is imperative that legislative drafters need to be very specific in the language being proposed. As the robocall Strike Force reports, it may become necessary to revisit some Authority to Act provisions as it is essential to establish a new Telephone Number Trust Anchor as part of the ATIS-SIP Forum STIR/SHAKEN framework proposal that will be recommended by the Strike Force.