S. HRG. 114–560

THE TELEPHONE CONSUMER PROTECTION ACT AT 25: EFFECTS ON CONSUMERS AND BUSINESS

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

MAY 18, 2016

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ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

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THE TELEPHONE CONSUMER PROTECTION ACT AT 25: EFFECTS ON CONSUMERS AND BUSINESS

WEDNESDAY, MAY 18, 2016

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 10:12 a.m., in room SR–253, Russell Senate Office Building, Hon. John Thune, Chairman of the Committee, presiding.

Present: Senators Thune [presiding], Blunt, Fischer, Sullivan, Heller, Gardner, Daines, Nelson, Cantwell, McCaskill, Klobuchar, Blumenthal, Markey, Booker, and Manchin.

OPENING STATEMENT OF HON. JOHN THUNE, U.S. SENATOR FROM SOUTH DAKOTA

The CHAIRMAN. This hearing will get underway. My apologies for being tardy. I'm running around a lot today already, so I thank you all for your patience. And welcome you to today's hearing on the Telephone Consumer Protection Act.

When passing TCPA nearly 25 years ago, Congress expressly sought a balanced approach that protects the privacy of individuals and permits legitimate telemarketing practices. As a result of TCPA, a number of abusive and disruptive telemarketing practices have been significantly reduced or eliminated. For example, companies have to maintain Do Not Call lists and cannot make solicitation calls before 8 a.m. or after 9 p.m.

But, TCPA is also showing its age, and there are opportunities to build on its consumer benefits while also ensuring consumers fully benefit from modern communications. Consumers should be able to take advantage of new technologies that help them avoid falling victim to unscrupulous actors and those callers who ignore Do Not Call requirements. I doubt there's a person in this room who has not received a recorded voice on their mobile phone telling them that they've won a cruise. We should also ensure that the FCC continues to take action against abusive and harassing practices, and has the tools it needs to bring bad actors to justice, including those operating from overseas.

We recently took a step in this direction by unanimously approving Ranking Member Nelson and Senator Fischer's anti-spoofing legislation as part of the FCC Reauthorization Act. But, our discussion today is not only about policing abusive and harassing practices and stopping bad actors. We must also acknowledge that most

businesses are trying to do the right thing and play by the rules. And we need to understand whether TCPA is inadvertently hurting the good actors and consumers.

When Congress passed TCPA, cell phones were uncommon and mobile telephone service was extremely expensive. It made sense to have particularly strict rules about contacting people on their mobile phones. Today, however, mobile phones are not only ubiquitous, they are actually smart devices that do much more than just send and receive phone calls. Consumer behavior is also far different than it was back in 1991. In fact, today's consumer expectations about communications connectivity and the benefits of better contact with their doctors, schools, favorite charities, and, yes, even their lenders, would be unrecognizable to Congress 25 years ago. More than 90 percent of Americans now have a mobile phone, and nearly half of all households in the United States are mobile-only. These percentages are even higher for young adults. Simply put, if you can't reach these people on their mobile phones, you're going to have a hard time reaching them at all. The balance forged decades ago may now be missing the mark, and consumers may be missing the benefits of otherwise reasonable and legitimate business practices.

The Federal Communications Commission was tasked by Congress with assuring a balanced application of TCPA. The Commission, however, has struggled to apply TCPA to a changing communications marketplace, and the agency actually seems to be creating more imbalances and more uncertainty. The Commission's rules have created new questions rather than answers. For example, what is an auto-dialer? The Commission will not answer that clearly, and, instead, only says it's something other than a rotary-dialed telephone. The FCC declared last year that it would not address the exact contours of the auto-dialer definition or seek to determine comprehensively each type of equipment that falls within that definition. Hospitals, charities, utilities, banks, and restaurants should not have to engage engineers and telecommunications attorneys in order to know if they can call their customers without being sued.

Another example is what to do if a customer's number has been reassigned. While the FCC claims to have addressed this issue, companies say there is still no way to know with certainty. What is certain, however, is that, if a phone number has been reassigned and you call it more than once, you have—you could be liable for $500 per call, even if the new party never answers.

TCPA litigation has also become a booming business. TCPA cases are the second most filled type of case in Federal courts, with 3,710 filed last year alone. That represents a 45-percent increase over 2014. And the companies affected by an unbalanced TCPA may surprise you. For example, Twitter stated the following in a filing at the FCC, and I quote, "As the result of this hyper-litigious environment, innovative companies increasingly must choose between denying consumers information that they have requested or being targeted by TCPA plaintiffs' attorneys filing shakedown suits. No company should be put to such a choice."

The cost of getting the balance wrong isn't just burdensome litigation, it is also the cost to consumers and to the economy of the

important consumer contact that is not being made, for fear of running afoul of an ill-defined rule. Text messages to let parents know about weather-related cancellations, calls to struggling low-income households know how to keep the heat from getting cutoff, calls to alert borrowers that they're at risk of defaulting on their debts and ruining their credit ratings, and follow-up calls to patients to make sure they understand their post-discharge treatment plans.

Another specific matter that will be discussed today is the Obama administration's carve-out to allow robocalls to mobile phones to collect debts owed to or guaranteed by the Federal Government. The administration used last year's must-pass Bipartisan Budget Act as a vehicle to achieve its robocall carve-out. The Committee reached out to the Office of Management and Budget, the Department of the Treasury, and the Department of Education to testify about why the administration has prioritized this robocall carve-out for years. Unfortunately, the Obama administration is not represented before us today, but we will continue to seek its input as its robocall carve-out is implemented by the FCC and as the Committee continues its oversight of TCPA.

Ultimately, finding the right balance is essential to protecting the privacy of consumers while making sure that they have reasonable access to the information they want and need and making sure good-faith business actors can reasonably assess the cost of doing business.

We have a variety of perspectives represented on the panel before us today, and I look forward to hearing your testimony, and appreciate your participation. Thank you.

I'll recognize the Senator from Florida, our Ranking Member, Senator Nelson.

STATEMENT OF HON. BILL NELSON,
U.S. SENATOR FROM FLORIDA

Senator NELSON. Mr. Chairman, if you go anywhere in this country and you ask a consumer, "Do you want to receive robocalls?" or you ask them, "Would you like to receive robocalls on your cell phone?"—you may get the cell phone thrown at you. There are few things that unite our countrymen and -women like the distaste for robocalls that are interrupting them at dinnertime, in the middle of driving—I mean, it goes on and on. It's a sentiment that nearly all of us share, and that's why, for the last 25 years, the laws have sided with consumers. The number of consumer complaints about robocalls, regardless of the laws, continue to increase. The FCC receives tens of thousands of robocall complaints every month. And we all have stories to tell.

One of our friends signed up for a landline service one morning, and, by the afternoon, before he had given his new number to his family and friends, his phone was being flooded by robocalls. So, he gave up the landline. In fact, how many of us know friends at home that have given up the landline and just used the cell phone, for that exact same reason? They don't want the robocalls. Most of us, our cell phone is our lifeline, and if we allow those annoying robocalls to begin freely bombarding folks, where do consumers go to escape the harassment?

So, what would happen on mobile phones is that they would start to ignore the calls from unknown numbers so they don't have to hear another recording, only to miss an important call. Or what about the senior citizens? And how about low-income Americans? Many of those consumers have calling plans that are restricted in the number of minutes that they can use every month. So, opening the floodgates of wireless robocalls to those individuals would have an immediate adverse effect.

Or what about driving down the road, just like I was this morning, dodging in and out of traffic, coming across the 395 bridge, people cutting in front of me and me having to slam on the brakes, and suddenly you get a call, and you want to answer it, but it's not something important. It's a robocall. And therefore, leading to distracted driving. And where would all of that end?

The frustration is there also because of fraudulent callers. Scammers are always going to be a problem. We have tried to address that directly in a bipartisan way with the Chairman, thanks to his leadership. Senator Fischer and I have teamed up on our bill to combat spoofing. I'd also like us to see a revamped, improved Do Not Call List.

Now, obviously, there are legitimate businesses and other reasons to call consumers on their wireless phones. But, there's already an answer to that. Just get the consumers' consent. That has been the law since 1991. In this bubble of Washington, policymakers are often in danger of losing sight to what is actually out there in America. And there's no doubt. Ask that question of any American consumer.

So, I want to thank you, Mr. Chairman, for calling this hearing to shed light on the distaste of American consumers about these annoying calls.

The CHAIRMAN. Thank you, Senator Nelson.

All right, we'll get underway. We have with us today The Honorable Greg Zoeller, who's the Attorney General for the State of Indiana; Ms. Becca Wahlquist, testifying on behalf of the U.S. Chamber Institute of Legal Reform; Ms. Margot Saunders, with the National Consumer Law Center; Mr. Rich Lovich, testifying on behalf of the American Association of Healthcare Administrative Management; and Ms. Monica Desai, who's a Partner at Squire Patton Boggs law firm.

So, we'll start on my left, and your right, with Mr. Zoeller. Please proceed. And welcome to the Committee.

STATEMENT OF HON. GREG ZOELLER, ATTORNEY GENERAL, STATE OF INDIANA

Mr. ZOELLER. Thank you, Mr. Chairman and members of the Committee. I appreciate the opportunity to come and be heard.

I'll pick up where Senator Nelson left off, that we do, in the state of Indiana, receive remarkable number of complaints each year. I think last year it was somewhere around 14,000 calls, well the largest number of complaints in our consumer protection area. Over half of those complaints were about robocalls specifically.

Indiana has a unique statute that was passed in 1988 that prohibits the use of the autodialer to make calls to consumers. And this is across the board. We've successfully defended that statute

up through the Federal courts, up to the 7th Circuit Court of Appeals, really talking about how we do not allow these calls for any—other than those that, like Senator Nelson mentioned, have opted in. So, the schools and the pharmacies and the people that you referred to, in terms of important calls, have opted in, and we do have those that are still being heard.

But, I think the points that I want to make, I'll—I've got written testimony that I've submitted, but I'll kind of summarize briefly that, really, the focus of our attention has been on maintaining the protection of our own statutes. So, the recent budget bill that you mentioned that had the exception for Federal debt now challenges the ability of our state to defend our own statute. Since we did not have any exceptions, we can claim that there are no, let's say, unconstitutional acts on the part of the state, so now that we have this new exception for Federal debt, I know the case that's recently filed by the American Association of Political Consultants challenges the constitutionality. And, according to our read of the 7th Circuit Court of Appeals in our own defense, I think we've got risks now whether that exception might raise the question about whether it's unconstitutionally distinguishing between certain types of calls. So, we have a blanket exception. It has been very effective. And we have been able to defend, but based on the fact that we did not have those types of exceptions that now the Federal Government has allowed.

Just briefly, I'll say that, you know, in the last month alone, according to YouMail, which is a national robocall index, they estimate that 2.5 billion robocalls were made in the month of March. So, again, the barrage of this—I, quite frankly, had to ask my staff whether that was a legitimate number, because I couldn't believe it. But, unless someone wants to argue the other side, I'll just leave it that that's the only number we've got, in terms of the volume of these.

We do have a very specific sense of what a robocall, the autodialer, is. When it can blast out 10,000 calls per minute, it's a robocaller. And when you say that you get a call on a new line, it's not that they actually called you; they called everybody in the area code. So, within an hour and a half, you can literally call everybody in Washington, D.C.

We've heard from a number of companies that they really need the opportunity to call cell phones. But, again, I will side with Senator Nelson's view that we—that's the last link, in terms of the ability to communicate, since most of us have long since pulled out our landline due to the robocalling abuse. And again, most of it's from overseas, so, again, not something that either State attorneys general or the Federal Government can address.

Frankly, the problems that we have with robocalls, I've warned all the citizens of our state that, if it's a robocall, you should assume it's a scam artist. It's really the best tool for scam artists. So, anytime you see these calls, we've trained the people of Indiana, hang up as quickly as you can, because, frankly, anything you say or do, even just staying on the line, will actually be sold to others. The information that you're going to be home on a Wednesday at 10:30 is now known by the people who have done the robocalling, and they sell that to others that may want to use other techniques

to call you at that same time and place, knowing that you'll be home, the likelihood. And again, the risk to seniors is really where we see this. The use of this technology to collect data, when you—we talk about scam artists, you're really talking about the old version of a confidence man. The more they understand about you, the more they can win over your confidence. And knowing when you're going to be home, time, place, and the ability to target people with the amount of information, the risk to consumers are not just the harassment; this is the number-one tool to gain the information that the scam artists are using to bilk particularly the seniors in our state.

I'll, finally, just say that we were very disappointed with the exception that was carved out. Without this type of hearing—we're having a hearing after-the-fact of the budget bill, which, again, the Chairman noticed that it was put in without really this kind of attention—we're—I'm representing, now, 25 attorneys general who have asked that you take up the HANGUP Act, which would take that back out. So, while we've made an exception, which, again, risks the constitutionality defense, plus you're targeting particularly the younger students who are using their cell phone, and now that we've managed to run up a 1.3 trillion dollars of student loan debt, again, that's going to be the number-one target. So, we're very worried about where this ends. We're against creating a safe harbor, a number of reasons we can go through.

But, finally, I would just say that the point that—for years, 25 years now, of having the TCPA, there has always been the opportunity for legitimate businesses to ask people to opt in, "We have new programs that you may want to know about. Please sign up, and we won't harass you. We will use it very specifically. You can always opt out." But, we've never seen anyone really go through this process of asking consumers whether they would like to get a robocall. So, again, without the trial of going through the process of trying to get people's opt-in consent, the assumption should be made that people don't want this. And businesses know they will never get people to sign up for a robocall unless they can really argue the case to their own customers. This shouldn't be something that the Federal Government allows, that the people that you represent have already made it pretty clear that they don't want.

So, thank you for——

The CHAIRMAN. Thank you, Mr. Zoeller, very much.

[The prepared statement of Mr. Zoeller follows:]

PREPARED STATEMENT OF HON. GREG ZOELLER, ATTORNEY GENERAL, STATE OF INDIANA

Thank you Mr. Chairman and members of the Committee. I am Greg Zoeller, the Attorney General of Indiana. I appreciate the invitation to speak to you today.

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 2.5 billion robocalls were

made in the U.S. in the month of March alone. Sixteen of the top twenty robocallers were debt collectors.[1]

It has been a long, tireless battle to help protect Hoosiers' privacy by working to stop unwanted calls that pester, intrude and all too often scam people. In Indiana, we've advanced some of the strongest telephone privacy laws and banned nearly all types of robocalls. A Federal court recently upheld Indiana's ban on political robocalls to peoples' phones without their consent. We've also expanded our state's Do Not Call law to include cell phones.

Unfortunately, the Federal Telephone Consumer Protection Act (TCPA) was recently altered, undermining our tough state laws. The new amendment allows debt collection robocalls to peoples' cell phones if the debt is owned or guaranteed by the United States. Prior to the amendment, the TCPA prohibited all robocalls to cell phones. By carving out this exception, Congress is legitimizing robocalls and allowing them a free pass to harass people.

Debt collection robocalls are aggressive, relentless, and often inaccurate. Of the nearly 700 debt collection complaints my office received last year, about 90 percent were because the caller was harassing the wrong person. The vast majority of robocallers are scam artists. Legitimizing some types of robocalls adds confusion and creates more opportunity for fraud, particularly as government impersonation scams rise. We had more complaints about the IRS impersonation scam this year than any other telephone privacy complaint, with nearly 1,400 complaints received this year at a rate of 10 complaints per day.

The debt collection exception particularly burdens young Americans struggling with student debt. College students and recent graduates are already buried in mountains of debt. Blasting them with robocalls, running up their cell phone bills and putting them at risk for fraud only adds insult to injury. In a letter sent earlier this year, I—along with 24 state attorneys general—called on the Committee to defend the telephone privacy rights of citizens by passing the HANGUP Act and keeping the ban on robocalls to cell phones intact.

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. There is no "safe harbor" for those who hire telemarketers or buy leads to sell their products in Indiana. Our legislature clearly stated that liability extends not only to those who make calls, but also to those who cause them to be made. That is why I am urging you not to water down the TCPA by approving any amendment that lets sellers off the hook.

I would also like to stress the importance of the TCPA's provision that allows private citizens to take action against companies and individuals that violate their telephone privacy rights. As Congress envisioned in 1991, individuals can pursue legal cases against telemarketers, faxers and debt collectors who violate the TCPA. This tradition has produced a rich body of case law, and curbed abuses by those who would otherwise ignore TCPA restrictions.

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.

Thank you for your time. I am available for any questions.

The CHAIRMAN. Ms. Wahlquist.

STATEMENT OF BECCA WAHLQUIST, PARTNER, SNELL & WILMER, L.L.P., ON BEHALF OF THE U.S. CHAMBER INSTITUTE FOR LEGAL REFORM AND U.S. CHAMBER OF COMMERCE

Ms. WAHLQUIST. Good morning, Chairman Thune and Ranking Member Nelson, members of the Committee. That was my good mornings.

My name is Becca Wahlquist. I am honored to represent the U.S. Chamber of Commerce and the Chamber of Institute for Legal Reform testifying before you today.

[1] Source: *http://www.youmail.com/phone-lookup/robocall-index/2016/march*

The context for my knowledge about the TCPA is that, for over a decade, I have defended various companies sued under the TCPA for a variety of communications made via phone, text, and facsimile. So, I've been a firsthand witness to the growing cottage industry of TCPA plaintiffs lawyers who have been targeting American businesses. I can confirm that, in the past few years, the problems with TCPA litigation abuse have only worsened. And so, we need your help.

Over-incentivized plaintiffs, a growing TCPA plaintiffs' bar, and an antibusiness 2015 order from the FCC have led to an explosion of litigation in our country, litigation that is less about protecting consumers and more about driving a multimillion-dollar commercial enterprise of TCPA lawsuits. These suits, for the large part, are not about marketing calls. They're not about the kinds of robocalls that we were just hearing of. Robocalls are those indiscriminate calls reaching out, trying to get anyone, going through the numbers in an area code, just getting someone to pick up the phone. Robocalls are not what my clients have sent.

So, for example, a client that has millions of customers, has a lot of automated systems, a customer's credit-card payment is rejected. The customer has provided a telephone number as their point of contact to the company. The company then contacts the customer to let them know, "Your credit card's been rejected," because if they don't know that, and their service gets turned off, there are going to be fees to get your service turned back on again. So, this is all trying to provide information to a customer-provided number.

The biggest driver of litigation now is if that number has been reassigned and the company has no knowledge about the reassignment. So, who they then send that message to ends up being a new owner, and that's what's driving a big chunk of the TCPA litigation now, is that you now have someone who says, "Well, I didn't consent to get that call," and especially if they don't inform the company, the calls can keep rolling in for other reasons, and then you start getting, "I now have 40 calls, now I want my $20,000," and you get the demand. And this is what companies are facing over and over again.

The TCPA itself does not provide for attorneys' fees. It's clear that TCPA class lawsuits are just a lawyer-driven business at this point. Attorneys' fees awards are getting pulled from common class funds, dwarfing any recovery for individual consumers. For example, in 2014, the average attorneys' fees awarded in a TCPA class action was $2.4 million, while the average class member's award in those actions would be $4.12.

It's not just large companies who are finding themselves targeted. Small businesses throughout the country are finding themselves brought into court when they had no intention of violating any law, they had no knowledge of the TCPA. I have one client right now who has six employees and found me on the Internet because I talk about TCPA, and I took on their case. And if they can't—they're not sure what to do. They're going to have to shutter their business and fire their employees and close shop if they can't get past this TCPA lawsuit that's being brought on a class-action basis by someone who received a call at a reassigned number.

So, small businesses throughout the country, a wide range of industry, so you have—literally thousands of different companies are being sued under the TCPA right now—social media companies, electric companies, banks, sports teams, pharmacies, family owned plumbing companies, a ski resort, an accountant, a local dentist office. They've all found themselves defending against TCPA litigation and facing what, for them, is potentially annihilating statutory damages for gotcha violations. And these are not spoofing robocalls, these are legitimate communications that these companies are trying to make.

The TCPA is not only a liability trap, it's a vicarious liability trap, as well. So, for example, there are companies that make no calls, they have no telemarketing, they have no interaction with consumers—such as manufacturers—and they're finding themselves getting dragged into TCPA litigation on the argument that, "Your product name was mentioned in the spoofed robocall that I received. And, because your name was mentioned, you're on the hook and you are responsible." And this is a problem, because you have companies with deep pockets now in litigations having to defend themselves on a class-action basis, where the statutory damages are so potentially annihilating that it really forces settlements rather than a defense.

So, I provided some examples in my witness statement of some of the litigation abuse, such as the Pennsylvania woman who subscribes to 35 cellular phones, carries them around in a suitcase with her so she can jot down all the calls that she gets. She specifically chooses area codes from Florida areas so that they are more likely to have potentially socioeconomically depressed conditions. She chooses the area codes carefully and then waits for reassigned numbers to come in, and brings hundreds of suits.

I mentioned the Ohio man who was so resistant to putting his number on the Do Not Call List that he actually fought up through the Ohio Supreme Court to be able to keep getting calls, because he wanted to bring suits under them and didn't want to be on the Do Not Call List.

There are a lot of plaintiffs that are—people that are making their living right now as TCPA plaintiffs.

I also provided some examples in my written statement of TCPA attorneys who are behind quite a bit of litigation abuse.

So, it has been 25 years since the TCPA was drafted, and the equipment that was focused on was equipment that doesn't even exist anymore. The original intent of the TCPA is something I discuss in part 2 of my statement. I ask you to review that, to think about the changes that need to be made. I make suggestions in part 5 of my statement.

I'm just here today to sum up, to voice the hope of thousands of businesses being sued under the TCPA, that Congress will act to update the TCPA, provide the greatest degree of clarity and alleviate the intolerable and unfair burdens that portions of the statute are placing on legitimate American businesses.

[The prepared statement of Ms. Wahlquist follows:]

PREPARED STATEMENT OF BECCA WAHLQUIST, PARTNER, SNELL & WILMER L.L.P., ON BEHALF OF THE U.S. CHAMBER INSTITUTE FOR LEGAL REFORM AND U.S. CHAMBER OF COMMERCE

Chairman Thune, Ranking Member Nelson, and distinguished members of the Committee, thank you for inviting me to testify on behalf of the U.S. Chamber Institute for Legal Reform ("ILR") and U.S. Chamber of Commerce. The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than three million companies of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system. ILR is an affiliate of the Chamber dedicated to making our Nation's civil legal system simpler, faster, and fairer for all participants.

I appreciate the opportunity to testify about the impact of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA") on American businesses big and small, in a manner never intended by the drafters of this 25-year-old statute.

The TCPA is a well-intentioned statute that established our Nation's Do Not Call list and carried forward important policies. But portions are horribly outdated; in particular, Section 227(b), which addresses technologies used for cold-call telemarketing in the early 90s, is now being expanded to attach liability to all manner of calls (*i.e.,* informational and transactional) placed by businesses small and large to customer-provided numbers. TCPA litigation is also fueled by statutory damages that are untethered to any actual harm, and that can quickly balloon to staggering amounts of potential liability.

Unfortunately, it is American businesses, and not harassing spam telemarketers, who are the targets for these suits. As FCC Commissioner Pai recently noted, "The TCPA's private right of action and $500 statutory penalty could incentivize plaintiffs to go after the illegal telemarketers, the over-the-phone scam artists, and the foreign fraudsters. But trial lawyers have found legitimate, domestic businesses a much more profitable target." [1] Indeed, businesses reaching out in good faith to customer-provided telephone numbers are now the most common target of TCPA litigation.

It is time for this statute to be revisited and brought in line with other Federal statutes that provide for statutory damages when there is no actual harm. While protections should remain for consumers, businesses too need protection from astronomical liability for four years' worth of communications to customer-provided numbers (with no stated statute of limitations, courts have applied the default four-year period in TCPA litigation). As further detailed below, the TCPA has created perverse incentives for persons to invite calls from domestic businesses and then sue for those calls, and for lawyers to search avidly for deep-pocket defendants calling their potential clients, even offering smartphone applications to help generate those lawsuits. TCPA litigation abuse is rampant, and its negative impact on American businesses is not what was intended when this statute was passed in a different technological era.

I. Background: The Destructive Force of TCPA Litigation

The TCPA was enacted twenty-five years ago to rein in abusive telemarketers. But in recent years American businesses have discovered that if they reach out to customers via call, text, or facsimile for any reason, their company is at risk of being sued under the TCPA.

A plaintiff claims that a communication was made without his or her consent using certain technologies, and more often than not, that plaintiff claims to represent a nationwide class seeking the $500 (or $1,500, if willful) statutory damages available under the TCPA for *each* communication. Thus, the small business that sent 5,000 faxes finds itself being sued for a minimum of $2.5 million; the restaurant that sent 80,000 text coupons is sued for trebled damages of $120 million; and the bank with 5 million customers finds itself staring at $2.5 billion in minimum statutory liability for just one call placed to each of its customers.

Individual plaintiffs can also stockpile calls they believe violate the TCPA for years, and then make demands or sue once they reach critical mass—seeking $20,000 to $60,000 in individual damages, for example, for 40 unanswered calls a company thought it was placing to its own customer's number over a three-year period. The targeted company must then decide whether to pay plaintiffs' counsel or the complaining individual, or to spend significant money defending an action in

[1] *See In re Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 30 F.C.C.Rcd. 7961, 8072–73(2015) (Pai Dissent).

which, when a class is alleged, has statutory damages that can reach into the millions or billions of dollars.

For over a decade, I have defended various companies sued under the TCPA for a variety of communications made via phone, text, and facsimile. I have been witness to the growing cottage industry of TCPA plaintiffs and lawyers targeting American businesses that reach out to their own customers for any reason (transactional, informational, or marketing), and I can confirm that in the past few years, the problems with TCPA litigation abuse have only worsened. Over-incentivized plaintiffs and a growing TCPA plaintiffs' bar, as well as an anti-business July 2015 Order from a sharply divided FCC majority,[2] have led to an explosion of litigation throughout the country—litigation that is less about protecting consumers and more about driving a multi-million dollar commercial enterprise of TCPA lawsuits.

Indeed, while the TCPA itself does not provide for attorneys' fees, it is clear that TCPA class lawsuits are a lawyer-driven business, with attorneys' fees awards (pulled from common class funds) dwarfing any recovery for individual consumers. For example, one survey of Federal TCPA settlements found that in 2014, the average attorneys' fees awarded in TCPA class action settlements was $2.4 million, while the average class member's award in these same actions was $4.12.[3]

And it is not just large companies who find themselves targeted: Small businesses throughout the country are finding themselves brought into court when they had no intention of violating any law and had no knowledge of the TCPA. One family-owned company from Michigan, Lake City Industrial Products, Inc., struggled for several years to defend a TCPA class action for 10,000 faxes, providing a chilling example of how the risks of unknowingly violating the TCPA can be exacerbated by lead generators who reach out to small companies and promise an inexpensive and legal way to get new businesses. Lake City received a faxed advertisement suggesting a way to generate new business: faxes to be sent to approximately 10,000 targeted businesses, all for the low sending cost of $92.[4] The family-run company believed it was engaging in a legal marketing tactic and worked with the fax advertiser to design the facsimile it would send; on summary judgment, the court found Lake City liable for approximately 10,000 violations of the TCPA for the unsolicited marketing facsimiles, even though Lake City noted that statutory damages of $5,254,500 would force its bankruptcy.[5] This is just one of the small businesses that has found itself facing annihilating statutory damages and accruing staggering defense costs for sending faxes in the modern age, when facsimile machines are no longer expensive and, indeed, most "facsimiles" are converted to e-mail PDF and sent to a recipient's e-mail by company servers.

With such riches to be had through TCPA lawsuits, between 2010 and 2015, the amount of TCPA litigation filed in Federal court increased by 940 percent.[6] For just one example of how this has impacted the already-crowded Federal court system, look to Florida: in 2015, at least 170 TCPA actions were filed just in Florida's Federal courts, compared with less than 30 such Federal actions in 2010.[7]

The dramatic increase in TCPA litigation has been spurred by multi-million dollar settlements (such as Capital One's $75 million settlement in 2014), as well as news of individual awards in the hundreds of thousands of dollars (such as one New Jersey woman's $229,500 verdict against her cable provider in July 2015,[8] or a Wisconsin woman's $571,000 verdict in 2013 against the finance company calling her husband's phone after she defaulted on car payments[9]).

Attorneys have profited as well, often teaming up to split the costs of "investing" in a TCPA litigation, so that multiple firms split the business risk and share in the reward when companies facing enormous statutory damages end up settling. In the Capital One action, for example, when considering the appropriate attorneys' fees

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[2] *See In re Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 30 F.C.C.Rcd. 7961 (2015) (hereafter, "July 2015 FCC Order"). Various appeals of this Order have been consolidated and are now pending before the D.C. Circuit Court of Appeals.

[3] *See* Wells Fargo Ex Parte Notice, filed January 16, 2015, in CG Docket No. 02–278, p. 19, available at *http://apps.fcc.gov/ecfs/document/view?id=60001016697.*

[4] *See Am. Copper & Brass, Inc.* v. *Lake City Indus. Products, Inc.,* 1:09–CV–1162, 2013 WL 3654550 (W.D. Mich. July 12, 2013) (business retained fax blaster to send faxes; no question that the business first inquired whether such faxes were legal and received assurances that they were).

[5] *See id.*at *6.

[6] *See http://webrecon.com/out-like-a-lion-debt-collection-litigation-cfpb-complaint-statistics-dec-2015-year-in-review/.*

[7] Source: Bloomberg Law Litigation & Dockets (searched on May 10, 2016 with a search of "TCPA" OR "telephone consumer protection" in the Florida District Courts).

[8] *King* v. *Time Warner Cable,* 113 F. Supp. 3d 718 (S.D.N.Y. 2015).

[9] *Nelson* v. *Santander Consumer USA, Inc.,* 2013 WL 1141009 (W.D. Wisc., March 8, 2013), a decision later vacated by agreement of the parties as part of a confidential settlement.

(rather than the 33–40 percent of the award the named plaintiffs had agreed to with their various lawyers), the court recognized that while Capital One had many defenses that could extinguish the plaintiffs' TCPA claims, the *in terroem* value of settling an action with even a slight chance of billions of dollars in statutory damages was "bankruptcy-level exposure" that made settlement (and a fees award) more likely than not, so that a fees award of a little over 20 percent was more appropriate.[10] The plaintiffs' law firms were awarded their costs and $15,668,265 in fees out of the settlement fund.[11]

Businesses of all sizes in a wide range of industries—from social media companies, electric companies, banks, sports teams, and pharmacies, to a family-owned plumbing company, a ski resort, an accountant, and a local dentist's office—have found themselves defending against TCPA litigation and demands. Indeed, the TCPA is not only a liability trap, but also a vicarious liability trap as well. For example, companies (such as manufacturers) who place no phone calls to consumers are finding themselves defending class action litigation for millions of calls or texts placed by downstream resells simply because those communications purportedly mentioned their name-brand products. Companies are subject to the expense of defending against claims such as, for example, a text message was sent on their behalf, when the company did not send the message, did not authorize that such messages can be sent, and had no knowledge of which business partner (if any) would breach its contract to perform illegal telemarketing (as often the actual senders of spam text messages spoof the originating number that would show in the Caller ID field to hide their identity). Even the simple mention of the company's name in the text message subjects it to class-wide TCPA litigation by plaintiffs' attorneys hoping for the big payday of a settlement (because so many companies do settle due to the *in terrorem* specter of billions of dollars in potential damages, if a large enough class could be certified.[12]).

To better explain the current TCPA landscape, Part II of my testimony below first addresses the original intent of the TCPA and the language that, in 1991, was designed to target certain abusive and harassing marketing calls, and then explains how the statute has been twisted and expanded without Congress' input to apply to modern technologies. Part III examines the current driving forces behind TCPA cases, and the reasons that companies cannot fully protect themselves from suits under Section 227(b). Part IV provides examples of just some of the rampant litigation abuse by both serial TCPA plaintiffs and by attorneys incentivized to bring TCPA lawsuits at an ever-increasing pace. I conclude in Part V by voicing the hope of the thousands of businesses being sued under the TCPA: that Congress should act to update the TCPA in order to provide the greatest degree of clarity and to alleviate the intolerable and unfair burdens that portions of this statute are placing on businesses. In order to start that discussion, I provide several recommendations that would bring the TCPA's private right of action in line with that of other Federal statutes offering consumer remedies and that could help protect American companies and Federal courts from the repercussions of litigation abuse, and allow business to continue communications helpful and important to their customers.

II. The Original Intent, and Current Application, of the TCPA

The TCPA was enacted during a very different technological era, and is now twenty-five years removed from modern technologies. The telemarketing calls and faxes that the TCPA was designed to curtail were made by aggressive marketers employing tactics—such as random number generation or sequential dials—that systematically worked through every possible number in an area code, with the hope of getting someone to answer the phone or look at a fax with a marketing pitch for a product or service. Facsimile machines required expensive thermal paper; cellular phones were extremely uncommon (and very bulky) with expensive usage costs—thus, special protections were put in place for unsolicited calls made to cell phones and for unsolicited faxes that did not provide an easy opt-out. Caller ID was not in use, and so the only way to know who was calling was to pick up the ringing

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[10] *See In re Capital One Tel. Consumer Prot. Act Litig.,* 80 F. Supp. 3d 781, 805 (N.D. Ill. 2015), appeal dismissed (May 5, 2015), appeal dismissed (June 8, 2015), appeal dismissed (June 26, 2015) (also recognizing "the strong incentives to settlement created by the magnitude of Capitol One's potential liability").

[11] *Id.* at 809.

[12] As Chief Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit has explained, certification of a class action—even one lacking in merit—forces defendants "to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability. *In re Rhone-Poulenc Rorer Inc.,* 51 F.3d 1293, 1299 (7th Cir. 1995).

telephone. Text messages did not exist (indeed, e-mail was still uncommon), and today's smart phones were science fiction fantasies.

An understanding of the technologies available in 1991 is crucial to an understanding of the TCPA's intent: Businesses reaching out to their own customers were not doing so through what the statute defined as "ATDS machines"—systems capable of randomly and sequentially generating and dialing numbers,[13] which were being used by telemarketers who did not care whom they reached, as long as they could get a certain number of people to pick up the phone. Congress was focused on the belief that limiting calls from ATDS autodialers would stop a certain kind of calling technology that "seized" phone lines that had been called randomly or sequentially.[14]

The TCPA was designed to address consumer privacy concerns and serious intrusions from that type of aggressive marketing. As the Supreme Court has noted, "Congress determined that Federal legislation was needed because telemarketers, by operating interstate, were escaping state-law prohibitions on intrusive nuisance calls."[15] The TCPA set rules about the kinds of consent required to make certain communications to phones and facsimile machines,[16] and further authorized the establishment of a national Do Not Call (DNC) list that would record consumers' requests to not receive any telemarketing calls.[17] The FCC was tasked with implementing the TCPA and promulgating the regulations that would create the national DNC, and over time the FCC has updated its regulations to add new requirements (such as the need for companies to maintain their own internal DNC list for requests to stop telemarketing otherwise permissible because of an Existing Business Relationship (EBR)).[18]

On the Senate floor, the TCPA's lead sponsor, Senator Hollings (D–SC), explained that the TCPA was intended to "make it easier for consumers to recover damages" from computerized telemarketing calls, and that the intent was for consumers to go into small claims courts in their home states so that the $500 in damages would be available without an attorney:

> 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.* However, it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages. I thus expect that the States will act reasonably in permitting their citizens to go to court to enforce this bill.[19]

It is clear that the private right of action focused on allowing consumers to sue *telemarketers.* Moreover, it was so clear that TCPA claims were intended to be handled on an individual basis in small claims court, the few early TCPA litigants in Federal courts were told that there was no jurisdiction in Federal court to hear TCPA claims, a matter only finally resolved by the U.S. Supreme Court in 2012 in its *Mims* decision (when the question had essentially been mooted for large TCPA

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[13] *See* 47 U.S.C. § 227(a) "Definitions: As used in this section—*(1)* The term "automatic telephone dialing system" means equipment which has the capacity—*(A)* to store or produce telephone numbers to be called, using a random or sequential number generator; and *(B)* to dial such numbers."

[14] *See, e.g.,* Report of the Energy and Commerce Committee of the U.S. House of Representatives, H.R. Rep. 102–317, at 10 (1991) (discussing "Automatic Dialing Systems" as follows: "The Committee report indicates that these systems are used to make millions of calls every day. . . . Telemarketers often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations, as well as unlisted telephone numbers. Once a phone connection is made, automatic dialing systems can "seize" a recipient's telephone line and not release it until the prerecorded message is played, even when the called party hangs up. This capability makes these systems not only intrusive, but, in an emergency, potentially dangerous as well.")

[15] *Mims* v. *Arrow Fin. Servs., LLC,* 132 S. Ct. 740, 742 (2012).

[16] *See* 47 U.S.C. § 227(b).

[17] *See* 47 U.S.C. § 227(c).

[18] *See, generally,* 47 C.F.R. § 64.1200.

[19] 137 Cong. Rec. 30821–30822 (1991) (emphasis added).

class actions by the earlier Class Action Fairness Act's provision that class actions alleging over $5 million in damages could be removed to Federal court).

There was no real debate over the TCPA at the time of its passage; certainly, there was no indication of what the TCPA would grow to become. But now, a statute designed to provide a private right of action for consumers to pursue their own claims against entities placing intrusive and aggressive telemarketing calls, preferably in small claims court and without an attorney, now threatens to bankrupt any legitimate company placing legitimate business calls, as well as any "deep-pocket" entity that plaintiffs can claim could be vicariously liable for another person's or entity's communications.

The largest driver of TCPA litigation these days is claims of "autodialed" calls or texts to cellular phones placed without prior consent, because so many Americans now use their cell phones as their primary point of contact—as of 2014, 90 percent of American households had cellular phones,[20] and almost 60 percent were wireless-only households.[21] Unlike in 1991, the modern owners of cellular numbers often opt to provide those numbers to companies with whom they do business. And unlike in 1991, companies often use computerized systems to efficiently contact these numbers—systems that TCPA plaintiffs argue are "autodialers" subject to the TCPA's restrictions.

As already noted above, the TCPA defines an "autodialed" call as one made on an automated telephone dialing system (ATDS), "equipment which has *the capacity* (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."[22] TCPA plaintiffs and their attorneys have been arguing in lawsuit after lawsuit that if a call was placed with equipment that has even a hypothetical, *future* capacity to store or produce random or sequentially generated numbers (*i.e.,* through reprogramming), that call or text was placed with an ATDS. And in an Order now on review before the D.C. Circuit Court, a divided majority of FCC commissioners agreed in June 2015 that "capacity" to randomly/sequentially dial need not be an operative feature in dialing equipment for the call to be considered "autodialed" and subject to the TCPA's restrictions.[23] (The two dissenting commissioners vehemently disagree.[24])

The central problem to businesses with Section 227(b)'s prohibition on "autodialed" calls to cellular phones is that legitimate companies are being swept into the strict liability intended for the bad actors who, in 1991, were cold-call telemarketing random or sequential telephone numbers using a specific kind of equipment. No legitimate company in 1991 was trying to reach its own customers by randomly dialing numbers with equipment that fit the definition of an ATDS (as it would make no sense to try to reach a customer by dialing random numbers), so as to be subject to $500 or $1,500 per call liability for "autodialed" calls. Thus, it makes sense to see no affirmative defenses built into Section 227(b), because no one making cold calls to random telephone numbers would have a defense for such practices.

On the other hand, many companies in 1991 did conduct some form of targeted telemarketing to customers, former customers, or prospective customers, and were bound by Section 227(c) to adhere to all the telemarketing rules established as to the DNC list. The separate private right of action in Section 227(c)(5) gives more protection to the legitimate companies that could violate DNC provisions: having exceptions during existing business relationship periods; allowing one free mistake each twelve months per number; setting statutory damages at the less draconian "up to" $500 per communication; and providing affirmative defenses for companies who are making good faith efforts to comply with the law (*i.e.,* by establishing writ-

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[20] Pew Internet Project, *Mobile Technology Fact Sheet,* Pew Research Center (2014), available at *http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/*.

[21] Stephen J. Blumberg & Julian V. Luke, Div. of Health Interview Statistics, Nat'l Ctr. for Health Statistics, Centers for Disease Control and Prevention, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2014,* at 1–3 (Dec. 16, 2014).

[22] 47 U.S.C. § 227(a)(1) (emphasis added).

[23] *See* July 2015 FCC Order, 30 FCC Rcd. at 7974–7976.

[24] *See also id.,* Pai Dissent, 30 FCC Rcd. at 8074 ("That position is flatly inconsistent with the TCPA. The statute lays out two things that an automatic telephone dialing system must be able to do or, to use the statutory term, must have the "capacity" to do. If a piece of equipment *cannot* do those two things—if it *cannot* store or produce telephone numbers to be called using a random or sequential number generator and if it *cannot* dial such numbers—then how can it possibly meet the statutory definition? It *cannot.* To use an analogy, does a one-gallon bucket have the capacity to hold two gallons of water? Of course not."); *see also id.,* O'Rielly Dissent, 30 FCC Rcd. at 8088–90.

ten DNC policies and training employees on such policies[25]). Thus, companies were given instructions needed to comply with the DNC section of the TCPA, and could defend themselves in the instances when the inevitable human error, such as a customer representative not accurately recording a DNC request, would occur.

It should come as no surprise that most TCPA litigation is now being brought under Section 227(b)'s unforgiving prohibitions on autodialed or prerecorded calls placed to cellular phones without prior express consent. Plaintiffs argue that calls or call attempts were autodialed. While the FCC has opined that "prior express consent" for transactional and informational calls exists when a customer opts to provide his or her cellular telephone number to a company (*i.e.,* on an application),[26] the FCC majority has also now stated that companies are liable (after the first call) to all "autodialed" calls placed to those customer-provided numbers if, unbeknownst to the company, the customer has changed his or her telephone number or provided a wrong number in the first place.[27] Thus, a company reaching out to a customer-provided number can unknowingly be contacting a new subscriber to the cellular phone, who then can claim calls were made with an autodialer in violation of Section 227(b) without prior consent.

As further addressed in Part IV below, this has created "gotcha" litigation, where someone signs up for a credit card with a friend's telephone number, and then the friend sues for calls received, or where someone keeps acquiring dozens of new cellular telephone lines in the hopes of "striking it rich" with a phone number receiving calls from deep-pocket companies trying to reach the prior owner of the line.[28] Because the private right of action in Section 227(b)(3) lacks the affirmative defenses that Congress intended should apply to legitimate businesses (whom it was known could be targets of litigation under Section 227(c)(5), which does have such defenses), TCPA plaintiffs and their lawyers argue that there is strict liability for all these calls placed without consent, regardless of the company's good faith belief and adherence to practices meant to comply with the TCPA.

One final note on the 1991 statute and the technology of that time: Text messages did not exist twenty-five years ago when the statute was drafted, nor did any phones capable of displaying such a message. However, some courts and now the FCC majority have decided that a text message is the same thing as a "call" to a cellular phone, and is subject to the $500 to $1,500 per communication liabilities under the TCPA for autodialed calls (even though Commissioner O'Rielly vehemently dissented to extending the TCPA to text messages).[29] Many recent TCPA litigations focus on text messages—and even though companies ensure that a "STOP" response to a text message will stop all future messages, a consumer has no obligation to ask for texts to "STOP", but instead can simply keep collecting messages until there are enough for his or her lawyer to make a hefty demand. It is difficult to imagine that Congress, had it conceived of text messages in 1991, would not have had separate provisions to address this very different kind of communication that so many consumers welcome for easy and quick delivery of information.

It should be clear that the technological shift since 1991, particularly the advent of cellular phones and now smart phones, should have made portions of the TCPA inapplicable to such new technologies. However, the opposite has happened. While foreign-based scam telemarketers continue to barrage consumers with calls, legitimate domestic businesses find themselves targeted primarily for transactional and informational calls never intended to be subject to the TCPA's restrictions—calls placed via modern technologies not contemplated by the TCPA. As Commissioner Pai has pointed out, this is something Congress should address:

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[25] *See* 47 U.S.C. § 227(c)(5) ("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 telephone solicitations in violation of the regulations prescribed under this subsection.").

[26] *See In re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 23 F.C.C.R. 559, 564–65 ¶ 10 (F.C.C. Jan. 4, 2008).

[27] *See* July 2015 FCC Order, 30 FCC Rcd. at 8001.

[28] The Third Circuit recently made such matters worse, in a ten-year battle over a single phone call one roommate picked up on March 11, 200, by ruling in October 2015 that a "habitual user" of a shared telephone such as a roommate was in the "zone of interests protected by the TCPA", and had alleged sufficient facts to pursue a claim under the TCPA if he answered a "robocall" intended for his roommate (who may herself have given prior consent for that call). *See Leyse* v. *Bank of Am. Nat. Ass'n,* 804 F.3d 316, 327 (3d Cir. 2015).

[29] *See* July 2015 FCC Order, O'Rielly Dissent, 30 FCC Rcd. at 8084 ("I disagree with the premise that the TCPA applies to text messages. The TCPA was enacted in 1991—before the first text message was ever sent. The Commission should have had gone back to Congress for clear guidance on the issue rather than shoehorn a broken regime on a completely different technology.").

> Congress expressly targeted equipment that enables telemarketers to dial random or sequential numbers in the TCPA. If callers have abandoned that equipment, then the TCPA has accomplished the precise goal Congress set out for it. And if the FCC wishes to take action against newer technologies beyond the TCPA's bailiwick, it must get express authorization from Congress—not make up the law as it goes along.[30]

But the FCC majority in issuing its recent July 2015 Order (now in litigation in the D.C. Circuit) instead continued to expand the reach of the TCPA, allowing litigation against businesses across all industries to proceed aggressively.

III. Core Factors Driving TCPA Litigation Against Businesses

For many years, as it was intended to do, TCPA litigation focused primarily on unsolicited marketing facsimile, DNC violations, and prerecorded cold-call telemarketing calls. Around 2010, however, there was a sea-change in TCPA litigation. I recall that year defending one client sued on a class action basis for fraud alert calls placed to cellular telephones alerting the recipient that he or she might be a victim of identity theft. I thought that as soon as I alerted plaintiff's counsel that she had not received a marketing call, plaintiff would dismiss her lawsuit (as was usual); however, because the TCPA's protections for cellular telephones did not specifically apply to "marketing" calls, and my client was a large and well-funded corporation, the litigation went forward with tens of millions of dollars in statutory damages in play for fraud alert calls placed in the previous four years. Plaintiff argued that she had not given her prior consent for a prerecorded message from my client, but only to the credit reporting agency.

We did win in summary judgment, with the court recognizing that Plaintiff had requested fraud alert calls be placed to her cellular phone through an intermediary and that there was indeed "prior express consent" to receive said calls, but that victory required my client to take on the costs of eighteen months of hard-fought litigation. In the end, Plaintiff's counsel walked away to file more TCPA lawsuits, only on the hook for my client's costs (and not for the significant expenditures in attorneys' fees, under the default American rule that leaves companies left holding the bag when a litigation ends).

Before 2010, I defended just a few TCPA cases each year. By 2012, however, a critical mass of plaintiffs' attorneys had discovered the TCPA and its uncapped statutory damages and saw the expansion of TCPA litigation as a legal "gold rush." By that time, I had become an almost full-time TCPA defense lawyer. And, given the amount of TCPA litigation being filed across the country, law firms also started TCPA defense practice groups. Now, TCPA litigations consume significant court resources across the country.

In my experience, TCPA actions have been fueled in the past few years primarily by the following four issues:

a. "Capacity" to Autodial Remains Hotly Contested

A debate continues as to whether "capacity," as used in Section 227(b) of the statute, refers to a system's present actual capacity, or includes a system's potential capacity, and the FCC's July 2015 Order only adds to the confusion. Under the FCC's view, any telephone call placed with equipment that is not an old-fashioned rotary dial telephone may encourage plaintiffs' lawyers to take a shot at a TCPA lawsuit.

Some courts have rejected the theory that any technology with the potential capacity to store or produce and call telephone numbers using a random number generator constitutes an ATDS. For example, the Western District of Washington noted that such a conclusion would lead to "absurd results" and would "capture many of contemporary society's most common technological devices within the statutory definition."[31] But other courts have accepted the "potential" capacity argument forwarded by the plaintiffs' bar. One judge in the Northern District of California, for example, has held that the question is "whether the dialing equipment's present capacity is the determinative factor in classifying it as an ATDS, or whether the equipment's potential capacity with hardware and/or software alterations should be considered, regardless of whether the potential capacity is utilized at the time the

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[30] July 2015 FCC Order, Pai Dissent, 30 FCC Rcd. at 8076.

[31] *Gragg* v. *Orange Cab. Co., Inc.,* 995 F. Supp. 2d 1189, 1192–93 (W.D. Wash. 2014); *see Hunt* v. *21st Mortg. Corp.,* No. 2:12–cv–2697–WMA, 2013 WL 5230061, *4 (N.D. Ala. Sept. 17, 2013) (noting that, as, "in today's world, the possibilities of modification and alteration are virtually limitless," this reasoning would subject all iPhone owners to 47 U.S.C. § 227 as software potentially could be developed to allow their device to automatically transmit messages to groups of stored telephone numbers).

calls are made."[32] And the FCC majority refused, in its July 2015 Order, to find that "capacity" should reflect a system's present and actual abilities, with challenges to that opinion now pending in the D.C. Circuit.

Thus, there is no certainty for American businesses as to whether the expansion of the "ATDS" definition advocated by TCPA plaintiffs does indeed cover all modern, computerized systems used to dial telephone numbers or send text messages. A company whose employees are dialing calls that use any form of a computer in the process might find itself a target in a TCPA lawsuit, even when calls could not have been placed unless a human representative initiated the one-to-one call. To have uncapped statutory damages available that may or may not apply based on the interpretation of an undefined term in an outdated section of a Federal statute is an untenable situation for companies to find themselves in, when facing claims under the TCPA.

b. Calls Made To Recycled Or Wrongly Provided Cell Phone Numbers Are Generating New Suits

On a daily basis, companies across the country make calls or send texts to numbers provided to them by their customers, and prior express consent should exist for such communications even if they are made to cellular numbers with an "autodialer" or if they provide information via a prerecorded message. However, cell phone numbers can easily be relinquished and reassigned without notice to anyone, let alone to the businesses that were provided the number as a point of contact by their customer. Indeed, every day, an estimated 100,000 cell phone numbers are reassigned to new users.[33]

Further, sometimes a customer makes a mistake when providing a contact number, or enters one belonging to a friend or roommate, or in these days of family plans, enters a number for a phone line shared with or later bequeathed to another family member. Then, when the company attempts to reach out to its customer at the provided number, it can unintentionally be sending communications to a non-customer, *i.e.,* the new or actual owner of the number. This seemingly innocent mistake has become the most significant driver of new TCPA litigations. Indeed, a statute intended to cover abusive telemarketing has morphed into one supporting claims against well-intentioned companies attempting to communicate with their own customers, generally for transactional or informational purposes.

As another example, automated calls set up by a cell phone owner to be sent to his or her cellular phone as a text message can be received instead by a new cell phone owner if the prior owner forgets to turn off such requested messages relinquishing a phone line. One California restaurant chain's automated voice-mail systems sent 876 food-safety-related text messages intended to reach one of its employees' cell phones, after that employee had set a forwarding feature on his work telephone that was designed to message his own phone. However, after he changed numbers, those messages were unintentionally sent to the new owner of that telephone line.[34] That restaurant was sued for over $500,000 in statutory damages, and after a protracted fight, the small restaurant chain informed me that it ended up settling for an undisclosed amount after incurring hundreds of thousands of dollars in defense costs to fight the allegations. Again, it is difficult to believe that Congress intended companies to be sued for "set it and forget it" messaging services set up by the prior owner of a phone line, once that line is recycled to a new owner.

c. Vicarious Liability Theories Are Targeting New Defendants (In Particular, Those With Deep Pockets)

Another driver of TCPA litigation is vicarious liability: it is no longer just the entity placing a call, sending a text, or faxing a document that needs worry about defending a TCPA lawsuit. In a 2013 Order long-anticipated by the plaintiffs' bar, the FCC opined that vicarious liability could attach under the TCPA to companies who themselves had not initiated the communications in question, so long as the calls were placed "on behalf of" the company, using the Federal common law of agency.[35]

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[32] *Mendoza* v. *UnitedHealth Grp. Inc.,* No. C13–1553 PJH, 2014 WL 722031, *2 (N.D. Cal. Jan. 6, 2014).

[33] July 2015 FCC Order, O'Rielly Dissent, 30 FCC Rcd. at 8090.

[34] *See* Rubio's Restaurant, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02–278, at 3 (filed Aug. 11, 2015).

[35] *See In the Matter of The Joint Petition Filed By DISH Network, LLC, the United States of America, and the States of California, Illinois. North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules,* Declaratory Order, CG Docket No. 11–50 (issued Apr. 13, 2013).

Thus, a person or company can find itself defending a TCPA lawsuit with claims it is responsible for someone else's decisions to communicate via phone, text, or fax.

The FCC's vicarious liability order invites the plaintiffs' bar to reach up the chain to the defendant with the deepest possible pocket. This, in turn, has led to a dogpile of lawsuits being brought against security equipment manufacturers for calls mentioning their branded equipment (even when the calls were not made to sell that equipment, but rather the caller's own $39.99 a month monitoring services). Further, lawsuits are being brought against major corporations for third-party calls made by independent contractors not authorized in any way to call as, or on behalf of, the company.

And in the case of an employee gone rogue who violates the TCPA's rules by breaking all of his own company's policies, the company finds itself facing potentially annihilating liability if it loses on the vicarious liability fight, and enormous pressure to settle. One insurance company, for example, recently completed settlement of a $23 million class action that was brought by the recipient of a facsimile sent against company policy by an insurance agent who contracted on his own with a fax blaster to set up a server and send faxes in a home garage. When alleged vicarious liability for millions of faxes would be in the billions of dollars, it is easy to see how enormous the pressure to settle can be. And when there is a deep pocket defendant to put on the ropes, it is no wonder that the fax blaster who actually sent the faxes (after ensuring clients that such transmissions were legal) was not sued by the plaintiff.

Companies are facing allegations of vicarious liability for calls and texts for which no source can even be ascertained; if a prerecorded marketing message promises a free gift card for a certain retailer, that retailer finds itself facing demands under the TCPA under the argument that it is liable under some ratification or apparent authority aspect of vicarious liability.

d. Revocation of Prior Express Consent Also Driving New Lawsuits

A fourth breeding ground for modern TCPA litigations is found in situations in which a company is calling its customer, at the customer-provided number, but then the recipient claims to have revoked consent for further calls. The Third Circuit stood alone in 2013 when it held that the TCPA provides consumers with the right to revoke their prior express consent to be contacted on cellular telephones by autodialing systems.[36] Before this point, there were no revocation-based TCPA litigations; now, with the FCC majority stating in its July 2015 Order that prior consent can be revoked at any time and in any manner, claims that consent was revoked has become one of the fastest growing areas of TCPA litigation.[37]

The problem with allowing revocation by any means when larger businesses are making informational and/or transactional calls (sometimes through a variety of vendors) is that TCPA plaintiffs and their lawyers plan to generate suits by "revoking consent" for further calls with an oral statement, in the hopes that the customer representative does not capture that oral request.[38] Other plaintiffs are sending convoluted text messages that a system might not recognize as a "STOP" message, and then claiming consent had been revoked. One demand I recently dealt with for a client involved someone who never replied "STOP" as the text messages instructed him to do whenever he wanted to opt out of the text reminders, and instead sent a wordy text message "withdrawing permission for future calls to his cellular phone number." The system did not recognize this language, and in any case would only have been able to stop text messages and not phone calls; the determined consumer insisted that he had revoked consent for all communications, and was entitled to tens of thousands of dollars for later calls he received.

Another issue with the newly announced "revocation" right is that the FCC majority implies that it should be instantaneous in implementation, without giving the business time to receive and process DNC requests from its vendors and/or to adjust its outbound calls. (In contrast, a business knows that DNC prohibitions attach to

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[36] *Gager* v. *Dell Financial Services, LLC,* 727 F.3d 265, 272 (3d Cir. 2013).

[37] Commissioner O'Rielly points out that the TCPA itself had no mention of revocation or a means to do so, and that the FCC majority has simply invented a vague and unworkable new "common-law" based rule never vetted by Congress. *See* July 2015 Order, 30 FCC Rcd., O'Rielly Dissent, at 8095.

[38] For example, in April 2014, the Davis Law Firm of Jacksonville, Florida, posted an article providing 5 steps to "stop calls" from a targeted company and to potentially make money under the TCPA. *See http://davispllc.com/lawyer/2014/04/16/Consumer-Protection/How-to-Get-DirecTV-to-Stop-Calling-You__bl12785.htm,* last accessed November 6, 2014. Step 2 instructs cell phone owners to say "I revoke my consent for you to call me" and then to hang up. Thereafter, the firm asks the cell phone owner to keep a detailed call log regarding any additional calls to be the basis of a TCPA lawsuit. *See id.*

a number 30 days after it is entered into the DNC list.[39]) Thus, claims of "immediate" revocation rights are leading to even more "gotcha" litigation, including claims that a consumer revoked prior consent on a Monday morning but received three more calls over the next few days before all calls stopped—and that $4,500 in willful calling damages for the three calls are thus owed to that consumer under the TCPA.

Thus, revocation-based claims—like those claims based on "capacity" arguments, recycled or wrongly-provided numbers, and vicarious liability allegations—are certain to increase in number as TCPA litigation continues to grow exponentially throughout the country. Another certainty is that litigation abuse, too, will spread.

IV. Examples of TCPA Litigation Abuse

As I mentioned at the start of this testimony, I have defended various companies facing TCPA claims for more than a decade. As a junior associate in 2001, I began working on a then-rare TCPA case in which a client was sued for millions of faxes an affiliated company had sent in a three-day period using a fax blaster service. I was shocked to see a statute (which I had not heard anything about in law school) that could create such staggering statutory liability—my client settled for millions rather than face billions of dollars in statutory liability, and because its insurance policy covered the claims (something that is no longer the case). My introduction to the TCPA was during a time when the few lawsuits being brought still focused on the kinds of unsolicited facsimiles and cold-call telemarketing that the statute was intended to address when it was authored and adopted in 1991. But seeing just how lucrative TCPA lawsuits can be, various serial TCPA plaintiffs and TCPA-focused attorneys are doing everything they can to find and bring TCPA actions against American businesses.

a. Serial TCPA Plaintiffs

Serial plaintiffs amassing multiple phone numbers at which to receive calls are making a living through TCPA demands and litigation. Some focus on sending copious demand letters to businesses, seeking several thousand dollars from each company. An early example was a man in San Diego who acquired a telephone number of 619–999–9999, even though such telephone numbers were normally not given out to consumers—he found out that companies at the time whose systems required some telephone number be entered into a phone number field had set a default of the 999–9999 to fill in after an area code, and his number was getting thousands of calls each month from systems of various companies. As Commissioner Pai has noted, this man even hired staff to log every wrong-number call he received, issue demand letters to purported violators, file actions, and negotiate settlements; only after he was the lead plaintiff in over 600 lawsuits did the courts finally agree that he was a "vexatious litigant."[40] But what Commissioner Pai does not know (and I do, as I was brought in to deal with later demands from the phone's new "owner" after this man was barred from his "TCPA business"), is that the man then leased this telephone number to a friend who started her own business, paying commissions to the owner of the 999–9999 number for the calls she received and acting with her part-time staff of paralegal support to send TCPA demand letters to hundreds of businesses. It was only after this contract came to light that her "TCPA business", too, was finally shuttered.

But other consumers in the business of TCPA actions continue to make their living (and a good living, too) through this statute. For example, in the past year alone, one Pennsylvania woman has filed at least eleven (11) TCPA cases in the Western District of Pennsylvania and at least twenty (20) pre-litigation demand letters. When a company she had sued deposed her recently, it found that she had intentionally bought 35 cell phones and subscribed to cellular service lines for the sole purpose of receiving calls under which she can assert "wrong number" TCPA violations. Moreover, she specifically sought phone numbers in economically depressed area codes to make the receipt of collections calls more likely (*i.e.,* she lives in PA, but acquires FL area code numbers). She carries all 35 plus phones with her when she travels so she can keep up on her recordkeeping—she logs all calls coming into the telephone numbers in efforts to reach the previous owner of the cellular phone. And she even loads more minutes as needed onto her phones to ensure she keeps the lines open for business.

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[39] *See* 47 C.F.R. §64.1200 ("Persons or entities making calls for telemarketing purposes (or on whose behalf such calls are made) must honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date of such request.").

[40] July 2015 FCC Order, Pai Dissent, 30 FCC Rcd. at 8073.

Another constant TCPA litigant, an Ohio man, has been bringing TCPA actions for fifteen years, and in recent years he has lent his name to actions in Federal court outside of Ohio as well, including in Wisconsin, Florida, Illinois, New York, West Virginia, California, and Connecticut. As an example of one recent suit, this consumer was the named plaintiff in a TCPA action settled by American Electric Power in 2015. He received two (2) marketing phone calls while on the Federal DNC (entitling him to up to $1,500 for the second call, if the company had no valid defenses), but his named-plaintiff incentive payment under the settlement is $12,500. Tellingly, this man's actual registration on the DNC list only happened ten years into his TCPA career. Because it was so clear he wanted marketing calls (and was making his living by receiving them), he was ordered by one state court in 2005 to register his phone lines with the Federal DNC, but he appealed that order to the Ohio Supreme Court, which held in 2007 that he was not required to register his telephone numbers. Later, with the shift in TCPA litigation to autodialed/prerecorded calls, he registered his lines (via a settlement in 2011) and now sues for autodial/prerecorded calls, as well as violations of his registered Federal DNC status. Like many persons supplementing their incomes or fully depending on TCPA monies, he has the usual mechanisms for trapping callers (recordings and logs) and generating demand letters.

Indeed, there are plenty of "do-it-yourself" guides on the Internet advising consumers how to bring TCPA claims and rake in significant money. What businesses are finding problematic in the past few years lawsuits and demands brought by family members, roommates, or partners of a customer who gave that person's telephone number as his or her own. In actions I am currently defending for various companies, the plaintiff or class plaintiff is the daughter, the aunt, the boyfriend, the son, the mother-in-law, or the guardian of the customer who provided their telephone number to a company as his or her own number. There are indications that some such provisions are happening *on purpose,* to try to create viable fact patterns for a TCPA claim by that family member or friend. Indeed, I had one recent demand letter in which the telephone number the customer provided actually belonged to a well-known TCPA lawyer, who then of course threatened suit and demanded payment of thousands of dollars.

The consumers abusing the statute to ensure that calls are placed to them, so that they can support themselves from demands and lawsuits filed against American businesses, are bad enough; as detailed below, the tactics of some of the lawyers specializing in TCPA claims are even worse.

b. Over-incentivized TCPA Attorneys

As already detailed above, the TCPA (which has no attorneys' fees provision) provides for hefty statutory damages that incentivize attorneys to start litigations and carve fees out of the uncapped statutory damages that are available. One Connecticut-based firm, Lemberg Law, LLC, even came out with a smartphone application, "Block Calls, Get Cash," that potential clients could download to make their call data directly available to the firm, which could review inbound calls to look for potential litigation targets.[41] The app's website states that "with no out-of-pocket cost for the app or legal fees, its users will 'laugh all the way to the bank.'"[42] And at least one other firm has followed suit with its own competing application.

Lemberg Law is now engaged in litigation with an associate who withdrew to start up her own lucrative TCPA shop, and its business practices are being revealed. In counterclaims against Lemberg Law, which sued the associate for absconding with clients and the settlement monies they could engender, she claims that demands are filed by Lemberg Law for consumers who have no idea that they have "retained" a law firm to represent them and who were not even consulted about complaints filed on their behalves.[43] In fact, the former associate claims that the first time some of these consumers find out about their own lawsuit is when Lemberg tries to contact the client to send them their portion of a settlement agreement (after accessing the consumer's private phone call information, crafting de-

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[41] *See* Reply Comments of the U.S. Chamber of Commerce, CG Docket 02–278, at 4 (filed Dec. 1, 2014) (citing *Lawsuit Abuse? There's an App for That,* U.S. Chamber Institute for Legal Reform (Oct. 29, 2014), *http://www.instituteforlegalreform.com/resource/lawsuit-abuse-theres-an-app-for-that/).*

[42] *Id.*

[43] *See, e.g.,* Amended Answer, Affirmative Defenses, and Counterclaim, Dkt. No. 32, Filed 11/12/15, in *Lemberg Law, LLC* v. *Tammy Hussin and the Hussin Law Offices, P.C.,* Case No. 3:15–cv–00737–MPS (D. Conn), at ¶¶ 1.k, 1.l, 1.o, and 1.p; *see also* 1.p ("Based on Hussin's belief that her paralegal had confirmed the facts with the new clients, Hussin unknowingly filed complaints on behalf of Californians who were unaware of legal representation.").

mands based on calls, and carving out Lemberg's own fees and costs, including a $595 "PrivacyStar" Cost).[44]

As just one more example of many, Anderson & Wanca is a Midwest-based firm focused on bringing facsimile actions after receiving, in discovery years ago, a roster of clients from a fax-blaster named B2B. In a recent decision, the Seventh Circuit upheld $16,000 worth of statutory damages against a small digital hearing aid company in Terra Haute, Indiana, for 32 facsimile ads, but noted its distaste in doing so:

> Fax paper and ink were once expensive, and this may be why Congress enacted the TCPA, but they are not costly today. As a result, what motivates TCPA suits is not simply the fact that an unrequested ad arrived on a fax machine. *Instead, there is evidence that the pervasive nature of junk-fax litigation is best explained this way: it has blossomed into a national cash cow for plaintiff's attorneys specializing in TCPA disputes.* We doubt that Congress intended the TCPA, which it crafted as a consumer-protection law, to become the means of *targeting small businesses. Yet in practice, the TCPA is nailing the little guy, while plaintiffs' attorneys take a big cut.* Plaintiffs' counsel in this case admitted, at oral argument, that they obtained B2B's hard drive and used information on it to find plaintiffs. They currently have about 100 TCPA suits pending.[45]

As the Seventh Circuit has recognized in its recent decision quoted above, it is a perversion of the original intent of the TCPA to "target small businesses" who are not alleged to have caused actual harm. And I should note that Anderson & Wanca is not always so unlucky as to only get $16,000 verdicts; that firm has been the recipient of multi-million dollar fees awards in the past few years from class action settlements as well.

V. Conclusion and Recommendations

The TCPA was designed to protect privacy and to stop invasive and persistent telemarketing, primarily of the "cold call" kind, that ensues when telemarketers use dialing technology to randomly or sequentially dial numbers. It was not designed to subject companies to claims regarding "autodialed" calls when they reach out to targeted, segmented lists of their own customers who have a common need for information using the telephone numbers (including cellular phone numbers) provided by those customers. It was not intended to apply to text messages, and it was not designed to cover collections calls, which have independent sets of rules to ensure that those calls are not abusive or overly intrusive.

Congress needs to take a hard look at updating the TCPA in a manner that provides more certainty and protection for businesses who need to legitimately communicate with their customers and employees, and who strive to comply with the law but who, for example, may unknowingly be calling a reassigned number, or have a customer representative err in recording a revocation request. If Congress wishes to pull text messages into the TCPA's protection, then it should assess what rules should apply.

In sum, considering the unfair and unintended onslaught of TCPA cases hammering American businesses, the following updates to the statute could be taken under consideration.

Statute of Limitations: The TCPA contains no statute of limitations, and so has fallen into the four-year default, which makes no sense for calls/faxes that are supposedly invasions of privacy that the consumer knows about at the moment they are placed. Class actions reach staggering amounts of damages because class plaintiffs seek four years' worth of calling data and liability. (I defended one putative class action brought against a company for a single text sent three years and ten months before Plaintiff filed his suit.) The TCPA's time to bring suit should be reasonably

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[44] *See, e.g., id.* at Affirmative Defenses, ¶¶1.f, 1.g, 1.k; *see also* 1.s ("Lemberg insisted on taking a 40 percent referral fee for new "clients' without even having discussed legal representation with them and without having obtained a signed fee agreement. Upon reaching the new "clients" when Hussin transferred the cases to her firm, most of them had no knowledge of Lemberg's firm and were unaware of legal representation, yet Lemberg insisted on taking a 40 percent referral fee on said cases.").

[45] *Bridgeview Health Care Center, Ltd.* v. *Jerry Clark,* 2016 WL 10852333, *5 (7th Cir. Mar. 21, 2016) (emphasis added; internal citations and quotations omitted).

limited, as is the case with the other Federal statutes providing private rights of action for statutory damages.[46]

Capping Statutory Damages and Adding Provisions for Reasonable Attorneys' Fees: Like every other Federal statute providing statutory damages and a private right of action to consumers to seek those damages, the TCPA should have a cap on the amount of individual and class action damages that can be sought.[47] There is no better way to curb litigation abuse, bring the TCPA in line with its sister statutes, and avoid unconstitutional and excessive fines for technical violations causing no actual harm.

Affirmative Defenses: As businesses are targeted for calls under Section 227(b), as well as for the 227(c) calls that Congress knew could be made in error by a business acting in good faith to follow the appropriate policies and procedures (*see* Part II above), the affirmative defenses available in Section 227(c) should also be imported into Section 227(b) to provide protection to businesses working in good faith to comply with the TCPA.

Capacity: The "capacity" of an autodialer should be interpreted for past calls as written in the text of the statute, meaning only those devices that have the actual ability to randomly/sequentially dial telephone calls would be actionable. And if Congress wishes to limit some other sort of calling technologies or text messages, new and more precise language should be drafted, vetted, and implemented after a notice period to companies so that they can comply with statutory requirements.

Reassigned or Wrongly-Provided Number: Businesses should not be punished via TCPA lawsuits when they, in good faith, call a customer-provided phone number that now belongs to a new party unless and until the recipient informs the caller that the number is wrong and the business has a reasonable time to implement that change in its records. (If, after that notice and reasonable time the company continues to call, then lack of prior consent would be established for future calls.)

Vicarious Liability: The FCC has interpreted the TCPA to allow "on behalf of" liability for prerecorded/autodialed calls, something not specifically provided for in the statute. Among other things, the TCPA should be revised to define any such vicarious liability so that it would exist only against the appropriate entities—those persons who place the calls, or who retain a telemarketer to place calls, or who authorize an agent to place calls on their behalf.

Bad Actors: The TCPA should be reformed to focus on the actual bad actors (*i.e.,* fraudulent calls from "Rachel from Cardmember Services", with spoofed numbers in Caller ID fields to hide the identity of caller), instead of companies trying to contact their consumers for a legitimate business purposes.

Address New Technologies, Such As Text Messaging: A text message is not the same as a call, and courts are wrong in treating them equally. Should Congress wish to set rules on text messaging within the TCPA, it should do so through the regular channels of drafting, vetting, and implementing new statutory language.

Revocation: If a consumer that has provided a telephone number to a company no longer wishes to receive communications at that number, there should be a set process (as in the Fair Debt Collection Practices Act) on how the business should be told of the revocation, and a reasonable time for the company to implement that change.

Importantly, when considering these changes, Congress should keep in mind what TCPA reform should *not* include policies that will:

- Increase in the number of phone solicitations;
- Encourage abusive or harassing debt collection practices (which are addressed, in any case, by the FDCPA); and
- Create an end-run around the Federal and Internal Do Not Call List rules.

The changes discussed above—which would help to protect American companies from expensive and damaging litigation abuse—would not risk any of these repercussions. Thus, we urge this Committee to revisit the TCPA to bring this 20th Century statute in line with 21st Century challenges. Twenty-five years have passed, and it is evident that the TCPA has had a negative impact on businesses that Congress never intended when first enacting this law in 1991. We appreciate the Com-

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[46] *See, e.g.,* Electronic Funds Transfer Act (15 U.S.C. § 1693), Section 1693(m) (statute of limitations—1 year); Fair Debt Collection Practices Act (15 U.S.C. § 1692), Section 1692(k) (statute of limitations—1 year).

[47] *See, e.g.,* Electronic Funds Transfer Act (15 U.S.C. § 1693), Section 1693(m); Fair Debt Collection Practices Act (15 U.S.C. § 1692), Section 1692(k); Truth in Lending Act (15 U.S.C. § 1631 et. al), Section 1640; Fair Credit Reporting Act (15 U.S.C. § 1681 et. al.), Section 1681(o). (Several of these statutes also permit defendants to recover costs/fees when actions are shown to have been brought in bad faith.)

mittee's calling of today's hearing and stand ready to work with you on this important issue.

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Thank you for inviting me to testify. I am happy to answer any questions you may have.

The CHAIRMAN. Thank you, Ms. Wahlquist.
Ms. Saunders.

Ms. Saunders's oral remarks at this May 18, 2016, hearing and written prepared statement submitted to the Committee before the hearing follow.

On May 20, 2016, Ms. Saunders wrote to the Committee and noted that she had "referred to the incorrect row of figures supplied by the FTC. As a result, in those parts of my testimony discussing the number of complaints to the FTC about robocalls, my numbers were slightly off."

Here are Ms. Saunders corrections:

- There were 2,200,000 complaints about robocalls to the FTC (not 3,500,000) in 2015.
- There were an average of 184,000 complaints to the FTC about robocalls each month (not 298,000) that year.
- Complaint numbers have spiked in the first four months of 2016 which when annualized indicate that there may be 3,300,000 complaints to the FTC about robocalls in 2016 (not 5,200,000 complaints).
- For every 1,000 complaints to the FTC, less than two (not "only one") lawsuits are filed. Most consumers who receive robocalls do not take the time to complain to a Federal agency and even a tinier percentage, less than two-tenths of 1 percent (not one-tenth of 1 percent) actually files a lawsuit.

STATEMENT OF MARGOT SAUNDERS, OF COUNSEL, NATIONAL CONSUMER LAW CENTER

Ms. SAUNDERS. Chairman Thune, Senator Nelson, Senator Markey, members of the Committee, thank you very much for inviting me to testify today on behalf of the National Consumer Law Center and eight other national groups that collectively represent millions of American consumers. We believe that robocalls pose a severe problem, and we ask that you defend the TCPA and work to strengthen it.

Twenty-five years ago, the TCPA was passed because of the complaints about one line of robocalls which are still pouring in. The problem is that robocalls cost only a tiny fraction of a penny per call, making it cheaper for businesses to make the calls than to be careful about who they're calling.

The TCPA was designed to ensure that consumers control who robocalls them on their cell phone by requiring express consent before the calls can be made, unless there is an emergency. And many of the examples that Senator Thune made of—raised were emergencies that should fall under the exception already in the law.

The industry is making extravagant claims about spurious lawsuits and wrongful class-actions, churning new claims, litigating TCPA—in TCPA litigation, all to support their insistence that the law be changed. Yet, the judicial system has a—robust mechanisms to protect against meritless claims. As TCPA claims don't lead to attorneys' fees, the costs of initiating, investigating, and litigating a lawsuit already restricts these cases only to those in which numerous illegal calls have been made.

In 2015, there were over three and a half million complaints to the FTC, far more than any other issue for robocalls. For every 1,000 complaints, only one lawsuit was filed. Most consumers who've received unwanted robocalls don't complain to a Federal agency. Only one-tenth of 1 percent of those that did complain filed.

Here are a few of many examples of the cases brought to stop the unwanted barrage of robocalls: Yahoo sent 27,000 wrong-number text messages to one consumer, refusing to stop even after the FCC got involved to ask them to stop. State Farm Bank made 327 robocalls to one consumer in 6 months, seeking to collect a debt owed by someone else. Time Warner Cable used an automated system involving zero human capacity to make 153 robocalls to a woman who had never been a customer, including 74 calls made after she filed suit.

In all of these cases, business entities set loose an automated system that called the consumer's phone multiple times, even after the consumer's repeated attempts to stop the calls. In each case, the caller had decided that it was simply more cost-effective to ignore the expressed wishes of these consumers and continue to make these automated calls.

Seventy million people, approximately, rely in this country on prepaid or lifeline cell phones which only provide a fixed number of minutes. Many of these consumers are low-income, and they rely on these limited minutes for essential calls. And unwanted robocalls eat into these essential minutes. Any one of the industry proposals would lead to the receipt of more unwanted robocalls to all cell phone users, and would be devastating to these users with limited minutes.

For example, the industry argues that the FCC's longstanding definition of "autodialer" is wrong, based on the notion that the current definition covers too many instruments, thus making the distinction effectively meaningless. But, the definition the industry proposes would exclude all of the technology that's currently being used to make calls.

Unfortunately, Section 301 of the Budget Act passed last October to create an exemption to the TCPA that permits collectors of Federal debt, primarily student loan borrowers and—as well as taxpayers pursued by private collectors to be made without the consent of the consumer. This is dangerous precedent that will impact over 61 million Americans, and it should be repealed. We strongly support the HANGUP Act, which repeals Section 301. It is evident the consumers need more protection from such abuses, not less.

Continued enforcement of the TCPA is critical, and we ask that you support consumers in this battle.

Thank you.

[The prepared statement of Ms. Saunders follows:]

PREPARED STATEMENT OF MARGOT FREEMAN SAUNDERS, OF COUNSEL, NATIONAL CONSUMER LAW CENTER, ON BEHALF OF THE LOW-INCOME CLIENTS OF THE NATIONAL CONSUMER LAW CENTER, AND AMERICANS FOR FINANCIAL REFORM, CENTER FOR RESPONSIBLE LENDING, CONSUMER ACTION, CONSUMER FEDERATION OF AMERICA, CONSUMERS UNION, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, NATIONAL CENTER FOR LAW AND ECONOMIC JUSTICE, PUBLIC CITIZEN, AND MFY LEGAL SERVICES

Chairman Thune, Senator Nelson, and Members of the Committee, I appreciate the opportunity to testify today on the importance of maintaining the integrity of the Telephone Consumer Protection Act (TCPA) for consumers. I provide my testimony here today on behalf of the low-income clients of the *National Consumer Law Center*[1] *(NCLC),* as well as *Americans for Financial Reform, Center for Responsible Lending, Consumer Action, Consumer Federation of America, Consumers Union, National Association of Consumer Advocates, National Center for Law and Economic Justice, Public Citizen,* and *MFY Legal Services.*[2]

I am here today, on behalf of the millions of consumers whom we represent, to ask you to defend and strengthen the Telephone Consumer Protection Act as an essential bulwark against unwanted, annoying, harassing, and even dangerous, robocalls.

"If robocalls were a disease, they would be an epidemic."[3] An average of 298,000 complaints were made to the Federal Trade Commission (FTC) every month in 2015 about robocalls.[4] Indeed, some estimate that 35 percent of all calls placed in the U.S. are robocalls.[5] The problem is escalating: the FTC reported more than 3.5 million complaints about unwanted calls in 2015—over twice as many complaints as there were in 2010.[6] Almost half of these calls (1,823,897) occurred after the consumer had already requested that the company stop calling.[7] Indeed, in the first four months of 2016, the complaint numbers have spiked again, increasing to an average of over *440,000 a month, which will produce a yearly rate of over 5.2 million complaints.*[8]

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[1] The *National Consumer Law Center* (NCLC) is a non-profit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace. NCLC has expertise in protecting low-income customer access to telecommunications, energy and water services in proceedings at state utility commissions, the FCC and FERC. We publish and annually supplement nineteen practice treatises that describe the law currently applicable to all types of consumer transactions, including *Access to Utility Service* (5th ed. 2011), covering telecommunications generally, and *Federal Deception Law* (2d ed. 2016), which includes a chapter on the Telephone Consumer Protection Act.

[2] A description of all the groups on whose behalf this testimony is provided is included in an Appendix.

[3] *Rage Against Robocalls,* Consumer Reports (July 28, 2015) [hereinafter *Rage Against Robocalls*], available at *http://www.consumerreports.org/cro/magazine/2015/07/rage-against-robocalls/index.htm.*

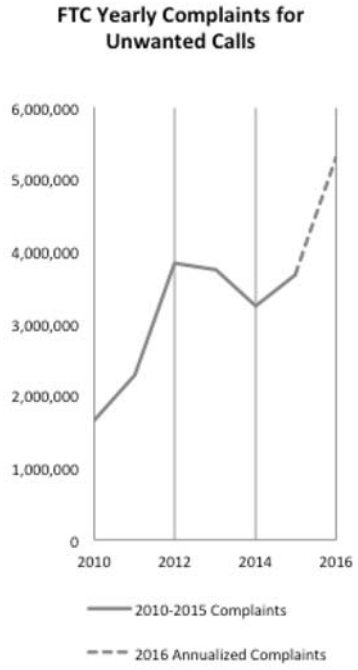
[4] Federal Trade Commission, National Do Not Call Registry Data Book, FY 2015, at 5 (Nov. 2015).

[5] *Rage Against Robocalls.*

[6] Federal Trade Commission, National Do Not Call Registry Data Book, FY 2015, at 4 (Nov. 2015).

[7] Federal Trade Commission, National Do Not Call Registry Data Book, FY 2015, at 5 (Nov. 2015).

[8] The 2016 figures for robocall complaints to the FTC's Do Not Call Registry were supplied by the FTC's Bureau of Consumer Protection on May 12, 2016. The 2016 annualized complaint data was determined by averaging the total complaints received in the first four months and then multiplying that monthly average by twelve.



Congress passed the Telephone Consumer Protection Act[9] (TCPA) in 1991 in direct response to "[v]oluminous consumer complaints about abuses of telephone technology—for example, computerized calls dispatched to private homes."[10] Yet 25 years later, the complaints are still pouring in. Robocalls are very inexpensive to make. Both legitimate callers and bad actors can discharge tens of millions of robocalls over the course of a day at a fraction of a penny per call.[11] The TCPA needs to be strengthened.

The problem of unwanted and harassing robocalls is growing worse. No one likes robocalls. Consumers in every district and every state are complaining. The current structure of the TCPA does provide some protection, but it does not provide enough.

In this testimony I will cover the following topics:

1. The role that the Telephone Consumer Protection Act plays in protecting consumers from unwanted and invasive calls and texts to cell phones.
2. The reasons why the FCC's 2015 Omnibus Order[12] on the TCPA was correct.
3. The importance of passing the HANGUP Act.
4. Needed additions to Federal law to deal with abusive robocalling to consumers.
5. A real fix for the reassigned number problem.
6. Vicarious liability rules under the TCPA are appropriate.

1. The Telephone Consumer Protection Act provides consumers critically important protections from unwanted and invasive calls and texts to cell phones.

Privacy Concerns. The TCPA is an essential privacy protection law, intended to protect consumers from the intrusions of unwanted automated and prerecorded calls

[9] 47 U.S.C. § 227.

[10] *Mims* v. *Arrow Fin. Servs., L.L.C.,* 132 S. Ct. 740, 744 (2012).

[11] *See e.g.,* Call-Em-All Pricing, which quotes pricing from a high of 6 cents per call to $7.50 per month "for one inclusive monthly fee. Call and text as much as you need." *https://www.call-em-all.com/pricing,* (last accessed May 13, 2016).44, 73

[12] *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02–278, Report and Order, 30 FCC Rcd. 7961 (2015) [hereinafter 2015 TCPA Declaratory Ruling and Order].

to cell phones. But for the exception created in the Budget Act last October,[13] the TCPA permits these calls *only if* the consumer has given "prior express consent" to receive them.[14] Calls for emergency purposes are excluded from this prohibition. When it enacted the TCPA in 1991, Congress found that automated and prerecorded calls are "a nuisance and an invasion of privacy, regardless of the type of call . . ."[15] They are no less a nuisance and an invasion of privacy today.

Heavy impact on struggling households. Many people in the United States today rely exclusively on their cell phones as their only means of communication. These consumers include:

- Close to 70 percent of adults aged 25–29 and over 67 percent of adults aged 30–34;
- Nearly 60 percent of persons in households below the poverty line;
- 59 percent of Hispanics and Latinos, and 46 percent of African Americans.[16]

Many, if not most, of the households living below the poverty line rely on pay-as-you-go, limited-minute prepaid wireless products. These wireless plans have been growing in use, especially among low-income consumers and consumers with poor credit profiles.[17] These prepaid wireless products provide a fixed number of minutes, and often a fixed number of texts. After these limits are exceeded, consumers must purchase a package of new minutes periodically to maintain their service. Consumers in such plans are billed for incoming calls in addition to outgoing calls, making them very sensitive to repetitive incoming calls—especially calls that they do not want.

Additionally, almost 12.5 million low-income households maintain essential telephone service through the Federal Lifeline Assistance Program.[18] Most of these Lifeline participants have service through a prepaid wireless Lifeline Program, which most commonly limits usage to only 250 minutes a month for the entire household.[19]

Allowing calls without the consent of the person called, limiting the right to revoke consent, or curbing the definition of autodialer—all proposals made by the calling industry in repeated filings before the FCC—would be devastating for households struggling to afford essential telephone service. Any one of these changes would lead to the receipt of more unwanted and unconsented-to calls that would further deplete the scarce minutes available for the Lifeline household. For the lower-income consumers and households that struggle to afford telephone service, any one of these changes would use up the minutes on which the entire Lifeline household depends to access health care, transportation, emergency, and other essential services, and to avoid social isolation.

Public safety threatened. Cell phones accompany people wherever they go, including in cars. Too often, calls and texts are answered while people are driving because so many cannot resist the imperious ring of the wireless telephone. Receiving cell phone calls while driving threatens public safety. The National Highway Traffic Safety Administration found that cell phone use contributed to 995 (or 18 percent) of fatalities in distraction-related crashes in 2009. More robocalls will inevitably lead to more distracted drivers and, inescapably, more accidents.[20]

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[13] Congress amended the TCPA in 2015 to allow calls to be made without consent to collect a debt owed to or guaranteed by the United States, subject to regulations issued by the FCC. Pub. L. No. 114–74, 129 Stat. 584 (2015) (§ 301).

[14] 47 U.S.C. § 227(b)(1)(A)(iii).

[15] TCPA, Pub. L. No. 102–243, 105 Stat. 2394 (1991) §§ 12–13.

[16] *See* Stephen Blumberg and Julian Luke, U.S. Dep't of Health and Human Services, National Center for Health Statistics, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey,* July–December 2014, at 6 (June 2015).

[17] 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).

[18] Universal Service Administrative Company, 2014 Annual Report 9 (2014).

[19] Federal Communications Commission, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order 15–71, ¶ 16 (Rel. June 22, 2015).

[20] *See* U.S. Dep't of Transportation, Facts and Statistics, available at *http://www.distraction.gov/stats-research-laws/facts-and-statistics.html* (last accessed Jan. 14, 2016) (citing 3,154 deaths and 424,000 injuries from distracted drivers in 2013, and noting that text messaging, because of the visual, manual, and cognitive attention required from the driver, is "by far the most alarming distraction"). *See also Injury Prevention & Control: Motor Vehicle Safety: Distracted Driving,* Centers for Disease Control and Prevention, available at *http://www.cdc.gov/motorvehiclesafety/distracted_driving/* (last accessed Jan. 14, 2016) ("Each day

Continued

Texts are as intrusive as calls. The TCPA's prohibitions against unwanted communications apply to both phone calls and texts.[21] This is because text messages are just as intrusive and costly to consumers as phone calls. And, particularly for low-income consumers using prepaid wireless plans, the unwanted texts deplete the limited data they pay for and rely on.

As noted in a recent Gallup study: "Texting, using a cellphone and sending and reading e-mail messages are the most frequently used forms of non-personal communication for adult Americans." [22] As Americans' use of texts as a regular means of communication increases, unwanted texts become more and more invasive. People now respond to text messages in the same reflexive way they respond to calls—the beep of a text demands an immediate acknowledgment. As a result, autodialed texts that arrive in droves interrupt, annoy and harass consumers just as robodialed calls do. And these unwelcome texts use up precious limits for consumers whose cell phone plans impose restrictions, such as those consumers on prepaid or Lifeline plans.

Litigation protects consumers and is justified by the number of complaints about robocalls. In addition to the hundreds of thousands of complaints made monthly to government agencies, a tiny percentage of consumers who are plagued with repeated and unwanted robocalls and prerecorded calls do file suit. A small selection of cases illustrates just some of the abuses to which consumers have been subjected:

- *Dominguez* v. *Yahoo, Inc.*[23]—Yahoo sent 27,809 wrong number text messages in 17 months to this consumer, and refused to stop even after the consumer's many pleas.
- *Osorio* v. *State Farm Bank*[24]—327 robocalls to the consumer's cell phone in 6 months, all seeking to collect on a debt owed by someone else.
- *Gager* v. *Dell Fin. Servs., L.L.C.,*[25]—40 robocalls to the consumer's cell phone in 3 weeks, even after she asked the company to stop robocalling.
- *King* v. *Time Warner Cable,*[26]—An automated system for debt collection calls involving zero human intervention or review resulted in 153 robocalls to a woman who had never been a customer. The calls continued even after she informed Time Warner of its error and asked it to stop calling, including 74 additional robocalls after she filed suit.
- *Moore* v. *Dish Network L.L.C,*[27]—31 robocalls in 7 months to the cell phone of a low-income consumer using a Lifeline support phone, even after he repeatedly told the company it had the wrong number and to stop calling.
- *Munro* v. *King Broadcasting Co.*[28]—Hundreds of text messages despite the consumer's dozens of requests for the company to stop.
- *Beal* v. *Wyndham Vacation Resorts, Inc.*[29]—Dozens of robocalls to the consumer's cell phone, which continued even after her repeated requests to stop calling.

In these cases, and in a number of filings before the FCC, the defendants argued that the technology used to make the multiple calls did not fit the definition of an *autodialer* under the statute (*see Dominguez;*[30] *King;*[31] *Moore* [32]); that the statutory term "*called party*" should be construed to allow calls to a number given by, and formerly assigned to, a different person (the "intended party") (*see Osorio,*[33] *King,*[34] *Moore* [35]); and that the *consumer could not revoke* consent (*see Osorio;*[36] *Gager;*[37]

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in the United States, more than 9 people are killed and more than 1,153 people are injured in crashes that are reported to involve a distracted driver.").

[21] *See In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02–278 Report and Order, 18 FCC Rcd. 14014 (2003) (¶165).

[22] Frank Newport, *The New Era of Communication Among Americans,* Gallup (Nov. 10, 2014), available at *http://www.gallup.com/poll/179288/new-era-communication-americans.aspx.*

[23] 629 Fed. Appx. 369 (3d Cir. 2015).

[24] 746 F.3d 1242 (11th Cir. 2014).

[25] 727 F.3d 265 (3d Cir. 2013).

[26] 113 F. Supp. 3d 718 (S.D.N.Y. 2015), *appeal filed,* No. 15–2474 (2d Cir. Aug. 6, 2015).

[27] 57 F. Supp. 3d 639 (N.D. W. Va. 2014).

[28] 2013 WL 6185233 (W.D. Wash. Nov. 26, 2013).

[29] 956 F. Supp. 2d 962 (W.D. Wis. 2013).

[30] 629 Fed. Appx. at 371.

[31] 113 F. Supp. 3d at 722, 725.

[32] 57 F. Supp. 3d at 652–55.

[33] 746 F.3d at 1252.

[34] 113 F. Supp. 3d 718 at 722, 725.

[35] 57 F. Supp. 3d at 648–49.

[36] 746 F.3d at 1255–56.

[37] 727 F.3d at 272.

King;[38] *Beal;*[39] *Munro*[40]). If the FCC's position had not been sustained in those cases, or if it had been changed by statute, nothing would prevent callers like these from continuing the unwanted calls.

In all of these cases, a business entity set loose an automated system that called a consumer's cell phone multiple times, even after the consumer's repeated attempts to stop the calls. In each case, the caller had simply decided that it was more cost-effective to ignore the clearly expressed wishes of these consumers and continue to make these automated calls and texts.

It is evident that consumers need more protection from such abuses, not less. The sheer number of calls a single caller with an autodialer can generate is staggering. The figures exemplify why robust interpretation and continued enforcement of the TCPA is critical, particularly given the increase in cell phone use and advances in technology.

The calling industry, including all those represented here today, make extravagant claims about spurious lawsuits, wrongful class actions, and nefarious attorneys churning new claims relating to TCPA litigation—all to support their insistence that the TCPA must be changed, and their arguments that the FCC's 2015 Order is substantively improper. For example, some groups point to websites that track incoming unlawful calls to support their claim that much of TCPA litigation is a sham. Yet these businesses, like Privacy Star, track calls only *after callers choose to make them.* Further, the judicial system has robust mechanisms to protect against meritless cases. And even if there were some meritless cases that still made it through the judicial system, this would certainly not justify allowing innocent consumers to fall victim to a barrage of unwanted robocalls. Congress should not let this fictional specter of spurious litigation distract it from the harmful effects on consumers of the millions of unwanted calls.

Congress deliberately created statutory penalties in the TCPA to ensure compliance. Any allegedly harsh consequence of repeated violations is precisely the deterrent intended and needed to instigate corrective action and industry-wide compliance. Only businesses that make robocalls without consent and without up-to-date dialing lists risk liability from TCPA lawsuits.

Despite the facts that robocalls consistently top the list of consumer complaints[41] and that 3.5 million complaints about unwanted calls were made to the FTC in 2015,[42] there were only 3,710 TCPA lawsuits filed in 2015.[43]

This means that for every 1,000 complaints to the FTC, only one lawsuit is filed. Most consumers who receive robocalls do not take the time to complain to a Federal agency, and even a tinier percentage (one tenth of 1 percent) actually files a lawsuit. Most contact the caller or give up. Only those who are very frustrated will seek redress with state or Federal agencies. For example, the consumer in the *Dominguez* case, who received nearly 28,000 text messages from Yahoo, repeatedly asked Yahoo to stop, without success. The consumer then turned to the FCC, which also asked Yahoo to stop. Yahoo refused, stating that it did not believe, based on its narrow view of what constitutes an autodialer under the TCPA, that it was regulated by the FCC. Only then did the consumer file suit.[44] If the industry callers represented here today achieve their goal of weakening the law, the number of unwanted calls and texts will skyrocket.

The TCPA does not provide for an attorney fee award even when the consumer prevails, and the statutory damages recovery is limited to $500 per impermissible call. (The court has discretion to treble this amount if it finds that the defendant acted willfully or knowingly.[45]) This means that only cases involving a high volume of illegal calls will provide the possibility of a recovery that is even sufficient to cover the attorney's time to investigate, file and litigate the case. Thus the very structure of the TCPA weeds out cases that involve only a low volume of isolated, unwanted calls.

Moreover, the alarmist criticisms of class actions are simply a red herring. A few problematic class actions do not diminish the necessity of fostering effective enforcement of the significant substantive protections provided by the TCPA. The vast majority of TCPA claims are brought as individual actions, but having the ability to

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[38] 113 F. Supp. 3d 718 at 726.
[39] 956 F. Supp. 2d at 977.
[40] 2013 WL 6185233, at *3–4.
[41] *See* 2015 TCPA Declaratory Ruling and Order ¶ 1.
[42] Federal Trade Commission, National Do Not Call Registry Data Book, FY 2015, at 4 (2015).
[43] *See* WebRecon, *Out Like a Lion . . . Debt Collection Litigation & CFPB Complaint Statistics,* Dec 2015 & Year in Review, available at: *http://webrecon.com/out-like-a-lion-debt-collection-litigation-cfpb-complaint-statistics-dec-2015-year-in-review/#sthash.m8WYbAKa.dpuf.*
[44] 629 Fed. Appx. at 371.
[45] 47 U.S.C. § 227(b)(3)(C).

pursue TCPA claims as a class action furthers the statute's fundamental purpose. Class settlements bring real relief to the public, as many defendants then stop making the offending calls or they implement safeguards. Also, because the TCPA has no attorney fee provision, class actions often present the only practical means of litigating a claim.[46]

2. The FCC's 2015 Omnibus Order on the TCPA was correct.

The callers have pressed the FCC to change three critical definitions within the TCPA:

(a) They seek a narrow definition of "autodialer" or "ATDS" under the TCPA—which would have the effect of eliminating any statutory or government oversight over automated calls, whether for informational, telemarketing, debt collection, or other purposes.

(b) They seek a definition of the term "called party" to mean the "intended recipient" of the call—which would remove any incentives for callers to maintain timely records of consent, and eliminate the legal basis for consumers to ask that wrong number calls cease.

(c) They seek a ruling that once a consumer has provided consent to receive robocalls, such consent can never be revoked, regardless of the number of unwanted automated calls and texts the consumer receives.

Not only are these arguments incorrect as a matter of law, but the granting of any one of them would unleash a tsunami of unwanted calls upon owners of cell phones in the United States. The FCC was quite correct, both legally and as a policy matter, to deny each of these requests by the industry.

Autodialer definition. The calling industry's argument that the FCC's longstanding definition of autodialer is wrong is based on the notion that the current definition covers too many instruments, supposedly making the distinction meaningless. The implication is that because so many people have smart phones, each of which could be considered an autodialer, all of those people could be sued under the TCPA—a danger the industry would prevent by changing the definition of autodialer to exclude all of the technology that is actually being used by commercial entities to call consumers.

Called party. The calling industry argues that "called party" must mean the person the caller intended to call, rather the person the caller actually reached at the dialed number. The industry proposes a tortured analysis of the TCPA's plain language that would lead to disastrous results for consumers. Adopting the industry's absurd interpretation not only runs afoul of the TCPA's plain reading, but it would also leave innocent consumers who receive uninvited, wrong number robocalls without recourse. For example, in one reported case, Nelnet called one consumer over 185 times, contending that it had consent because the *intended recipient* was the person it was trying to call, namely the real debtor.[47]

If the position advanced by industry were to become the rule, Nelnet would have no liability no matter how many times it called the wrong person. Nelnet's defense would be that because it *intended* to call one party 185 times, and it had consent from that party, that would be sufficient. It would not matter that it actually reached someone else 185 times. The person who answers and owns the phone is clearly the "called party." It does not make sense to treat the "intended party" as the "called party," and leave the party actually called unprotected.

In *Osorio,* the consumer received 327 debt collection robocalls to her cell phone for a debt owed by someone else.[48] In *Dominguez,* Yahoo sent 27,809 texts, and maintained that it did not have to stop because it had consent from a prior subscriber.[49] In *Allen* v. *JPMorgan Chase, N.A.,* a noncustomer of Chase Auto Finance received over 80 prerecorded calls to her cell phone relating to the debt of someone else. When she answered the calls, an automated voice instructed her to call Chase Auto Finance to discuss "her" account, or to visit *www.chase.com.* When she called, Chase initially refused to take action because she was not a customer. Only after numerous complaints and litigation did the calls cease.[50]

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[46] "It may be that without class certification, not all of the potential plaintiffs would bring their cases. But that is true of any procedural vehicle; without a lower filing fee, a conveniently located courthouse, easy-to-use Federal procedural rules, or many other features of the Federal courts, many plaintiffs would not sue." *Shady Grove Orthopedic Associates, P.A.,* v. *Allstate Insurance Co.,* 559 U.S. 393, 435 n.18 (2010).

[47] *Cooper* v. *Nelnet,* 6:14–cv–00314–GKS–DAB (M.D. Fla.).

[48] 746 F.3d at 1246.

[49] 629 Fed. Appx. at 371.

[50] Case No. 13–cv–08285 (N.D. Ill.).

The FCC did not make new law in its 2015 ruling. It simply reiterated the holdings of the vast majority of courts that "called party" is indeed the person actually called and not some other intended recipient.[51]

The reassigned numbers issue is a red herring. In its 2015 Omnibus Order, the FCC allowed callers only one call to determine whether a cell phone number had been reassigned to a new consumer.[52] It did this because if there were not a strict limit on these calls, callers would have no incentive to ensure that they are calling the person who provided consent to be called.

Wrong number calls generally are not a matter of one or even two calls, but usually result in many calls. Here are just a few examples involving a huge number of wrong number calls:

- *Singh* v. *Titan Fitness Holdings, L.L.C. d/b/a Fitness Connection:* 200 calls.[53]
- *Percora* v. *Santander:* 50 calls[54]
- *Scott* v. *Reliant Energy Retail Holdings, L.L.C.:* at least 100 calls.[55]

It does not matter if the industry does not benefit from wrong number calls—the industry must be incentivized to *stop* the wrong number calls. The TCPA places the burden of proving consent on the caller. This burden should remain on the caller to ensure that the consent remains valid. The experience reflected in the cases shows that, without proper incentives to stop making wrong-number calls, the industry will simply keep calling. (But actually, the industry does benefit from the wrong number calls by shifting the cost of ensuring that the right party is called from the caller to the called party.)

The FCC's Order on reassigned numbers is reasonable, and allows industry groups one "free" call before liability attaches. After all, the businesses placing the calls are in the best position to ensure ongoing consent. Industry groups that insist on placing robocalls to consumers can seek technologies with a higher accuracy rate than those on the market (which currently have between 85 to 99 percent accuracy in identifying cellular numbers).[56] They can combine existing technologies with other strategies to prevent wrong number calls, such as making a manual call first, or developing a method to confirm that the called party is in fact the intended recipient. The discussion in section 6 of this Testimony provides more detail about methodologies that can be used to avoid wrong number calls.

Keeping the onus on the caller is appropriate. It is analogous to what transpired in the financial sector after the Fair Credit Billing Act was passed.[57] Placing the burden of managing consumer fraud in credit card transactions upon banks provided them with the incentive to create systems that limit and avoid fraud. The rationale is the same here.

Many callers communicate regularly with the persons they intend to call (*i.e.,* their own customers). Who better than the callers to ensure that they have ongoing consent? These callers have processes in place to maintain current customers' contact information; they can also establish consent to call cell phones. Businesses can implement features in their customer communications to confirm ongoing consent (*i.e.,* via their websites, at their storefronts, via telephone). If they are unable to confirm consent, the best practice would be to remove the consumer's name from their automated calling lists.

Notably, most cell phone providers do not reassign numbers for at least 30 days.[58] Autodialers are equipped to record "triple-tone" signals that identify a number that

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[51] *See* Osorio, 746 F.3d at 1250–52 (rejecting argument that "intended recipient" is the "called party"). *See also Soppet* v. *Enhanced Recovery Co.,* 679 F. 3d 637, 640–41 (3d Cir. 2013); *Paradise* v. *Commonwealth Fin. Sys., Inc.,* No. 3:13–cv–00001, 2014 WL 4717966, at *3 (M.D. Pa. Sept. 22, 2014) ("called party" does not mean intended recipient); *Fini* v. *DISH Network L.L.C.,* 955 F. Supp. 2d 1288, 1296 (M.D. Fla 2013) ("possessing standing as a 'called party' . . . does not require the plaintiff to have been the intended recipient"); *Manno* v. *Healthcare Revenue Recovery Group, L.L.C.,* 289 F.R.D. 674, 682 (S.D. Fla. 2013); *Breslow* v. *Wells Fargo Bank, N.A.,* 857 F. Supp. 2d 1316, 1322 (S.D. Fla. 2012) ("called party" refers to the actual, not the intended, recipient).

[52] *See* 2015 TCPA Declaratory Ruling and Order at 8006–10, ¶¶ 85–92.

[53] Case No. 4:14–cv–03141 (S.D. Tex).

[54] Case No. 5:14–cv–04751–PSG (N.D. Cal.)

[55] Case No. 4:2015–cv–00282 (S.D. Tex).

[56] Michael P. Battaglia, Meg Ryan, Marcie Cynamon, *Purging Out-Of-Scope And Cellular Telephone Numbers From RDD Samples,* in Proceedings of the AAPOR–ASA Section on Survey Research Methods 3798 (2005).

[57] 15 U.S.C. §§ 1601 *et seq.*

[58] *See* Numbering Resource Optimization, CC Docket No. 99–200, Report and Order, 15 FCC Rcd. 7574, 7590, ¶ 29 (2000).

has been disconnected. A manual dialer will also hear a triple-tone. Once the caller knows that the number has been disconnected, it also knows that the number is on track to be reassigned to a different person.[59]

And, of course, if a business wants an absolute guarantee against TCPA liability, it has the option of simply refraining from making robocalls; it can manually dial instead. Businesses do not have a "right" to make robocalls. And their ability to do so must not undermine the privacy rights of consumers. The FCC's a safe harbor for liability for one call is an appropriate balance between assisting callers to determine whether a number has been reassigned and opening the floodgates to unwanted calls to consumers.

"Reasonable means of revoking consent" includes only means that are reasonable. The calling industry also complains about the FCC's order requiring that callers honor consumers' use of "reasonable means" to revoke consent.[60] But any "reasonable" means to revoke consent is appropriate and consistent with the plain reading of the TCPA. Industry arguments paint a myriad of far-fetched examples of ways consumers *could* attempt to revoke consent. Yet the FCC did not say consent could be revoked in *any* way, but rather any *reasonable* way.

Industry objects to the use of reasonableness as a standard. But reasonableness is often used as a standard in statutes, court rules, and administrative agency rules and decisions. The "Reasonable Man" is an eminent personality in United States law. For example, the term "reasonable" is used to define a standard in Rules 4, 5, 11, 12, 15, 16, 17, 23, 26, 27, 30, 32, 33, 34, 36, 37, 43, 45, 50, 51, 53, 56, 60, 65, and 68 of the Federal Rules of Civil Procedure.

The Uniform Commercial Code—the basic law governing commercial transactions throughout the United States—imposes upon parties a duty of good faith, defined to include "reasonable commercial standards of fair dealing."[61] It provides that an offer shall be construed as inviting acceptance "by any medium reasonable in the circumstances" and is construed to remain open for a "reasonable time."[62] "Reasonably predictable" fair market rent is part of the standard for distinguishing between a lease and a sale.[63] When the parties have not agreed upon a time for an action to be taken, it is to be taken within a "reasonable time."[64] And this is just a partial list of the references to reasonableness as a standard in only the first of the U.C.C.'s eleven Articles. The industry's objection to a reasonableness standard is alarming, and indicative that—absent this requirement—these industry groups would seek to impose *unreasonable* measures to *restrict* revocation of consent.

It is only when callers make it unduly cumbersome to revoke consent that they are likely to receive varying manners of revocation, which may or may not ultimately be deemed reasonable. For example, if the caller does not provide a mechanism to opt out when making a robocall (and many do not), the consumer might go to the brick and mortar storefront and ask a representative to remove his name from the calling list.

Reasonable methods of revocation should include an easy-to-use opt-out mechanism provided within the call or text. Other methods may include going to the caller's website, or calling the company's customer service line. It stands to reason that consumers would be likely to use these methods. However, no specific method should be mandatory because not every method fits every scenario.

Instead of requiring consumers to discern how to revoke consent for a particular business (*i.e.,* XYZ Co. requires completion of a form), the onus must be on the caller. If a business wants to robocall consumers, it should train its employees how to handle a consumer's wish to opt out of robocalls, and not shift its burden to consumers.

Allowing the industry to limit mechanisms for revocation is contrary to the TCPA's broad construction, and also disregards the myriad of ways in which businesses may be organized (*i.e.,* not all have a website or customer service line). Allowing any reasonable manner of revocation that conveys a message to the caller that the recipient does not wish to receive future communications is appropriate.

Some industry groups have suggested that the terms for revocation should be limited to the terms set out in the underlying contracts. However, not all communications are subject to a contractual relationship between the parties (*e.g.,* wrong number calls), so even the most consumer-protective contract would not be a one-size-fits-all solution. More important, leaving the matter to contract opens the door to

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[59] *See* 2015 TCPA Declaratory Ruling and Order at 38 n.303.
[60] *See* 2015 TCPA Declaratory Ruling and Order ¶ 47.
[61] U.C.C. §§ 1–201, 1–304.
[62] U.C.C. § 2–206.
[63] U.C.C. § 1–203.
[64] U.C.C. § 1–205.

unequal bargaining positions in contractual drafting and obscure provisions in fine print, all leading to consumer confusion about how to revoke consent. Better to keep the FCC's approach: that revocation must simply be *reasonable.*

3. The importance of passing the HANGUP Act.

Unfortunately, a provision seriously undermining the important protections of the TCPA was jammed through Congress as part of the Bipartisan Budget Act of 2015. Section 301 of this Act creates an exemption to the TCPA that permits robocalls and texts by debt collectors of Federal debt—primarily student loan borrowers who are delinquent on Federal student loan payments, as well as taxpayers pursued by private collectors—to be made to cellphones without the consent of the consumer. This is a dangerous precedent that will harm tens of millions of Americans, and it should be repealed. Senate Bill 2235, the HANGUP (Help Americans Never Get Unwanted Phone calls) Act, repeals the enactment of Section 301 in the budget bill. We strongly support the HANGUP Act.

Our best estimate of the total number of people who could be negatively impacted by Section 301 is over 61 million people. This includes:

- *Federal Student Loans.* The total number of unduplicated recipients of Federal student loans (including Direct loans, Federal Family Education loans, and Perkins loans) was 41.8 million as of Q1 2016.[65]
- *Federally Guaranteed Mortgages.* As of September 2015, there were a total of 4,934,260 mortgages with an explicit guaranty from the U.S. Government, including the Federal Housing Administration, the U.S. Department of Veterans Affairs, and certain other departments to a lesser extent. This number includes both current and performing mortgages (4.4 million) as well as delinquent mortgages (474,000).[66]
- *Small Business Loans.* The Small Business Administration (SBA) offers several kinds of guaranteed loan programs, as well as direct business loans and disaster loans. For Fiscal Year 2015, the SBA approved over 80 thousand loans.[67]
- *Agriculture Loans.* The U.S. Department of Agriculture (USDA) offers various kinds of loan programs, including direct and guaranteed loans for single/multifamily housing, community facilities, and business programs. The USDA's Rural Development loan programs serve 306,552 borrowers through direct programs and 942,367 borrowers through guaranteed programs, as of Fiscal Year 2015.[68]
- *IRS Taxpayer Delinquent Accounts.* Since 2004, the number of taxpayer delinquent accounts subject to collection activities has grown each year.[69] As of September 30, 2015, a total of 13.3 million taxpayer accounts were subject to IRS delinquent collection activities.[70] These accounts are now subject to robocalling by private debt collectors.[71]

Student loan collectors' and servicers' repeated debt collection violations. Student loan collectors and servicers have frequently violated the laws and regulations designed to protect consumers from overreaching, abuse and harassment. For example, consider the student loan servicer Navient's recent settlements with the FDIC and the Department of Justice. On May 13, 2014, Navient reached an agreement with the Department of Justice requiring it to pay $60 million to compensate student loan debtors for interest overcharges that violated the Servicemembers Civil Relief Act (SCRA).[72] On the same day, the FDIC announced a separate $96.6 million set-

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[65] U.S. Dept of Education, Federal Student Aid Portfolio Summary (May 2016), available at *https://studentaid.ed.gov/sa/about/data-center/student/portfolio.*

[66] "Office of the Comptroller of the Currency, OCC Mortgage Metrics Report, Third Quarter 2015 (Feb. 2016), available at *http://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/mortgage-metrics/mortgage-metrics-q3–2015.pdf.*

[67] "U.S. Small Business Administration, Number of Approved Loans by Program (Feb. 2016), available at *https://www.sba.gov/sites/default/files/WDS__Table3__ApprovalCount__Report.pdf.*

[68] "U.S. Dep't of Agriculture, Office of Inspector General, Rural Development's Financial Statements for Fiscal Years 2015 and 2014 at 23, available at *http://www.usda.gov/oig/webdocs/85401-0005-11.pdf.*

[69] Internal Revenue Service Data Book, SOI Tax Stats—Delinquent Collection Activities, Table 16 (2015), available at *https://www.irs.gov/uac/SOI-Tax-Stats-Delinquent-Collection-Activities-IRS-Data-Book-Table-16.*

[70] Internal Revenue Service Data Book 43 (2015), available at *https://www.irs.gov/pub/irs-soi/15databk.pdf.*

[71] *See* 26 U.S.C. § 6306 (amended by Pub. L. No. 114–94, 129 Stat. 1312 (Dec. 4, 2015)).

[72] *See* Press Release, Justice Department Reaches $60 Million Settlement with Sallie Mae to Resolve Allegations of Charging Military Servicemembers Excessive Rates on Student Loans

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tlement with Navient for manipulating the allocation of students' payments in order to maximize late fees, misrepresenting and inadequately disclosing how borrowers could avoid late fees, and violating SCRA requirements.[73]

Moreover, in 2014 testimony to Congress about problems with student loans, the Consumer Financial Protection Bureau's Student Loan Ombudsman stated:

> Loan servicers are the primary point of contact on student loans for more than 40 million Americans. . . . .
>
> As the recession decimated the job market for young graduates, a growing share of student loan borrowers reached out to their servicers for help. But the problems they have encountered bear an uncanny resemblance to the problems faced by struggling homeowners when dealing with their mortgage servicers. Like many of the improper and unnecessary foreclosures experienced by many homeowners, I am concerned that inadequate servicing has contributed to America's growing student loan default problem, now topping 7 million Americans in default on over $100 billion in balances.
>
> *The Bureau has received thousands of complaints from borrowers describing the difficulties they face with their student loan servicers. Borrowers have told the Bureau about a range of problems, from payment processing errors to servicing transfer surprises to loan modification challenges.* To ensure that we do not see a repeat of the breakdowns and chaos in the mortgage servicing market, it will be critical to ensure that student loan servicers are providing adequate customer service and following the law.[74]

Student loan collectors and servicers have also frequently been subject to private suits for TCPA violations. For example, Nelnet was a defendant in a recent TCPA action, *Cooper* v. *Nelnet,* because it contacted third parties' cell phones with pre-recorded messages. Mr. Cooper does not have a student loan serviced by Nelnet. Yet, he received the following pre-recorded call several times on his cell phone in addition to texts and other calls:

> Hello, this is an important message for Leonor Vargas from Nelnet, calling on behalf of the U.S. Department of Education. We do not have a current address, phone number, or e-mail on file for Leonor Vargas. Without current contact information, we are unable to provide important information about their student account. Please contact Nelnet 24/7 at 888–486–4722 or visit us at *www.nelnet.com.* This matter requires your immediate attention. Thank you.

Similarly, Sallie Mae was the defendant in *Cummings* v. *Sallie Mae,* 12–cv–09984 (N.D. Ill.), a case involving allegations that Sallie Mae called people who were references for the students' loans with pre-recorded debt collection messages. Sallie Mae had no relationship with these references in regards to the accounts that were the subject of the calls.

These examples demonstrate that student loan servicers and collectors are autodialing and delivering artificial voice messages to cell phones in violation of the TCPA, as well as violating other critically important consumer protections. Until the servicers and collectors begin complying with the rules and regulations to which they are currently subject, it is a mistake to create special exemptions from consumer protection law for their benefit. The situation calls for stronger enforcement, not weaker protections.

Financially distressed consumers. Studies have shown—and executives in the credit industry have repeatedly admitted—that the major causes of serious consumer delinquency are unemployment, illness, and marital problems. Moreover, the credit industry's overextension of credit, particularly high-cost credit, greatly inhibits debtors' ability to repay.

When Congress wrote the Federal Fair Debt Collection Practices Act (FDCPA) it explicitly recognized that most delinquency is not intentional. Just the opposite is the case. Most overdue debts are not the fault of the consumer:

(May 13, 2014), available at *http://www.justice.gov/opa/pr/justice-department-reaches-60-million-settlement-sallie-mae-resolve-allegations-charging.*

[73] *See* Press Release, FDIC Announces Settlement with Sallie Mae for Unfair and Deceptive Practices and Violations of the Servicemembers Civil Relief Act (May 13, 2014), available at *https://www.fdic.gov/news/news/press/2014/pr14033.html.* While this matter involved private student loans, rather than the Federal student loans for which section 301 provides a carveout, the behavior of student loan servicers is relevant to the discussion.

[74] Hearing on the Impact of Student Loan Debt on Borrowers and the Economy Before the United States Senate Comm. on the Budget, 113th Cong., 2d Sess. (June 4, 2014) (testimony of Rohit Chopra, Assistant Director & Student Loan Ombudsman, Consumer Financial Protection Bureau) (emphasis added).

> One of the most frequent fallacies concerning debt collection legislation is the contention that the primary beneficiaries are "deadbeats." In fact, however, there is universal agreement among scholars, law enforcement officials, and even debt collectors that the number of persons who willfully refuse to pay just debts is minuscule. Prof. David Caplovitz, the foremost authority on debtors in default, testified that after years of research he has found that only 4 percent of all defaulting debtors fit the description of "deadbeat." This conclusion is supported by the National Commission on Consumer Finance which found that creditors list the willful refusal to pay as an extremely infrequent reason for default.
>
> The Commission's findings are echoed in all major studies: *the vast majority of consumers who obtain credit fully intend to repay their debts. When default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce.*[75]

The FDCPA, along with other laws protecting debtors from abuse and harassment, is based on this recognition, rather than on the myth that draconian collection tactics are justified by the existence of substantial numbers of debtors who sought out credit without the intention or wherewithal to repay.[76]

There are clear, objective, widely recognized causes of delinquency and default on consumer debt. Unemployment is widely recognized as the leading cause of the failure to pay credit card debt.[77] Excessive medical debt is also widely seen as cause for the non-payment of other bills.[78]

The impact of the FCC's proposed rule on borrowers with Federal debt from for-profit colleges. There are numerous for-profit colleges that have been repeatedly investigated or sued for fraudulent activities that seriously harm consumers, especially low-income consumers. Just two examples are Corinthian[79] and ITT.[80] As the result of predatory practices, students who attend for-profits often do not benefit from the education paid for with the Federal student loans, and thus disproportionately default on their Federal student loans.

The vast majority of students at these for-profit colleges have Federal student loans. A 2012 report from the U.S. Senate's Health Employment Labor and Pension Committee that examined 30 publicly traded for-profit colleges, found that these institutions were up to 450 percent more expensive than their public counterparts, and that 96 percent of students who attend for-profit colleges borrow in order to do so.[81] Further, students who attend for-profit colleges are far less likely to be able to repay their loans, leading to greater default and serious financial consequences for former students. Nationally, the for-profit college sector generates nearly half of

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[75] S. Rep. No. 95–382, 95th Cong., 1st Sess., *reprinted in* 1977 U.S. Code Cong. & Admin. News. (Aug. 2, 1977) (emphasis added).

[76] David Caplovitz, Consumers in Trouble: A Study of Debtors in Default ch. 11 (1974). *See also* Teresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook, As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America (1989).

[77] Sumit Agarwal and Chunlin Liu, *Determinants of Credit Card Delinquency and Bankruptcy: Macroeconomic Factors,* 27 Journal of Economics and Finance 1 (2003).

[78] *See e.g.* Theresa Tamkins, *"Medical Bills Prompt More than 60 percent of Bankruptcies,"* CNN Original Series, June 5, 2009.

[79] *See* Anya Kamenetz, *Corinthian Colleges Misled Students On Job Placement, Investigation Finds,* Higher Ed, Nov. 17, 2015, available at *http://www.npr.org/sections/ed/2015/11/17/456367152/corinthian-misled-students-on-job-placement-investigation-finds. See also* Annie Waldman, *How a For-Profit College Targeted the Homeless and Kids With Low Self-Esteem,* ProPublica, Mar. 18, 2016 (newly released e-mails and PowerPoints show first-hand Corinthian Colleges' predatory practices), available at *https://www.propublica.org/article/how-a-for-profit-college-targeted-homeless-and-kids-with-low-self-esteem:* Press Release, CFPB Sues For-Profit Corinthian Colleges for Predatory Lending Scheme (Sept. 16, 2014) (Bureau Seeks More than $500 Million In Relief For Borrowers of Corinthian's Private Student Loans), available at *http://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-for-profit-corinthian-colleges-for-predatory-lending-scheme/.*

[80] Danielle Douglas-Gabriel, *Is this the beginning of the end for ITT?* Washington Post, Oct. 19, 2015 (CFPB accused the company of providing zero-interest loans to students but failing to tell them that they would be kicked out of school if they didn't repay in a year; when students could not pay up, ITT allegedly forced them to take out high-interest loans to repay the first ones),available at *https://www.washingtonpost.com/news/grade-point/wp/2015/10/19/is-this-the-beginning-of-the-end-for-itt/*

[81] Staff of S. Comm on Health, Education, Labor, and Pension, 112th Cong., For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success (2012), available at *http://www.help.senate.gov/imo/media/for__profit__report/Contents.pdf.*

all student loan defaults, while enrolling only about 13 percent of all students.[82] These harmful practices most often impact vulnerable populations including low-income persons, people of color, and veterans, all of whom are overrepresented in enrollment at for-profit colleges. This is illustrated in an October 2014 Center for Responsible Lending:

> We find that students who attend for-profit colleges are more likely to need to borrow for their education and tend to borrow more than their peers at public or private, non-profit schools. Unfortunately, this financial investment does not appear to pay off for many for-profit students, who graduate at lower rates, are more likely to default on their loans, and may face poor employment outcomes. African Americans and Latinos are at greater risk of the high debt burdens and poor outcomes caused by for-profit colleges because they are more likely to attend these schools than their white peers.
>
> [A]id received by recent veterans as part of the new Post-9/11 GI bill does not count towards the 90 percent limitation on Federal aid [that for-profits receive]. As a result, for-profit colleges target their recruitment efforts toward current and former members of the military, whose additional grant aid can be counted towards the 10 percent of funds that are intended to come from private sources.[83]

Vulnerable populations with delinquent Federal student loans from potentially fraudulent for-profit schools should not be further harassed by robocalls to their cell phones.

Abusive debt collection calls. Collectors are *not* generally dealing with people who are choosing not to pay something they can pay. Rather, they are dealing with people who are already struggling to pay their debts, for whom choosing to pay one debt will often mean that other debts or necessities will go unmet. This is supported by estimates indicating that the new loophole for debt collection robocalls will not generate significant revenue for the Federal Government. As pointed out by Consumerist, the Congressional Budget Office projects that debt collection robocalls will raise, at most, $500,000 per year over the next ten years.[84] This is why both debt collection regulation and cell phone regulation should not permit abuse, harassment or unfair or deceptive practices.

Causing one's cell phone to ring repeatedly is even more abusive for consumers than causing one's home phone to ring. Debt collection often begins with a series of form letters and then graduates to phone calls from collection employees. The industry's technological capabilities, along with the perverse incentives it provides its employees, often ensure that these calls are frequent and often abusive. In particular, the collection employee is often eligible for salary incentives based on the amount he or she collects. Collectors use automated dialing systems that will place a million calls per day.

As is indicated by the numerous cases filed in the courts about multiple calls as a collection tactic, people find it enormously stressful to receive multiple collection calls every day.[85] The calls are highly intrusive. They cause great distress and trigger difficulties in marriages. Numerous collection calls interfere with daily life. The calls themselves, the dread of future calls, and the fear of the dissemination of personal, embarrassing information to friends, neighbors, co-workers and employers permeate the lives of consumers. Indeed, in some cases, aggressive collection efforts have caused such significant emotional distress as to cause physical illness.[86]

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[82] Peter Smith & Leslie Parrish, *Do Students of Color Profit from For-Profit College? Poor Outcomes and High Debt Hamper Attendees' Future,* Center for Responsible Lending (Oct. 2014), available at *http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-for-profit-univ-final.pdf.*

[83] *Id.*

[84] Chris Morran, *Government's Own Budget Analysis Shows that Allowing Debt Collection Robocalls is Pointless,* Consumerist, Oct. 28, 2015, available at *https://consumerist.com/2015/10/28/governments-own-budget-analysis-shows-that-allowing-debt-collection-robocalls-is-pointless/.*

[85] *See, e.g., CashCall, Inc.* v. *Morrisey,* 2014 WL 2404300 (W. Va. May 30, 2014) (84,371 calls to 292 consumers) (unpublished); *Meadows* v. *Franklin Collection Serv., Inc.,* 414 Fed. Appx. 230 (11th Cir. 2011) (200–300 calls); *Rucker* v. *Nationwide Credit, Inc.,* 2011 WL 25300 (E.D. Cal. Jan. 5, 2011) (approximately 80 phone calls in one year); *Krapf* v. *Nationwide Credit, Inc.,* 2010 WL 2025323 (C.D. Cal. May 21, 2010) (four to eight calls daily for two months); *Turman* v. *Central Billing Bureau, Inc.,* 568 P.2d 1382 (Or. 1977) (at least four calls over nine days).

[86] *See, e.g., Margita* v. *Diamond Mortgage Corp.,* 406 N.W.2d 268 (Mich. Ct. App. 1987) (stress from telephone collection efforts including phone calls aggravated paroxysmal atrial tachycardia); *Turman* v. *Central Billing Bureau, Inc.,* 568 P.2d 1382 (Or. 1977) (affirming tort verdict; blind consumer rehospitalized with anxiety and glaucoma complications after repeated collection calls); *GreenPoint Credit Corp.* v. *Perez,* 75 S.W.3d 40 (Tex. App. 2002) (affirming jury verdict

Complaints about debt collection—wrong people called routinely. The Consumer Financial Protection Bureau's Annual Report for 2015 shows that 40 percent of debt collection complaints involved continued attempts to collect debts not owed, which include complaints that the debt does not belong to the person called.[87] Almost one fifth of all the complaints related to debt collector communication tactics.[88]

Similarly, a 2009 survey conducted by the Scripps Survey Research Center at Ohio University shows that 30 percent of respondents were being called regarding debt that was not their debt.[89] And according to statistics from the Federal Reserve, one in seven people in the United States is being pursued by a debt collector, a substantial percentage of whom report being hounded for debts they do not owe.[90]

Senate Bill 2235, the HANGUP Act, repeals the enactment of Section 301 in the budget bill. The best protection against unwanted robocalls is to require the consent of the called party, as the TCPA does for all other non-emergency robocalls and texts made to cell phones.

We urge you to pass S. 2235 as soon as possible.

4. Federal law should be strengthened to deal with abusive robocalling to consumers.

As is evident from the growing number of complaints about robocalls, as well as the growing litigation, American consumers are suffering from two problems related to robocalls. One is too many robocalls from legitimate companies. The other is the escalating number of robocalls from scammers. In the public's mind, these two issues are intertwined. And, until they are each independently dealt with, the complaints—both to government agencies and through the courts—will continue to escalate.

The TCPA and the Do Not Call Registry provide some protection for consumers from unwanted robocalls from legitimate companies, but these mechanisms have completely failed to address the entire robocall problem. Major phone companies provide little effective protection from the calls sent by scammers and unscrupulous actors. These calls cost consumers an estimated $350 million in 2011.[91] Many of these scam robocalls originate from overseas, outside of the reach of the law.[92] The FTC has had difficulty in enforcing the restrictions against unwanted calls, collecting less than 12 percent of the $1.2 million it has charged to Do Not Call and robocall violators since it created the national registry.[93]

The confluence of two changes in the law in 2015 with the ongoing caller ID spoofing problems will tremendously exacerbate existing problems. Scammers posing as IRS collection agents have long been known as perpetrating one of the worst consumer scams. Now that private debt collectors can collect IRS debts,[94] it will be especially difficult for consumers to determine the difference between real collectors for the IRS and scammers.[95] This likely confusion is made worse by a new statutory

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of $5 million in compensatory damages against debt collector; elderly consumer suffered severe shingles-related sores, anxiety, nausea, and elevated blood pressure due to repeated telephone and in-person harassment over a debt she did not owe).

[87] Consumer Financial Protection Bureau, Consumer Response Annual Report 16 (January 1–December 31, 2015) available at *http://files.consumerfinance.gov/f/201604__cfpb__consumer-response-annual-report-2015.pdf.*

[88] *Id.*

[89] Marcia Frellick, *Survey: Debt collection calls growing more frequent, aggressive,* Creditcard.com, Jan. 28, 2010, available at *http://www.creditcards.com/credit-card-news/debt-collectors-become-more-aggressive-break-law-1276.php.*

[90] David Dayen, *Someone Else's Debt Could Ruin Your Credit Rating,* New Republic, Mar. 31, 2014, available at *http://www.newrepublic.com/article/117213/debt-collector-malpractice-someone-elses-debt-could-ruin-your-credit.*

[91] Kevin B. Anderson, Federal Trade Commission, Staff Report of the Bureau of Economics, Consumer Fraud in the United States, 2011: The Third FTC Survey (April 2013), available at *https://www.ftc.gov/sites/default/files/documents/reports/consumer-fraud-united-states-2011-third-ftcsurvey/130419fraudsurvey__0.pdf.* The survey identified approximately 3.5 million telemarketing fraud cases in 2011 with a median loss per case of $100. *Id.* at 38 and 39.

[92] Ringing off the Hook: Examining the Proliferation of Unwanted Calls before the United States Senate Special Comm. on Aging, 114th Cong., 1st Sess. (2015) (testimony of the Federal Trade Commission), available at *http://www.aging.senate.gov/imo/media/doc/FTC__Greisman__6__10__15.pdf.*

[93] Federal Trade Commission, *FTC DNC and Robocall Enforcement,* (Apr 19, 2016) (on file with the author).

[94] *See* 26 U.S.C. §6306 (amended by Pub. L. No. 114–94, 129 Stat. 1312 (Dec. 4, 2015)) (requiring the IRS to enter into tax collection contracts for all inactive tax receivables).

[95] Internal Revenue Service, *Phone Scams Continue to be a Serious Threat, Remain on IRS "Dirty Dozen" List of Tax Scams for the 2016 Filing Season* (Feb. 2, 2016), available at *https://*

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provision authorizing the debt collectors of IRS debt to robodial consumers without consent. Calls from real collectors for the IRS will be permitted to robodial consumers—which directly conflicts with the explicit advice of the FTC "that the IRS never calls consumers out of the blue."[96]

One part of the problem is that scammers are able to use a spoofed caller-ID so that it may look to the consumer answering the telephone as though a legitimate business is actually calling. That spoof is often the beginning of a telemarketing scam. Until we deal with caller ID spoofing, we won't be able separate the robocalls from legitimate businesses from the scammers.

What is needed. The telephone companies must be required to provide easy to use and free services that enable consumers to block unwanted callers, especially robocalls. Additionally, effective and mandatory anti-spoofing technology needs to be developed and adopted immediately.

We appreciate the sentiment behind Senator Nelson's introduction of Senate Bill 2558: the Spoofing Prevention Act of 2016. This bill is a good start in the battle to push for a solution to the serious problem of caller ID spoofing. However, we fear that the effective anti-spoofing technology will not be developed until the telephone companies themselves are required to employ it.

H.R. 4932, the ROBOCOP (Repeated Objectionable Bothering of Consumers on Phones) Act, gives consumers the ability to protect themselves from scam robocalls. It directs the FCC to require phone companies to offer free, optional tools to all of their customers that will block unwanted autodialed or prerecorded calls. Emergency robocalls and those calls to which the consumer has consented would not be affected by this mandate. The bill would also require phone companies to address the "spoofing" problem[97] by improving call-blocking technologies and robocall enforcement.[98] This bill outlines a comprehensive solution to the robocall problem, and we ask the Senate to introduce a companion bill as quickly as possible.

Our groups also encourage consumers to put pressure on the major phone companies to offer all of their customers effective robocall-blocking tools at no additional cost. The FCC has declared that phone companies "should" offer these technologies,[99] and last summer, 45 state attorneys general called on five major phone companies to provide them to their customers.[100] Over 600,000 people have already signed Consumers Union's petition asking AT&T, Verizon, and CenturyLink to provide these technologies to their customers. Consumers can join the campaign at *www.EndRobocalls.org*.

5. A real fix for the reassigned number problem.

One of the chief bugaboos in the discussions about callers' professed difficulties complying with the FCC's 2015 Omnibus Order is this industry's statements that it has no reasonable way of knowing when the phone numbers have been reassigned to new people. So, they say, how can they reasonably avoid making these wrong number calls?

There are several ways to avoid these calls. First, the calling industry can arrange for a fully accurate database by setting up one with the cooperation of the cell phone providers.[101] A database would be fully accurate and relatively inexpensive to operate and access by the caller if has the following components:

1. All cell phone providers would participate by providing timely information about cell phone numbers that change ownership.

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www.irs.gov/uac/Newsroom/Phone-Scams-Continue-to-be-a-Serious-Threat,-Remain-on-IRS-Dirty-Dozen-List-of-Tax-Scams-for-the-2016-Filing-Season.

[96] Jon Morgan, Federal Trade Commission, *It's the IRS calling . . . or is it?* (Mar. 12, 2015) ("This has all the signs of an IRS imposter scam. In fact, the IRS won't call out of the blue to ask for payment, won't demand a specific form of payment, and won't leave a message threatening to sue you if you don't pay right away. Have you gotten a bogus IRS call like this? If you did, report the call to the FTC and to TIGTA—include the phone number it came from, along with any details you have.").

[97] Federal Communications Commission, "Spoofing and Caller ID," available at *https://www.fcc.gov/consumers/guides/spoofing-and-caller-id.*

[98] H.R. 4932 (ROBOCOP Act), 114th Cong., 2d Sess. (2016).

[99] Tom Wheeler, *Another Win For Consumers,* Federal Communications Commission Blog, (May 27, 2015) available at *https://www.fcc.gov/news-events/blog/2015/05/27/another-win-consumers.*

[100] Letter from National Association of Attorneys General to Randall Stephenson (AT&T), Lowell C. McAdam (Verizon), Glen F. Post, III (CenturyLink), Marcelo Claure (Sprint), John Legere (T-Mobile) (July 22, 2015), available at *http://www.oag.state.md.us/Press/NAAG_Call_Blocking.pdf.*

[101] My understanding is that Twitter has already arranged for a private database providing this information.

2. The information provided would simply be—on each reporting date—any telephone number that had been returned to the cell phone company (because it was dropped or abandoned or terminated) since the previous reporting date.
3. The providers would make these reports within a short time (one day? two days?) from the date that the number was dropped.
4. Callers could access the database easily online and simply ask: "For telephone number XYZ, when was the last time it changed ownership?" There would be no big data dump from the database, just the simple answer to the question: "Number XYZ most recently changed ownership on ABC date."
5. The fees charged to callers for accessing the information would pay for the maintenance of the database.

The keys components here are (a) all cell phone providers would participate, (b) by providing timely and updated information, (c) allowing reasonable cost for callers to access.

Indeed, there are already database systems on the market that provide, with a high degree of accuracy, information about whether phone numbers have been reassigned. For example, Early Warning, a data exchange company,[102] runs a database that can be accessed by callers to determine the status of each of the numbers they want to call. Early Warning describes its procedure in this way:

How Mobile Number Verification Service Works:

1. Organizations query the service, in real-time or batch, prior to calling customers.
2. The service returns a number match or mismatch indicator based on:
   - Changes to the account since the last date the [caller] contacted the customer.
   - The network status of the number, if deactivated or suspended. *This allows the organization to refrain from making an outbound call to an outdated number or out of service number.*
3. If the response returned is a "number match", then organizations can add the verified number to the Auto-Dialer/Contact Center process. If a number is flagged as a mismatch, organizations can take the steps necessary to re-verify, confirm or update the customer file.[103]

This company claims a high degree of accuracy: "In a recent test, Mobile Number Verification Service correctly identified over 99 percent of mobile changes."[104] We think it is likely that there are other companies that provide similar services or can develop them.

Additionally, callers can and should employ best practices that would include a number of practices to increase the accuracy of the callers' records to assure that the phone numbers for which they have consent to call still belong to their customers. After all it is in their interest to ensure that they are actually reaching their intended customers. Some ideas for these best practices might include:

- Capturing incoming numbers from customers and providing an alert when the number called from is different than the one for which the consumer has provided consent.
- Requesting current telephone numbers in all interactions with customers, including online and paper transactions.

The reassigned number problem need not really be a problem. Simple solutions are within reach. Congress should require that the cell phone providers participate in the database described above, and thereby provide a reasonable way to eradicate the reassigned numbers issue.

6. The vicarious liability rules under the TCPA are appropriate.

The issue of the extent to which one company should be liable for the TCPA violations of others has arisen recently, largely as the result of a case brought against DISH Network, L.L.C. The case was first filed in 2009 by the U.S. Department of Justice and the states of Illinois, California, Ohio and North Carolina.

The litigation was brought because DISH Network's dialers, as well as several of its retailers, were aggressively marketing DISH Network through robocalling con-

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[102] For more information, see Early Warning's website at *http://www.earlywarning.com/about-us.html.*

[103] Data Sheet from 2014, describing the mobile number verification service offered by Early Warning (emphasis added). This data sheet is on file with the author.

[104] *Id.*

sumers. Many of the calls were made to consumers who were on the National Do Not Call Registry. Some had specifically requested to DISH that they not to be called again. Consumers testified about the substantial inconvenience that DISH's calls caused them. Illinois consumers, for example, testified that the calls interrupted family meals, childcare, and taking care of sick relatives.

Retailers were paid by DISH simply based on the sign-up volume. The evidence produced at trial demonstrated that DISH knew many of the retailers would do telemarketing as part of their sales practices. The Federal and state governments argued at trial that, among other things, DISH knew the retailers were making outbound telemarketing calls with automatic dialers, and that DISH was aware there were violations of both TCPA and telemarketing laws because of consumer complaints and enforcement actions.

The issue is whether DISH Network can be held liable for the TCPA violations of its dialers and retailers. The FCC ruled that the Federal common law of agency is sufficient to show vicarious liability.[105] The court has since agreed with that position, holding that the facts could support a finding that DISH Network is liable for the TCPA violations of the retailers making calls on its behalf.[106] Although there have been reasoned positions advanced that third-party liability under the TCPA should reach further than agency principles to any act by a representative of or for the benefit of another,[107] the FCC and the court were clearly right to apply at least the common law rules of agency liability to the entity—DISH Network—on whose behalf the calls were made.

Congress should not consider passing any change to the vicarious liability standards applicable to TCPA enforcement cases.

Conclusion. Thank you very much for the opportunity to testify today. I would be happy to answer any questions.

APPENDIX

Descriptions of National Organizations On Behalf of Which This Testimony Is Filed

Americans for Financial Reform is an unprecedented coalition of over 250 national, state and local groups who have come together to reform the financial industry. Members of our coalition include consumer, civil rights, investor, retiree, community, labor, faith based and business groups.

The *Center for Responsible Lending (CRL)* is a nonprofit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, a nonprofit community development financial institution. For 30 years, Self-Help has focused on creating asset building opportunities for low-income, rural, women-headed, and minority families, primarily through financing safe, affordable home loans.

Consumer Action has been a champion of underrepresented consumers nationwide since 1971. A non-profit 501(c)(3) organization, Consumer Action focuses on consumer education that empowers low-and moderate-income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change. By providing consumer education materials in multiple languages, a free national hotline, a comprehensive website (*www.consumer-action.org*) and annual surveys of financial and consumer services, Consumer Action helps consumers assert their rights in the marketplace and make financially savvy choices. Over 7,000 community and grassroots organizations benefit annually from its extensive outreach programs, training materials and support.

The *Consumer Federation of America* is an association of nearly 300 nonprofit consumer groups that was established in 1968 to advance the consumer interest through research, advocacy and education.

Consumers Union is the public policy and advocacy division of Consumer Reports. Consumers Union works for telecommunications reform, health reform, food and product safety, financial reform, and other consumer issues. Consumer Reports is the world's largest independent product-testing organization. Using its more than

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[105] *In re* DISH Network, L.L.C., CG Docket No. 11–50, Declaratory Ruling, FCC 13–54, at 11 (May 9, 2013).

[106] United States v. DISH Network, L.L.C., 75 F. Supp. 3d 942, 1042 (C.D. IL 2014), *vacated in part on reconsideration,* (Feb. 17, 2015).

[107] *In re* DISH Network, L.L.C., CG Docket No. 11–50, Declaratory Ruling, FCC 13–54, at 4 (May 9, 2013).

50 labs, auto test center, and survey research center, the nonprofit rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

MFY Legal Services envisions a society in which there is equal justice for all. Its mission is to achieve social justice, prioritizing the needs of people who are low-income, disenfranchised or have disabilities. MFY does this through providing the highest quality direct civil legal assistance, providing community education, entering into partnerships, engaging in policy advocacy, and bringing impact litigation. MFY assists more than 20,000 New Yorkers each year. MFY's Consumer Rights Project provides advice, counsel, and representation to low-income New Yorkers on a range of consumer problems, including unwanted and harassing debt collection robocalls, and supports strengthening the TCPA.

The *National Association of Consumer Advocates (NACA)* is a non-profit association of attorneys and consumer advocates committed to representing consumers' interests. Its members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus is the protection and representation of consumers. As a national organization fully committed to promoting justice for consumers, NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means.

National Center for Law and Economic Justice (NCLEJ) works with low-income families, individuals, communities, and a wide range of organizations to advance the cause of economic justice through ground-breaking, successful litigation, policy work, and support of grassroots organizing around the country.

The *National Consumer Law Center* (NCLC) is a non-profit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace. NCLC has expertise in protecting low-income customer access to telecommunications, energy and water services in proceedings at state utility commissions, the FCC and FERC. We publish and annually supplement nineteen practice treatises that describe the law currently applicable to all types of consumer transactions, including *Access to Utility Service* (5th ed. 2011), covering telecommunications generally, and *Federal Deception Law* (2d ed. 2016), which includes a chapter on the Telephone Consumer Protection Act.

Public Citizen is a national non-profit organization with more than 225,000 members and supporters. We represent consumer interests through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues including consumer rights in the marketplace, product safety, financial regulation, safe and affordable health care, campaign finance reform and government ethics, fair trade, climate change, and corporate and government accountability.

U.S. Public Interest Research Group (U.S. PIRG) serves as the Federation of State PIRGs, which are non-profit, non-partisan public interest advocacy organizations that take on powerful interests on behalf of their members. For years, U.S. PIRG's consumer program has designated a fair financial marketplace as a priority. Our research and advocacy work has focused on issues including credit and debit cards, deposit accounts, payday lending and rent-to-own, credit reporting and credit scoring and opposition to preemption of strong state laws and enforcement. On the web at *www.uspirg.org*.

The CHAIRMAN. Thank you, Ms. Saunders.

Mr. Lovich.

STATEMENT OF RICHARD LOVICH, NATIONAL LEGAL COUNSEL, AMERICAN ASSOCIATION OF HEALTHCARE ADMINISTRATIVE MANAGEMENT

Mr. LOVICH. Chairman Thune, Ranking Member Nelson, and members of the Committee, thank you for the opportunity to submit this testimony for the record.

My name is Richard Lovich, and I serve as the National Legal Counsel for the American Association of Healthcare Administrative Management, known as AAHAM, which is a national organization actively representing the interests of healthcare administrative management professionals through a comprehensive program of legislative and regulatory monitoring and participation in many in-

dustry groups. I appreciate your holding this hearing today on these important issues.

As you know, the FCC last July ruled on more than 20 petitions seeking clarifications to the Telephone Consumer Protection Act and the FCC's TCPA rules. AAHAM was one of the petitioners and saw the clarification of what prior express consent means in the healthcare context, as well as a partial exemption from the Act to facilitate important healthcare-related calls. The FCC's ruling did not clarify consent and exempted only certain types of calls made by healthcare providers. These calls cannot be financial in nature.

Because of the ambiguity of the term "prior express consent" and whether related entities are protected, many well-intended healthcare organizations have been sued, and TCPA litigation continues to skyrocket.

To be clear, healthcare providers cannot do their jobs effectively, efficiently, or cost-effect—in a cost-effective manner without using appropriate technology. The TCPA inhibits the use of such technology, and, as a result, drives the cost of healthcare higher.

The TCPA was intended primarily to protect consumers from receiving unsolicited telemarketing calls in their homes at all hours of the day and night by restricting the use of autodialers and through requiring consent to be called. Mr. Chairman, AAHAM fully supports the goal and mission of the TCPA in helping to reduce unsolicited telemarketing calls. The complaints that have been mentioned here today typically are not involving healthcare providers.

Despite its positive intent, 25 years since its passage, the TCPA has become severely outdated. It prevents Americans from receiving non-marketing service messages that they want, including healthcare appointment reminders, insurance coverage eligibility issues, Social Security disability eligibility and payment options, credit-card fraud alerts, notifications of travel changes, package delivery information, and many more. Further, it prevents them from receiving these communications on the devices that they prefer; specifically, their mobile telephones.

At the time the TCPA legislation was passed, over 90 percent of U.S. households relied on their home or landline phone. Today, the trend is away from landline phones; in fact, nearly half of all American homes no longer maintain a landline, relying exclusively on wireless or cell technology. Since the enactment of the TCPA, the use of text messaging has exploded. In 2012, more than 2.19 trillion text messages were sent and received. This could not be anticipated when the TCPA was first enacted.

To make matters worse, new laws and regulations have been passed that make compliance with the TCPA even more difficult. Two examples are the Affordable Care Act and the new IRS regulations dealing with charitable hospitals.

The ACA requires hospitals and outpatient clinics to perform post-discharge follow up with patients to reduce the rate of readmission, which is a big contributor to the cost of healthcare. We know the reminders, surveys, and education that have proven to lower readmission rates can be successfully and cost-effectively conducted by phone. However, this cannot be economically done under the current TCPA.

Similarly, the IRS's 501(r) regulations create another unfunded Federal mandate. These regulations require hospitals to make reasonable efforts to determine whether an individual is eligible for financial assistance with regard to their hospital bills. Again, the TCPA prohibits the use of the most efficient manner in which to do this.

By requiring the use of more labor-intensive methods to comply with the regulations, the FCC's TCPA decisions have added unnecessary expense, diverting resources that could otherwise be dedicated to patient care.

In today's technologically burgeoning society, it makes no sense for the FCC to allow technology to be used to contact consumers via their landline phone but not their cell phones. Today, the FCC is looking at the modernization of the TCPA in the wrong way. The FCC should be looking at balancing the needs of consumers to obtain healthcare and other information quickly and efficiently through their mobile devices, and also be protected by the strong anti-telemarketing rules that already exist. We urge Congress to modernize the TCPA to allow automated dialing technology to be used to text or call mobile phones as long as these texts or calls are not for telemarketing purposes.

Mr. Chairman and Ranking Member Nelson, modernization of the TCPA in the healthcare arena is not a partisan issue, nor should it be. This issue simply points out the need for government regulations to keep pace with the needs of today's consumers and businesses. This is about government working to bring healthcare costs down for consumers, not drive them up by continuing to require adherence to outdated rules and regulations.

The current TCPA invites opportunistic parties to pressure caregivers for huge payouts. Lawsuits, even unsuccessful ones, require extraordinary time, cost, and effort to defend, and, thus, rob hospitals of the ability to fulfill their mission, which is delivering quality healthcare at a reasonable cost.

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

[The prepared statement of Mr. Lovich follows:]

PREPARED STATEMENT OF RICHARD LOVICH, NATIONAL LEGAL COUNSEL, AMERICAN ASSOCIATION OF HEALTHCARE ADMINISTRATIVE MANAGEMENT

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

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

I appreciate your holding this hearing today. As you know, the Federal Communications Commission recently ruled on over 22 petitions seeking changes to the current rules governing the Telephone Consumer Protection Act (TCPA). AAHAM was one of those groups that submitted a petition seeking clarification of how the FCC defines consent. Consent by definition may seem like something simple to answer, but we have found that consent does not mean the same thing to so many people and thus has caused our members to be sued over this issue. Healthcare providers

cannot do their job effectively, efficiently, or in a cost effective manner without using technology today.

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

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

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

- At the time the TCPA legislation was passed, over 90 percent of U.S. households relied on their home or landline phone. Only 3 percent of Americans had a mobile phone, they were truly the province of the elite. So much has changed since then.
- Today, the trend is away from landline phones, in fact nearly 2 in 5 American homes no longer maintain a land line and rely exclusively on wireless or cell technology.
- Since the enactment of the TCPA, a new form of communication, text messaging, has emerged. In 2012, more than 2.19 trillion text messages were sent and received. In 1991, legislators had no way of predicting the growth of the mobile market or the rapid adoption of text messaging as a critical form of communication.

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

The ACA was passed in 2011, requires hospitals and outpatient clinics to perform post-discharge follow-up with patients to reduce the rate of readmission, a big contributor to the cost of healthcare. We know the reminders, surveys, and education that have proven to lower readmission rates, can be successfully and cost effectively conducted by phone.

However, under the TCPA, these calls place the hospital at high-risk of violating the statute and facing penalties and defense fees and costs where the patient's primary contact number is a mobile number and the patient didn't expressly provide the mobile phone number for that purpose. The FCC's recent ruling helps by making some slight changes to the TCPA for healthcare related calls, but it just touches the surface and does not get to the root of the problem.

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

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

The practical impact on the care provider community is devastating. It is a significant financial strain on a hospital or any size, let alone a physician's office to try

and determine if the phone number a patient left is a cell number or landline number. Then is it is a wireless number, determining if the provision of the number constituted express consent to call them and for what purpose? In addition, when can a hospital vendor rely upon the level of consent provided to the hospital to gauge if their work on behalf of the hospital is protected at least to the limited extent that the hospital is protected.

The bottom line is that healthcare providers must be able to effectively, efficiently, and economically communicate with their patients. The TCPA robs our community of this fundamental aspect of the careprovider-patient relationship by imposing outdated and artificial restraints on effective communication. In addition, the TCPA prevents providers from fulfilling statutory and regulatory mandates in an effective and efficient manner, all at the expense of greater patient care.

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

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

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

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

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

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

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

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

The CHAIRMAN. Thank you, Mr. Lovich.

Ms. Desai.

STATEMENT OF MONICA S. DESAI, PARTNER, SQUIRE PATTON BOGGS

Ms. DESAI. Good morning, Chairman Thune, Ranking Member Nelson, and members of the Committee. Thank you very much for the opportunity to address the effects of the TCPA on consumers and on businesses.

My name is Monica Desai. I'm a Partner at Square Patton Boggs. I'm testifying today in my own individual capacity and not on behalf of any specific client.

Before joining Squire Patton Boggs, I spent over a decade in senior positions at the Federal Communications Commission, including service as Chief of the Consumer and Governmental Affairs Bureau, which is the bureau that oversees implementation of the TCPA policies and rules.

In private practice, I work with a wide range of clients in a—in various industry sectors on TCPA compliance. They all share one very serious dilemma: how to manage TCPA risk in an environment where the normal, expected, or desired way to communicate is by calling a cell phone or sending a text, and where regulators and industry standard require certain out-bound communications via a call or a text, but where every single call to a cell phone or every single text carries with it the potential risk of ruinous damages.

When Congress implemented the TCPA, it struck a careful balance in protecting consumers from abusive calls that made them feel frightened and harassed, protecting public safety entities and businesses from the jammed phone lines caused by specialized dialing equipment that automatically generated and dialed thousands of random or sequential numbers, and protecting normal, expected, or desired communications.

Today, there are no longer any safeguards protecting callers from TCPA liability for normal communications. It doesn't matter if you're a national bank, a local blood bank, or tire banks. You may have obtained prior express consent, but you will never know for certain before you make a call whether that number has been reassigned.

The FCC created a safe harbor, but that safe harbor doesn't work. The safe harbor doesn't apply after one single reassigned call, whether or not there's any actual knowledge of a reassignment. You may be using modern technology that does not use, or even have, a random or sequential number generator, but, according to the FCC, you're still using an automatic telephone dialing system if your equipment has something more than the theoretical potential to be modified at some hypothetical point in the future to become an ATDS. No one knows what this means. This is not workable and not what Congress intended.

As a result, beneficial consumer communications are chilled, compliance-minded entities are put into a Catch 22. Consumers trying to manage default and companies trying to engage in financial education are punished.

First, many types of important and beneficial consumer communications trigger TCPA risk in the current environment, including communications from utilities to warn of service outages, mobile health programs, such as Text for Baby, schools to provide attendance notifications, nonprofits to ask for cans to restock food banks, credit unions to provide low-balance alerts, political candidates to provide information regarding townhalls and election information. The list goes on and on and on.

Second, while the environment surrounding communications has become increasingly punitive, other regulatory agencies are in-

creasingly encouraging, and even requiring, contact through phone calls and texts. Companies are diverting resources from core business functions and taking inefficient steps to mitigate TCPA risk. For example, companies are replacing modern technologies, which have many consumer benefits, with low-tech systems and fat-finger dialing, although this creates a higher risk of wrong-number calls. Larger companies with more resources are paying for multiple databases without any assurance of additional accuracy. Small businesses often can't afford to do so. Companies are requiring consumers to provide notice of any phone number change, and subjecting them to lawsuits for failure to do so.

Finally, I want to emphasize that not getting a call doesn't mean that a debt will go away. What a call is likely to do, if a person is reached, is educate the consumer about available repayment options and potentially avoid negative consequences, such as the shutting off of a service, a bad credit report, foreclosure, or other legal remedy. The Department of Education stated that, when servicers are able to contact a borrower, they have a much better chance at helping the borrower resolve the delinquency or the default.

In conclusion, I very much appreciate that the Commerce Committee wants to understand how the TCPA is impacting consumers and businesses today. I have three recommendations for restoring the balance that Congress worked so hard to achieve.

First, I would—I would ask Congress to support the creation of a reassigned numbers database and allow a safe harbor for any caller who checks against the database to confirm that a number has not been reassigned.

A second quicker step would be for Congress to confirm that, when it created a statutory defense for prior express consent of the called party, it did not intend for that defense to be meaningless.

Third, Congress should confirm that, when it precisely defined an automatic telephone dialing system, it did not intend to broadly sweep into that definition any and every modern dialing technology.

Congress did not intend for the TCPA to serve as a litigation trap, with callers being put at untenable risk for normal, expected, or desired communications and with consumers ultimately suffering the consequences.

Thank you, and I look forward to your questions.

[The prepared statement of Ms. Desai follows:]

PREPARED STATEMENT OF MONICA S. DESAI, PARTNER, SQUIRE PATTON BOGGS

Good morning Chairman Thune, Ranking Member Nelson, and Members of the Committee. Thank you for the opportunity to speak to the Committee today to address the effects of the Telephone Consumer Protection Act (TCPA)[1] on consumers and business. My name is Monica Desai, and I am a partner at the law firm of Squire Patton Boggs. I am testifying today in my individual capacity, and not on behalf of any specific client.

When the TCPA was enacted 25 years ago, it was a welcome shield to protect consumers from abusive calls that made them feel frightened and harassed, and to protect essential public safety services and businesses from the jammed phone lines caused by specialized dialing equipment that automatically generated and dialed

[1] 47 U.S.C. § 227; *see also* 47 C.F.R. § 64.1200.

thousands of random or sequential numbers.[2] Over time, the TCPA has been transformed into a sword for harassing and abusive lawsuits, with astonishingly disproportionate settlements for cases with little to no actual harm. Consumers and business, as well as governmental entities, suffer from the lack of common sense application of the statutory language to modern technology and the failure to take into account how consumers and businesses communicate today. The careful balance that Congress struck between protecting consumers and safeguarding beneficial calling practices has all but been eliminated. The resulting state of disarray is not without significant cost. I will focus my testimony on three direct results of unchecked abusive litigation under the TCPA:

(1) detrimental impact to beneficial consumer communications,
(2) detrimental impact to businesses, non-profits and government entities engaging in normal, expected or desired communications, and
(3) detrimental impact to consumers trying to manage default and keep current on their payments.

Background

Before joining Squire Patton Boggs, I spent over a decade in senior positions at the Federal Communications Commission (FCC) under both Republican and Democratic administrations, including service as Chief of the Consumer and Governmental Affairs Bureau at the FCC, the Bureau that oversees implementation of TCPA policy and rules.

Since leaving the FCC in 2010, I have advised a broad range of clients in a wide variety of industries on TCPA compliance, including those in the retail, financial services, debt collection, insurance, energy, education, technology, and communications sectors. They all share one very serious dilemma: how to manage TCPA risk in an environment where the normal, expected or desired way to communicate is by calling a cell phone or sending a text, and where regulators and industry standards require certain outbound communications via call or text, but where every single call to a cell phone or every single text carries with it the risk of tens of millions to hundreds of millions in damages. While the plaintiffs bar advertises apps designed to entrap legitimate businesses with slogans such as "Laugh all the Way to the Bank,"[3] such exposure is no joke for compliance-minded companies and organizations, and is ultimately harmful for consumers. This could not have been what Congress intended.

The TCPA—Trigger Points for Litigation

The TCPA generally prohibits calls made to a cell phone using an "automatic telephone dialing system" (or "ATDS"), or artificial or prerecorded voice, without the prior express consent of the called party.[4] The FCC has since ruled that if such calls deliver a telemarketing message, they require a very specific form of "prior express written consent."[5] The FCC has also determined that a text message counts as a "call" under the TCPA.[6] Two of the largest areas of controversy triggering TCPA litigation involve whether an ATDS was used in a particular communication, and what happens when a caller calls a number that has been provided, but the number has been subsequently reassigned to another person without the knowledge of the caller.

What is an ATDS? Congress provided that statutory liability for a call to a cell phone is not triggered unless a calling party uses an ATDS, or unless a caller uses an artificial or prerecorded voice. An ATDS is "equipment which has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator; and . . . to dial such numbers."[7] Whether or not particular dialing equipment is an ATDS has been a contentious issue in litigation. The definition turns in part on the "capacity" of that equipment. The term "capacity" is not defined in the statute—and many plaintiffs have taken the position that "capacity" means future, hypothetical ability to perform the requisite statutory functions—and

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[2] *See* H.R. Rep. 102–317 (Nov. 15, 1991); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02–278, Report and Order, FCC 03–153 (July 3, 2003).

[3] *See* U.S. Chamber of Commerce *et al.* Notice of Ex Parte, CG Docket No. 02–278, at 4 (Sep. 24, 2014).

[4] 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1).

[5] 47 C.F.R. § 64.1200(a)(2); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02–278, Report and Order, FCC 12–21, ¶ 20 (Feb. 15, 2012).

[6] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02–278, Report and Order, FCC 03–153, ¶ 165 (July 3, 2003).

[7] 47 U.S.C. § 227(a)(1).

not the present ability. Last year, despite numerous court cases to the contrary,[8] the FCC agreed with the plaintiffs bar and found that "capacity" means "potential ability."[9] Whether or not equipment uses or even has the statutorily required "random or sequential number generator" makes no difference under the FCC's interpretation. According to the FCC, if there is "more than a theoretical potential that the equipment could be modified" to meet the statutory definition of ATDS, then it is an ATDS.[10] Or, in other words, the statutory definition does not matter. If the phone or dialing equipment used to make a call or send a text can *"theoretically" become an ATDS in the future, the calling party is liable as if using an ATDS now,* statute notwithstanding. The only equipment that the FCC confirms does not fall under this sweeping interpretation is a "rotary-dial phone."[11] Indeed, the FCC even refused to rule out the possibility that a smartphone now qualifies as an ATDS.[12]

Reassigned Numbers: Who is the "Called Party"? Congress created a statutory defense to the TCPA—calls and messages made to cell phones with the "prior express consent of the called party" are exempt from liability.[13] "Called party" is not defined under the statute. Callers have commonly been sued when they obtain the requisite consent but the number is then reassigned to a new person unbeknownst to the caller.[14] The FCC acknowledged that there is no comprehensive database of reassigned numbers, and many carriers do not participate in any database at all.[15] Yet the FCC ruled strict liability under the TCPA is triggered if a caller calls or texts a number that the caller had consent to contact, even if the number was subsequently reassigned to a new subscriber without the knowledge of the caller (and without any practical way for the caller to find out in advance). The FCC created a "one call safe harbor" but the safe harbor stops applying literally after "one" call—whether or not there is any actual knowledge of a reassignment,[16] including, for example, if the caller is greeted with a machine voice-mail message. There is no explanation of how the "safe harbor" would work in the text context. This interpretation of "called party," combined with the unworkable "safe harbor," eviscerates the statutory defense for "prior express consent" provided by Congress.

These interpretations leave callers in an impossible situation—(1) they cannot rely on the statutory definition of an ATDS, because the FCC has determined that the definition applies so long as there is the "theoretical potential" that their dialing equipment "could be modified" to become an ATDS in the future; and (2) they cannot rely on consent (as Congress intended) because of the lack of any reliable way to determine if a number has been reassigned, and the uselessness of the "one call safe harbor."

Combine this impossible situation with a private right of action for violations, strict liability statutory damages of $500 per call or text (and up to $1,500 for each "willful" or "knowing" violation),[17] and the result is liability exposure in a single class action lawsuit quickly reaching tens of millions to hundreds of millions of dollars or higher.

(1) Detrimental Impact to Beneficial Consumer Communications

I first became aware of abusive TCPA litigation in 2012, when SoundBite Communications, Inc., located in Bedford, Massachusetts, approached me after it had been targeted with a multi-million dollar TCPA class action lawsuit. The purported viola-

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[8] *See, e.g., Hunt* v. *21st Mortg. Corp.,* 2013 U.S. Dist LEXIS 132574, at *11 (N.D. Ala. 2013); *Gragg* v. *Orange Cab Co.,* 995 F. Supp. 2d 1189, 1193 (W.D. Wash. 2014).

[9] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.,* CG Docket No. 02–278 *et al.,* Declaratory Ruling, FCC 15–72, ¶19 (July 10, 2015) ("*2015 TCPA Order*").

[10] *2015 TCPA Order* ¶18.

[11] *2015 TCPA Order* ¶18.

[12] *ACA International et al.* v. *FCC et al.,* No. 15–1211, Brief for Respondents, at 34–36 (filed Jan. 15, 2016); *see also ACA International et al.* v. *FCC et al.,* No. 15–1211, Brief for Petitioners ACA International *et al.,* at 2, 13, 15, 24–25, 30–31 (filed Nov. 25, 2015); *2015 TCPA Order* ¶21.

[13] 47 U.S.C. §227(b)(1)(A); 47 C.F.R. §64.1200(a)(1).

[14] By one estimate, almost 37 million phone numbers are recycled each year. Alyssa Abkowitz, *Wrong Number? Blame Companies' Recycling,* The Wall Street Journal (Dec. 1, 2011), available at *http://www.wsj.com/articles/SB10001424052970204012004577070122687462582.*

[15] *2015 TCPA Order* ¶85 ("The record indicates that tools help callers determine whether a number has been reassigned, but that they will not in every case identify numbers that have been reassigned. Even where the caller is taking ongoing steps reasonably designed to discover reassignments and to cease calls, we recognize that these steps may not solve the problem in its entirety.") *See also* Comments of Twitter, Inc., CG Docket No. 02–278, at 9 (Apr. 23, 2015) (stating that "Twitter obtains information about deactivated numbers from those wireless carriers willing to supply it, and then uses privately purchased data to assess whether the number was reassigned").

[16] *2015 TCPA Order* ¶90.

[17] 47 U.S.C. §227(b)(3).

tion? Sending an immediate, one-time confirmation reply message whenever a customer sent a request to stop receiving future text messages. In sending the confirmation message, SoundBite was adhering to consumer best practices, and acting consistent with wireless industry requirements to send such a confirmation. I learned that SoundBite was not alone—at the time, many other companies, including Redbox, American Express, Barclays Bank, Citibank, Taco Bell, NASCAR, the NFL, and GameStop, were all being targeted with multi-million dollar class action lawsuits based on these one-time confirmations. Due to the lawsuit, SoundBite, then a publicly traded company with approximately 150 employees, was threatened with going into bankruptcy because of the potential risk of TCPA exposure. We petitioned the FCC to provide relief on this issue.[18] Then-Senator John Kerry and Senator Scott Brown asked the FCC to take into consideration that sending a confirmation in response to a request to cease future text messages "is not harmful to consumers, it is useful."[19] We were grateful the FCC recognized the usefulness of such messages to consumers and found them to be consistent with consumer expectations when it granted our petition and declared a simple confirmation of an opt-out did not violate the TCPA.[20]

Similarly, the Retail Industry Leaders Association (RILA) explained to the FCC that while it has become increasingly common for smartphone-equipped consumers to expect and demand concierge-like, personalized experiences from retailers, the fear of TCPA litigation threatened one particularly popular emerging service—"on demand" texts.[21] In that context, a consumer sees a display advertisement (*e.g.,* a store display ad to text "offer to 12–345 for 20 percent off your next purchase"). If interested, the consumer texts the word "offer" to 12–345, and receives a near instant response text containing the desired offer. We were again grateful that the FCC recognized that this type of convenient and efficient communication—that consumers were proactively requesting—should not subject a retailer to frivolous class action lawsuits.[22]

However, there are many, many other types of communications that are also useful to consumers, or that are otherwise normal, expected or desired, that are already the subject of TCPA class action litigation or create risk for TCPA liability—with potentially ruinous results for the entities sending the text messages or making the calls. For example:

- *Utilities are at risk:* Calls or texts to warn about planned or unplanned service outages, provide updates about outages or service restoration, ask for confirmation of service restoration or information about the lack of service, provide notification of meter work, tree-trimming, or other field work, verify eligibility for special rates or services, such as medical, disability, or low-income rates, programs and services, warn about payment or other problems that threaten service curtailment, and provide reminders about time-of-use pricing and other demand/response events, are all threatened by TCPA litigation.[23]
- *Mobile health programs are at risk:* The U.S. Department of Health and Human Services has touted mobile health programs as "an opportunity to improve health knowledge, behaviors, and clinical outcomes, particularly among hard-to-reach populations" through text programs, including, for example, to influence behavior changes to improve short-term smoking cessation outcomes as well as short-term diabetes management and clinical outcomes.[24] Federal agency poli-

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[18] SoundBite Communications, Inc. Petition for Declaratory Ruling, CG Docket No. 02–278 (Feb. 16, 2012).

[19] Letter from Senators John F. Kerry and Scott P. Brown to Chairman Julius Genachowski, Federal Communications Commission (Apr. 13, 2012); SoundBite Communications, Inc. Notice of Ex Parte, CG Docket No. CG 02–278, at 2 n. 4 (June 29, 2012).

[20] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling,* CG Docket No. 02–278, Declaratory Ruling, FCC 12–143, ¶ 8 (Nov. 29, 2012).

[21] Retail Industry Leaders Association Petition for Declaratory Ruling, CG Docket No. 02–278 (Dec. 30, 2013); Comments of RILA, CG Docket No. 02–278, at 2 (Feb. 21, 2014).

[22] *2015 TCPA Order* ¶¶ 103–06 (the FCC "agree[d] with commenters" that "consumers welcome" such text messages).

[23] Edison Electric Institute and the American Gas Association Petition for Expedited Declaratory Ruling, CG Docket No. 02–278, at 3 (Feb. 12, 2015) ("EEI/AGA Petition"). The EEI/AGA Petition explains that one EEI member company was sued under the TCPA after it sent a text message to its customers that had previously provided a wireless telephone number to the company notifying them of a new text program designed "to inform customers of power outages by text message, and to allow customers to report an outage to the utility by text message." *Id.* at 10; *see also Grant* v. *Commonwealth Edison,* No. 1:13–cv–08310 (N.D. Ill.).

[24] Anthem Petition for Declaratory Ruling and Exemption Regarding Non-Telemarketing Healthcare Calls, CG Docket No. 02–278, at 4–5 (June 10, 2015) ("Anthem Petition"); *see also*

cies encourage aggressive use of such programs and use text messaging and ATDS calls, but TCPA lawsuits stifle such programs. Anthem points out that federally supported text messaging initiatives are all at risk, including Text4baby, which provides information and referral times keyed to the prenatal stage or age and developmental stage of the child; QuitNowTXT, which delivers day-specific quit messages to persons in the process of smoking cessation; and Health Alerts On-the-Go, which provides the Centers for Disease Control and Prevention's health information, including seasonal flu and public health emergencies.[25]

- *Important school communications are threatened by TCPA litigation:* Attendance messages alerting parents that a child did not arrive at school as expected; alerts regarding emergency situations (weather, facilities issue, fire, health risk, threat situation); outreach messages providing information regarding school activities (teacher conferences, back-to-school night); and survey messages, which allow recipients to RSVP to events or provide input on an important issue using a telephone keypad, are all at risk.[26]
- *Nonprofits are equally impacted:* The National Council of Nonprofits has noted that nonprofits—including entities like American Red Cross, Salvation Army, United Ways, food banks, emergency shelters, food pantries and soup kitchens—call and send text messages for a wide variety of reasons, including to provide event updates, schedule changes, and important safety information, and to provide patients and clients with reminders of appointments, and other helpful notifications that people generally want.[27] These communications are subject to TCPA risk.
- *Financial institutions are constrained in their ability to deliver time-sensitive and valued financial communications:* Fraud and identity theft alerts, out-of-pattern activity notices, data breach information, fund transfer confirmations, responses to service inquiries, FEMA disaster related financial relief and service options, fee avoidance and low balance notifications, due date reminders, notifications to prevent lapses in insurance coverage, account closure and other milestone notice, and loan repayment counseling, are all at risk.[28]
- *Political discourse and communications* that provide important information about issues of public concern, including "tele-town hall" discussions,[29] the voting process, and other election information.[30]
- *Shopping and retail notifications requested by consumers:* Threatened communications include those that inform a consumer that an online purchase is available or has been delivered or offers and discount information that a consumer signs up for and expects to receive.[31]

U.S. Dep't of Health & Human Services, *Using Health Text Messages to Improve Consumer Health Knowledge, Behaviors, and Outcomes: An Environmental Scan,* at 1 (May 2014), available at *Khttp://www.hrsa.gov/healthit/txt4tots/environmentalscan.pdf.*

[25] Anthem Petition at 5–8 (noting the societal benefits of these communications).

[26] Blackboard, Inc. Petition for Declaratory Ruling, CG Docket No. 02–278, at 8 (Feb. 24, 2016).

[27] Comments of National Council of Nonprofits, CG Docket No. 02–278, at 2–3 (Sept. 24, 2014).

[28] The FCC recognized that financial institutions must be able to contact consumers to quickly alert them to fraud, a data breach, related remediation, and money transfers. *2015 TCPA Order* ¶¶ 125, 127–39. Although the FCC provided an exemption for such communications, the conditions it imposed in connection with the exemption made the exemption virtually unusable. *See* American Bankers Association Petition for Reconsideration, CG Docket No. 02–278 *et al.* (Aug. 8, 2015).

[29] *See* Marco Trujillo, *Lawmakers could be violating robocall restrictions,* The Hill (July 28, 2015); Federal Communications Commission, *FAQs—Tele-Town Halls* (July 31, 2015), available at *https://www.fcc.gov/document/faqs-tele-town-hall-robocalls.*

[30] The American Association of Political Consultants, The Democratic Party of Oregon, Public Policy Polling, Tea Party Forward PAC, and Washington State Democratic Central Committee have filed a lawsuit alleging that the ban on certain calls to cell phones under the TCPA is an unconstitutional violation of their First Amendment rights because it is content based and cannot withstand strict scrutiny. *American Association of Political Consultants, Inc. et al.* v. *Loretta Lynch,* Case No. 5:16–cv–00252–D, Complaint (May 12, 2016); *see also Shamblin* v. *Obama for America et al.,* 2015 U.S. Dist. LEXIS 54849 (M.D. Fla. Apr. 27, 2015) (complaint alleged violations of TCPA based on prerecorded calls explaining how to vote by mail, and calls encouraging early voting, instructions to bring a driver's license to vote, and voting locations; case decided on class certification issue without discussion of TCPA claims).

[31] *ACA International et al.* v. *FCC et al.,* No. 15–1211, Brief of Retail Litigation Center, Inc., National Retail Federation, and National Restaurant Association as Amici Curiae in Support of Petitioners, at 9–10 (D.C. Cir. filed Dec. 2, 2015).

- *Social media notifications* that consumers expect and desire.[32]
- *Food safety notices* have been the subject of TCPA litigation.[33]

A confluence of factors have fueled this fire of TCPA litigation: (1) increasing reliance on cell phones as the primary or only means of communications;[34] (2) increasing requirements by regulatory agencies to make specific outbound communications;[35] (3) industry guidelines requiring certain outbound communications in order to send messages through text channels;[36] and (4) the fact that there is no reliable way to determine if a number has been reassigned.[37] Combine these factors with high strict liability damages, no limits on total damages, and very low barriers to filing even the most frivolous of lawsuits, and the reasons for skyrocketing class action litigation in this area are clear.

Unfortunately, these key background factors have not only persisted, but the situation has only become worse. In 2010, there were 354 TCPA cases filed.[38] In 2015, there were 3,710.[39]

(2) "Catch-22" for Businesses, Non-Profits and Governmental Entities

The specter of high-stakes "bet the company" litigation—which can be based on a single call or a single text—and which has now been amplified by the FCC's recent interpretations, has made it punitive for businesses and other entities to engage in normal, expected or desired communications by call or text.

Financial institutions in particular have often been trapped in a "catch-22"[40] as a result of myriad statutory and regulatory obligations to make outbound communications to customers, while FCC rules penalize them for doing so. For example, the Consumer Financial Protection Bureau's (CFPB) "Early Intervention Rule" requires "live contact" or a good faith effort to establish live contact within 36 days after a mortgage loan becomes delinquent.[41] The Home Affordable Modification Program requires that an entity "proactively solicit" customers for inclusion—by mak-

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[32] *See, e.g.,* Comments of Twitter, Inc., CG Docket No. 02–278, at 3 (Apr. 22, 2015) (Twitter allows users to choose to "have Tweets sent to their cell phones as text messages" by inputting their phone numbers and providing express consent, but because telephone numbers are reassigned so frequently and due to the "hyper-litigious [TCPA] environment, innovative companies increasingly must choose between denying consumers information that they have requested or being targeted by TCPA plaintiffs' attorneys filing shake-down suits.").

[33] Rubio's Restaurant, Inc. Petition for Declaratory Ruling, CG Docket No. 02–278, at 1–3 (Aug. 11, 2014) (In order to "promptly respond to health and safety issues affecting the over 190 of Rubio's restaurant locations," Rubio's provides a "Remote Messaging" service that contacts only telephone numbers of Rubio's "Quality Assistance" staff. The Remote Messaging service is used "*exclusively* to report food safety-related issues, including, but not limited to, alleged foodborne illnesses, alleged foreign objects found in food, or suspicions of a team member having a disease transmittable through food." Rubio's was sued under the TCPA when a Remote Messaging alert was "sent to a cellphone number previously assigned to a Rubio's [Quality Assistance] Staff member who subsequently lost his phone," after which the number was reassigned without Rubio's knowledge.).

[34] The Center for Disease Control's December 2015 Wireless Substitution Report estimates wireless use during the first half of 2015, finding: (1) as of June 2015, 71.3 percent of young adults (ages 25–29) lived in wireless only households. Also, 67.8 percent of adults aged 30–34 lived in wireless-only households, and the percentage of adults living with only wireless telephones decreased as age increased beyond 35 years—56.6 percent for those 35–44; 40.8 percent for those 45–64; and 19.3 percent for those 65 and over; and (2) the rate of wireless-only households has grown significantly over the past several years. For example, the number of adults aged 25–29 that live in households with only wireless telephones increased by 10 percentage points between 2012 and 2015. The number of adults aged 35–44 that live in wireless-only households grew by 17.5 percentage points between June 2012 and June 2015. *See* U.S. Dep't of Health and Human Services, Centers for Disease Control and Prevention, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January–June 2015,* at 6 (Dec. 2015), available at *http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless 201512.pdf.*

[35] *See, e.g.,* the CFPB "Early Intervention Rule." 12 C.F.R. § 1024.39(a).

[36] CTIA—The Wireless Association, *CTIA Short Code Monitoring Program Short Code Monitoring Handbook,* v. 1.5.2, at 2 (Oct. 1, 2015) (requiring that an "opt-in confirmation message . . . must be sent to customers *always*" (emphasis retained)).

[37] *2015 TCPA Order* ¶ 85 (the FCC "agree[d] . . . that callers lack guaranteed methods to discover all reassignments immediately after they occur").

[38] *See* WebRecon, LLC, *Out Like a Lion . . . Debt Collection Litigation & CFPB Complaint Statistics, Dec 2015 & Year in Review,* Consumer Litigation: 2007–2015 (2016), available at *http://webrecon.com/out-like-a-lion-debt-collection-litigation-cfpb-complaint-statistics-dec-2015-year-in-review/.*

[39] *Id.*

[40] "A problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule." Merriam-Webster, *Catch-22* (last visited May 16, 2016), available at *http://www.merriam-webster.com/dictionary/catch%E2%80%9322.*

[41] 12 C.F.R. § 1024.39(a).

ing a minimum of four telephone calls to the customer at different times of the day.[42]

At the same time that financial regulators are advocating that financial institutions communicate with borrowers and create financial inclusion tools, the TCPA as interpreted by the FCC is stifling the exact type of communications that would benefit consumers. For instance, the CFPB recognized that especially for "economically vulnerable consumers," tracking transactions through mobile technologies such as text messaging may help consumers "achieve their financial goals" and can "enhance access to safer, more affordable products and services in ways that can improve their economic lives."[43] And, CFPB Director Richard Cordray positively described the use of text alerts to provide real time information about funds to customers as an "innovative approach[] to improving customer service."[44] Further, just this month, the Federal Deposit Insurance Corporation (FDIC) released a request for comment on "Mobile Financial Services Strategies and Participation in Economic Inclusion Demonstrations"[45] as a continuation of their October 2015 qualitative research that found that text message alerts give consumers "Access to account information;" "Help[] consumers avoid fees;" and "Help[] monitor accounts for fraud."[46] In fact, the FDIC research concluded that underbanked consumers may prefer texts to e-mails when receiving alerts because texts are "Faster," "Easier to receive," "Attention grabbing," and "Quicker and easier to digest."[47] According to an Underbanked Mobile Financial Services User interviewed as part of the study, "[t]ext-it's immediate. E-mail, you have to go in and actually be checking your e-mail account."[48]

But it is not just financial institutions that are caught in this bind. The wireless industry requires sending an affirmative "opt-in confirmation message" in order for companies to send text messages associated with company programs across carrier networks.[49] The Federal Trade Commission has emphasized the importance of proactive communications in connection with data breaches and is urging required notifications.[50] Utilities are required under some state laws to engage in proactive communications.[51] The Consumer Product Safety Commission's product safety "Recall Checklist" recommends that companies send "text messages to customers" as part of an "effective and comprehensive product safety recall."[52]

Compliance-minded companies are diverting resources from core business functions and taking inefficient steps to avoid frivolous lawsuits, with detrimental results for both companies and consumers:

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[42] Home Affordable Modification Program, *Handbook for Servicers of Non-GSE Mortgages,* Making Home Affordable Program, at 46 (Dec. 2, 2010), available at *https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_30.pdf.*

[43] CFPB, *CFPB 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.*

[44] CFPB, *Prepared Remarks by Richard Cordray at the CFPB Roundtable on Overdraft Practices* (Feb. 22, 2012), available at *http://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-by-richard-cordray-at-the-cfpb-roundtable-on-overdraft-practices/.*

[45] Federal Deposit Insurance Corporation, *Request for Comments on Mobile Financial Services Strategies and Participation in Economic Inclusion Demonstrations* (May 3, 2016), available at *https://www.fdic.gov/news/news/financial/2016/fil16032.pdf.*

[46] Federal Deposit Insurance Corporation, *Qualitative Research for Mobile Financial Services for Underserved Consumers,* at 19 (Oct. 30, 2015), available at *https://www.fdic.gov/about/comein/2015/come-in-2015.pdf.*

[47] *Id.* at 21.

[48] *Id.*

[49] CTIA—The Wireless Association, *CTIA Short Code Monitoring Program Short Code Monitoring Handbook,* v. 1.5.2, at 2 (Oct. 1, 2015).

[50] See Prepared Statement of Edith Ramirez, *Protecting Personal Consumer Information from Cyber Attacks and Data Breaches,* Before the Senate Committee on Commerce, Science, and Transportation, 113th Cong., at 2 (Mar. 26, 2014) (explaining that the "FTC supports Federal legislation that would strengthen existing data security standards and require companies, in appropriate circumstances, to provide notification to consumers when there is a security breach"), available at *https://www.ftc.gov/system/files/documents/public_statements/294091/ramirez_data_security_oral_statement_03-26-2014.pdf.*

[51] For example, New York requires utilities to provide "[s]pecial notice . . . during the cold weather protection period (November 1 to April 15) before any heat related utility service can be shut off. The utility must notify each tenant that service will be shut off and must also attempt to find out if a serious health or safety program would be caused in the household by the shutoff." *See* New York State Dep't of Public Service, *Consumer Guide: The Handbook for Utility Customers with Disabilities* (Dec. 18, 2012), available at *http://www3.dps.ny.gov/W/PSCWeb.nsf/All/1882DD3FA554D6D585257687006F395C?OpenDocument.*

[52] *See* Consumer Product Safety Commission, *Recall Guidance, Recall Checklist* (last visited May 16, 2016), available at *http://www.cpsc.gov/en/Business—Manufacturing/Recall-Guidance/.*

Purposefully Adding Technology Inefficiencies—Automated dialing technologies have many consumer benefits: they improve the ability to honor consumer contact preferences (such as time of day to call, specific dates to call, to what number to call); they improve the ability to honor "do not call" requests; they help govern call frequency attempts (daily, weekly, monthly); they help manage time between calls; and they improve access to historical account information, and information regarding financial assistance programs. Yet despite these benefits, companies that have already spent tens of thousands to hundreds of thousands of dollars on dialing technologies that are not an ATDS based on the statutory definition, are now evaluating and spending resources to add functions such as "self-destruct" mechanisms that will wipe out a calling system in the event a software update attempt is made. Companies are making calls from the most basic, "de-engineered" systems, but are still getting sued on the theory that such a calling system could theoretically get "plug[ged] . . . into" an ATDS.[53] Companies are moving to offshore call centers (where manual dialing is more efficient) and requiring manual dialing on desktop phones—and still getting sued.[54] Companies are purposefully interjecting elements of "human intervention" to make calls even where that carries a risk of wrong number calls and is less efficient.

Databases—Companies that have more resources are sometimes paying for multiple databases to check for reassigned numbers, still without any assurance of accuracy (as many carriers do not participate in any database at all). Smaller organizations, and those with more limited resources such as many non-profits, cannot afford to do so.

Terms and Conditions—Per the FCC's suggestion in the 2015 Order, companies are starting to add requirements to their terms and conditions that consumers who consent to receiving calls or texts must affirmatively provide a notification if they have abandoned the number they have provided. The FCC stated that "[n]othing in the TCPA or our rules prevents parties from creating, through a contract or other private agreement, an obligation for the person giving consent to notify the caller when the number has been relinquished," and that "the caller may wish to seek legal remedies for violation of the agreement."[55] It appears that the FCC is suggesting callers sue their customers for not notifying the caller when they change phone numbers.

Reducing Communications—Companies are evaluating what communications are absolutely necessary, and reducing consumer-beneficial communications as described in the first section. Indeed, many companies have chosen to stop or significantly curtail elective helpful communications.

Insurance Premiums—Due to the high risk of exposure to frivolous litigation and potentially astronomical damages, there is very little choice for TCPA insurance (sometimes none at all); if insurance is available, the premiums and the deductibles are extremely high.[56]

(3) Detrimental Impact to Consumers Trying to Manage Default and Keep Current on Payments

Keeping customers up to date on payments and managing their default is critical for financial well-being. Defaulting on payments can have long-term devastative consequences for consumers by impacting their credit score and ability to obtain credit in the future. Most people need credit to buy their home, finance their child's education, or start the small business they have worked toward. These purchases are made much more difficult with a damaged—or even bruised—credit score, which is why it is vital that consumers are aware of their financial obligations.

It is important to keep in mind that not getting a call does not mean that the debt will somehow go away. What a call is likely to do, if a person is reached, is educate the consumer about available repayment options, potentially avoid negative

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[53] ACA International Notice of Ex Parte, CG Docket No. 02–278, at 3 (May 9, 2014).

[54] *See Leschinsky* v. *Inter-Continental Hotels Corporation et al.,* Case No. 8:15–cv–01470–JSM–MAP, Defendants Orange Lake Country Club, Inc., and Inter-Continental Hotel Corporation's Dispositive Motion for Summary Judgment and Incorporated Memorandum of Law, at 1–2, 5–9 (Sept. 28, 2015).

[55] *2015 TCPA Order* ¶ 86, n. 302. In his dissent from the Order, Commissioner Pai stated that perhaps the "most shocking" part of the ruling was the FCC's suggestion that "companies . . . sue their customers." *2015 TCPA Order* Dissenting Statement of Commissioner Ajit Pai at 121. Commissioner O'Rielly's dissent also noted the oddity of the FCC's position that it is "reasonable *to have companies sue their own customers." 2015 TCPA Order* Statement of Commissioner Michael O'Rielly Dissenting in Part and Approving in Part at 134 (emphasis retained).

[56] ACA International Notice of Ex Parte, CG Docket No. 02–278, at 2 (May 9, 2014).

consequences such as shutting off of a service, increased debt due to added collection costs and fees, a bad credit report that can harm future borrowing, foreclosure on a home, repossession, or other legal remedy. There are consumer benefits to these calls in addition to avoiding default—for example, by one estimate, around 25 percent of identity theft occurrences are discovered through the debt collection process.[57]

In addition to consumers' critical credit needs, servicing debt and managing default are critical to government and non-government entities alike. Being able to make a call to discuss a debt is impactful for the Federal Government, state and local governments, colleges and universities, healthcare institutions, retailers, financial institutions, and indeed all types of businesses large and small.

The City of Philadelphia, for example, said in a 2013 Request for Information that funds recovered by debt collection agencies "are essential to support important community services, like public safety, a clean environment and quality public schools. Failure to collect all funds owed to the City jeopardizes much needed services and increases the financial burden on compliant taxpayers and residents." [58]

Nothing in the legislative history suggests that Congress intended the TCPA to be used as a shield against communications between a creditor and its customers concerning a past due obligation. Indeed, as the report of the House Committee on Energy and Commerce clearly states:

> The restriction on calls to emergency lines, pagers, and the like does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications. The Committee does not intend for this restriction to be a barrier to the normal, expected or desired communications between businesses and their customers. For example, a retailer, insurer, banker or other creditor would not be prohibited from using an automatic dialer recorded message player to advise a customer (at the telephone number provided by the customer) that an ordered product had arrived, a service was scheduled or performed, or a bill had not been paid.[59]

Fundamentally, congressional recognition of TCPA privacy rights applicable to mobile telephone customers was intended to provide choice of contact, not isolation from contact. Those who elect to conduct telecommunications solely by cell phone, or who choose to identify mobile telephone numbers as their preferred method of contact in dealing with service providers, have exercised the privacy choice protected by the TCPA. It is not good policy to make that choice more burdensome and less efficient.

To conclude otherwise would significantly harm both private and public debt collection programs, further straining our distressed economy. Indeed, the White House has over the last four years consistently emphasized the importance of contacting debtors specifically "via their cell phones" in connection with the collection of debt owed to or granted by the United States.[60] This Congress agreed when it exempted such calls from the TCPA.[61]

The same principle—that a call to a cell phone is beneficial in helping borrowers resolve delinquencies—applies with equal force to state and local governments, and

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[57] *Id.* at 5.

[58] City of Philadelphia, Request for Information, Accounts Receivable Management & Collections, The Office of the Chief Revenue Collections Officer, Exhibit 1 at 2 (Aug. 8, 2013); ACA International Notice of Ex Parte, CG Docket No. 02–278, at 1 (May 5, 2014).

[59] H.R. Rep. 102–317 (Nov. 15, 1991) (*emphasis added*).

[60] The Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2013,* at 232 (2012), available at *https://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/budget.pdf;* The Office of Management and Budget, *Analytical Perspectives, Budget of the United States Government, Fiscal Year 2013,* at 168 (2012), available at *https://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/spec.pdf;* The Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2016,* at 116 (Feb. 2, 2015), available at *https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/budget.pdf;* The Office of Management and Budget, *Analytical Perspectives, Budget of the United States Government, Fiscal Year 2016,* at 127–28 (2015), available at *https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/spec.pdf.*

[61] *Bipartisan Budget Act of 2015* § 301; 47 U.S.C. § 227(b)(1)(A)(iii). However, the FCC has proposed rules that would appear to thwart this Congress' intent in creating an exemption for Federal debt calls, by limiting the number of calls that can be placed to delinquent or defaulting account holders to three calls per month—regardless of whether or not the call results in a conversation with the borrower. Three calls per month is not sufficient to (1) have a live conversation with a borrower; (2) discuss available repayment, forbearance and deferment options with the borrower; and (3) enroll the borrower in the right plan based on the borrower's circumstances. *See, e.g.,* Statement of Commissioner Michael O'Rielly Dissenting in Part and Approving in Part, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02–278, Notice of Proposed Rulemaking, FCC 16–57, at 2 (May 6, 2016).

businesses large and small. This is supported by findings of the Federal Government and loan servicers. The U.S. Department of Education stated in a 2015 report that when "servicers are able to contact a borrower, they have a much better chance at helping that borrower resolve a delinquency or default." [62] For example, there are Income Driven Repayment (IDR) plans available to qualifying borrowers under which monthly payments may be as low as $0, and qualifying borrowers may have remaining balances forgiven after 20–25 years. The U.S. Department of Education endorsed allowing servicers to use modern technology to contact borrowers to help educate them about this and other repayment options and avoiding default.

One servicer estimates that it is able to help *more than 90 percent* of student loan borrowers avoid default when it has a telephone conversation with the borrower; conversely, 90 percent of student loan borrowers who have not had a telephone conversation with the servicer default.[63] And Federal Student Aid—an office of the U.S. Department of Education—estimates that 93 percent of persons in default "were not successfully contacted by telephone during the 360 day collection effort." [64]

Moreover, there is in place substantial oversight of the operating practices of financial service companies, including their interactions with consumers, through Federal laws such as the Fair Debt Collection Practices Act (FDCPA), the Dodd-Frank Act prohibition against Unfair, Deceptive and Abusive Acts and Practices, the Fair Credit Reporting Act, section 5 of the Federal Trade Commission Act, the Gramm Leach Bliley Act, the Truth in Lending Act, the Fair Credit and Charge Card Disclosure Act, the Federal Bankruptcy Code, and the Real Estate Settlement Procedures Act, and through oversight from a number of different Federal entities including the Federal Reserve, Federal Trade Commission, FDIC, Office of the Comptroller of the Currency, and the CFPB.[65] Additionally, the FDCPA explicitly outlines how a consumer can end any communications with a debt collector.[66]

It is also important to recognize that when Congress enacted the Dodd-Frank Act, it expressly assigned the regulation of debt collection to the CFPB. It granted the Bureau rulemaking authority for the FDCPA, which was designed to protect consumers when communicating with debt collectors and to provide remedies for abusive collection practices.[67] Significantly, the CFPB has announced its intention to initiate a rulemaking process to update and modernize the FDPCA and to promulgate comprehensive rules to govern the debt collection industry, covering first-party creditors (*i.e.,* financial institutions collecting debt owed to them) under its Dodd-Frank Act authority to prevent unfair, deceptive or abusive practices, and third-party collectors under the FDCPA.[68]

Consistent with this mandate, the CFPB has been actively pursuing abusive debt collection practices and expects to release a debt collection proposed rule this year. In the CFPB's fifth annual Fair Debt Collection Practices Act Report, CFPB Director Cordray indicated that "[i]n 2015 such actions by the CFPB returned $360 million to consumers wronged by unlawful debt collection practices and collected over $79 million in fines. During this time period, our colleagues at the Federal Trade Commission (FTC) banned 30 companies and individuals that engaged in serious and repeated violations of the law from ever again working in debt collection." [69] Further, the CFPB has resources on its website informing consumers of their rights against

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[62] U.S. Dep't of Education, *Strengthening the Student Loan System to Better Protect All Borrowers,* at 16 (Oct. 1, 2015), available at *http://www2.ed.gov/documents/press-releases/strengthening-student-loan-system.pdf.*

[63] Navient Corp. Notice of Ex Parte, CG Docket No. 02–278, at 2 (Mar. 29, 2016).

[64] Cynthia Battle & Eileen Marcy, *Late Stage Delinquency Assistance,* Federal Student Aid, at 7 (last visited May 16, 2016), available at *https://www.ifap.ed.gov/presentations/attachments/06FSAConfSession41.ppt.*

[65] *See* 15 U.S.C. § 1692 *et seq.;* Pub. L. 111–203; 15 U.S.C. § 1681 *et seq.;* 15 U.S.C. § 45 *et seq.;* Pub L. 106–102; 15 U.S.C. § 1601 *et seq.;* 15 U.S.C. § 1637(c); Title 11 of the U.S.C.; 12 U.S.C. § 2601 *et seq.* There are also numerous state laws in place providing oversight and constraint. Approximately 35 states have laws or requirements specific to debt collection communications. *Examples:* Cal. Civ. Code § 1812.700 (special text requirement); Iowa Code Ann. § 537.7103(3)(a)(6) (call frequency); Me. Rev. Stat. Ann. tit. 32 § 11013(3)(C) (postdated checks); Minn. Stat. § 332.37(13) (prerecorded messages); W. Va. Code Ann. § 46A–2–125(d) (call frequency). Approximately 40 states have laws specific to licensing.

[66] 15 U.S.C. §§ 805(c), 1692c.

[67] *See* 15 U.S.C. § 1692l(d).

[68] *See* Consumer Financial Protection Bureau, *Fall 2015 Regulatory Agenda submitted by the Consumer Financial Protection Bureau to the Office of Management and Budget* (Nov. 20, 2015), available at *http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=3170.*

[69] CFPB, *Fair Debt Collection Practices Act, CFPB Annual Report 2016,* at 2 (Mar. 2016), available at *http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf.*

debt collectors, including explaining the laws mandating what debt collectors can or cannot do,[70] what is harassment by a debt collector,[71] and how many times a debt collector may call a consumer.[72]

Correcting the Imbalance

I appreciate that the Commerce Committee wants to understand how the TCPA, enacted in 1991, is impacting consumers and businesses today. The current TCPA litigation environment, combined with the FCC's recent interpretations, is punitive to compliance-minded businesses, governmental entities, and non-profits that want to engage in normal, expected or desired communications with consumers. The environment is also detrimental to consumers, who expect to communicate via their cell phones and through texts, and who find it convenient and beneficial to do so. In today's environment, a compliance-minded caller or sender of text messages can have obtained the prior express consent that Congress established would protect a caller from TCPA liability, can be using modern technology that is not an ATDS under the statutory definition, and can still be subjected to potentially ruinous liability for every single call or text. This is fundamentally unfair to any entity making calls or sending texts, and is fundamentally unfair to consumers—who are increasingly paying the societal costs of abusive lawsuits. When Congress enacted the TCPA 25 years ago, it sought to implement a careful balance between protecting beneficial, normal, expected or desired communications and protecting public safety entities and consumers from abusive practices. That balance must be restored.

Mandate a Reassigned Number Database: One idea moving forward would be to establish a telephone number subscriber database that would require the participation of all carriers, and timely updates by the carriers to the database. The database would link each telephone subscriber—and to the extent possible any persons on that subscriber's family or business plan—with their telephone number. Callers or those sending text messages could check against the database to determine whether a number for which they have been given consent to call or text now belongs to a different subscriber. A TCPA safe harbor should be provided for callers who check the database for confirmation that the number that they have been provided consent to call or text has not been reassigned.

Privacy concerns could be avoided by allowing a calling party to check against the database only to see whether (and if so, when) a number has been reassigned to a different subscriber—but not provide the identity of the subscriber. There is no doubt that any combined database of 80+ carriers would take significant time, effort, and resources. If this could be accomplished, the benefits would be tremendous. Compliance-minded callers and texters who have obtained prior express consent could rely on that consent, as Congress intended. Those callers or texters would not be placed in the impossible situation of risking TCPA liability for each and every call or text based on a factor over which they have zero control—knowledge of a reassignment. Consumers would be less likely to receive calls or texts based on a reassigned number, and would be less likely to miss important, beneficial or desirable communications that they provided consent to receive.

Prior Express Consent is Not Meaningless: Another, more simple option may be for Congress to confirm that when it provided a statutory defense for "prior express consent of the called party," it did not intend for that defense to be meaningless. Congress intended that when a caller received prior express consent, it could rely on that consent until a caller had actual knowledge that consent has been withdrawn (including through a reassignment).

ATDS Definition is Not Meaningless: Another option may be for Congress to explicitly confirm that when it provided a narrow, specific and precise statutory definition of an "automatic telephone dialing system," it did not intend to broadly sweep into the definition any and every software system or device that "theoretically" could be modified at some hypothetical future point in the future to "store or produce numbers to be called, using a random or sequential number generator, and to dial such numbers."

Restore the Balance: Congress should confirm that when it enacted the TCPA it did not intend for it to become a "litigation trap" where compliance-minded callers are put at untenable risk for engaging in beneficial, normal, expected or desired

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[70] CFPB, *Are there laws that limit what debt collectors can say or do?* (last visited May 16, 2016), available at *http://www.consumerfinance.gov/askcfpb/329/are-there-laws-that-limit-what-debt-collectors-can-say-or-do.html.*

[71] CFPB, *What is harassment by a debt collector?* (last visited May 16, 2016), available at *http://www.consumerfinance.gov/askcfpb/336/what-is-harassment-by-a-debt-collector.html.*

[72] CFPB, *Is there a limit to how many times a debt collector can call me?* (last visited May 16, 2016), available at *http://www.consumerfinance.gov/askcfpb/1397/there-limit-how-many-times-debt-collector-can-call-me.html.*

communications, and where consumers are also suffering the consequences. Congress should consider taking steps to restore the balance that it intended when it enacted the TCPA.

The CHAIRMAN. Thank you, Ms. Desai.

Let's start with 5-minute rounds of questions.

I'll start with Ms. Wahlquist. As you know, the FCC's concluded that, and I quote, "Service outages and interruptions in the supply of water, gas, or electricity could, in many instances, pose significant risk to public health and safety, and the use of prerecorded message calls could speed the dissemination of information regarding service interruptions or other potentially hazardous conditions to the public." Nonetheless, and despite receiving prior consent, a number of utilities have faced expensive litigation and potentially ruinous judgments for making just such calls.

Do you agree that the Commission's action on the Edison Electric Institutes and the American Gas Association's petition for declaratory ruling filed with the Commission over a year ago would help utilities avoid meritless but oftentimes costly litigation for these notices? And do you think that that ruling is long overdue?

Ms. WAHLQUIST. I would agree that it would be helpful to the electric companies to have that ruling. I agree that it is overdue. I am concerned, though, that it's—would just be one more exception that the FCC would add into the checkbox of, "Here's a few kinds of calls we think are OK." And in the 2015 order, they listed a few. And this would just add a few more. OK? So, the electric companies can now say something about outage. And the problem is, there are all of these other calls that consumers would want, that they've signed up for, that they've requested, they've asked, that businesses are afraid to make, or, if they're making, they're getting sued under the TCPA. So, I think that the FCC does need to rule on that order. And I don't know why it wasn't in the earlier ruling.

Clearly, people need to know if there are power outages. I believe one of the petitions pointed out that people may have medical equipment at home that relies on power, and we need to be able to alert them to an outage. So, it—I think that should be ruled on. But, I think there needs to be a much bigger look across the board at calls that are legitimate calls that are generating lawsuits.

The CHAIRMAN. Ms. Desai, at a recent field hearing, CFPB Director Cordray said, and I quote, "Let me also take a moment to acknowledge another positive development, which is the decision some banks and credit unions have made to provide consumers with real time information about the funds in their accounts available to be spent. They are doing this through text and e-mail alerts, which can reduce the risks that consumers inadvertently overspend their accounts."

How can banks, credit unions, and other financial institutions increase communications with their consumers if they have the threat of TCPA litigation hanging over their heads?

Ms. DESAI. Well, thank you, Chairman Thune. You raise a very important point. There are all types of time-sensitive consumer-beneficial communications, such as the example you raised, available funds to reduce the risk of overspending, but also high-purchase alerts, low-balance alerts. And these types of time-sensitive

communications are only possible through modern technology. These communications can't be made through a rotary phone.

And this is the heart of the challenge, not only for my financial institution clients, but, frankly, all of my clients who engage in communications with consumers and with their customers. They are paying a significant cost for the additional risk that any time-sensitive communication they make runs the risk of being sent to a reassigned number, and that is a factor that they cannot fully control. As a result, many of my clients are choosing to decrease beneficial elective communications through cell phone or text because they know that every single one of these communications does carry that additional risk.

The CHAIRMAN. Mr. Lovich, you stated that, "The practical impact of TCPA restrictions on the care provider community is devastating." I'm wondering if you could sort of elaborate on what that—devoting so many resources to TCPA compliance means for patient care.

Mr. LOVICH. Thank you, Chairman. I think that's probably the most important question that I could be asked today, because it does impact upon patient care, which is obviously the most important aspect of providing healthcare.

As any other enterprise, a hospital has to make economic decisions when they are dealing with a finite pot of resources. If resources have to be dedicated to an administrative action, such as dealing with the TCPA, that requires decisions to be made with regard to staffing. If that impacts, for example, the number of nurse to—nurses that are there to treat patients, it reduces the direct interaction between the nurses and the patient, the delivery of direct follow up instructions, other instructions with regard to the patient care.

There have been studies done by the Department of Health and Human Services. The Agency for Healthcare Research and Quality has found that the reduction in nursing staffing has a direct relationship to negative patient outcomes with regard to the treatment of their conditions.

So, the more resources that have to be dedicated to the non-use of up-to-date technology calls from that pool of talent that is not being directed to patient care. And I don't think that's something that we want to do as a Nation.

The CHAIRMAN. My time's expired. I've got some other questions, but I'll hand it off to Senator Nelson.

Senator NELSON. Mr. Chairman, I'm going to defer my questions until later, but I just want to introduce a thought. The law says that it's illegal, robocalls on cell phones. And yet, our consumers receive millions of those robocalls on cell phones. Can you imagine if we made it legal, what would happen?

I'm going to defer and let our members ask their questions first.

The CHAIRMAN. Next up is Senator Blunt.

Oh, well, I'm sorry, if you—that's right. We'll keep it even. I have Blumenthal, not here. Senator McCaskill would be up.

**STATEMENT OF HON. CLAIRE MCCASKILL,
U.S. SENATOR FROM MISSOURI**

Senator MCCASKILL. So, this is not that complicated. All you have to have is the permission of the person you're calling, and call them. I mean, you guys make this sound like this is an impossible thing to do. I mean, Mr. Lovich, you have somebody who leaves your hospital, and you guys can't manage to get their permission to follow up with them by phone and call them? Why is that so economically difficult for you?

Mr. LOVICH. Thank you, Senator. The problem is, as my colleague, Ms. Wahlquist, had indicated in her testimony—is that the plaintiffs' bar has taken the opportunity to twist the language with regard to the use of consent, and has chosen to sue most of the members of my association with regard to the inexactitude of the language involved in the consent process. Typically, consent is obtained through the conditions of admission when someone is admitted to the hospital. That's a written document that's signed by the patient. That language is then torn apart by some of my brethren——

Senator MCCASKILL. Why don't you just do a simple—when someone checks out of a hospital, why don't you just present them a simple card and said, "Do you mind if we call you on follow up?" and have them sign that? I don't think lawyers would have much luck with that in front of a jury. And if you guys are settling those cases, shame on you. Take them to trial and kick them in the rear in the courtroom. That's what you do.

You guys need to understand this. This is the biggest consumer problem in the country. No bigger problem. And some of these witnesses—you all are in here whining about these poor businesses, and consumers really want these. They don't want them, Ms. Wahlquist. They don't want them. And when somebody has a reassigned number, you need to call them 40 times to figure out it's a reassigned number? That was your testimony. What about mail? Can you drop them a note in the mail and figure out that they have a different phone number?

Ms. WAHLQUIST. Yes, Senator. The problem is that not all the numbers are reassigned. There are numbers that are wrongly provided from the start. And if it was just that one number, it wouldn't be the issue. The issue is that, as long as there's one number, then a class-action is brought. You have a class-action, there was no statute of limitations put into the TCPA when it was drafted. So, then suddenly all phone calls made by that company for 4 years are put at issue. And that's what makes it not simple.

Senator MCCASKILL. Let me ask you, Mr. Zoeller. Have the complaints gone down or up on robocalls in the last several years?

Mr. ZOELLER. They've gone up every year in our office, and we're on track to set all new records yet this year.

Senator MCCASKILL. So, you would think that, if in fact these lawsuits were really damaging the cost of doing business in this country, you would see the opposite impact, wouldn't you, Attorney General?

Mr. ZOELLER. Well, you know, I think the massive amounts of phone calls are not from people being represented here, so the problem we have are the bulk calls that come from overseas, where

none of us have the ability, other than—I guess I'll throw the FCC under the bus—that they're the only ones who can really regulate those huge, massive calls that originate outside of our jurisdiction. So, without any enforcement ability, those are the ones that really are, let's say, well over half of the complaints we get.

Senator MCCASKILL. Although, I will tell you—I know you work with my Attorney General, Chris Coster, closely—in the last few months, he's brought against an insurance company, a lawn-care service, a home security company, a duct-cleaning service, and a charity for violating the Missouri law. Now, I don't hear tones of international in any of that list. So, this is a real problem.

And, by the way, Ms. Wahlquist, I would just suggest this. I know that the carriers are all members of the Chamber. We know, from hearings we've had in this committee, that the technology is available that the carriers could adopt. And it has been clarified by the FCC that there is no duty to connect calls that prohibits them from adopting this technology. They can adopt technology and make it available to consumers that allows consumers to opt out without having to take these calls. And what we're really trying to do here—we're not trying to punish people with litigation. We're trying to put power in the hands of the consumer. And this may not be the most artful way to do it, but I will just speak for me, and I think probably for a whole lot of people who run for office that hang out around here, if you think I'm backing up on going after people who make robocalls, in light of what I encounter every day from people I meet, including my own family—I mean, my son can't get two companies to quit calling him on his cell phone. He finally handed the phone to me. You know, and I said, "I'm a U.S. Senator. I'm going to sue you." Guess what? They called him 15 minutes later.

Ms. WAHLQUIST. Your Honor, I think that those are really the bad actors that need to be targeted, that have been getting targeted, and continue—would have liability under whatever modification you're doing to the TCPA, because I'm not saying that, when somebody receives notice, "This is a wrong number," and they receive it in a reasonable way, where they know, they should have a little bit of chance to implement that knowledge, and the calls should stop. And if they haven't, then——

Senator MCCASKILL. But, they don't. Ask Ms. Saunders. They don't stop.

Ms. WAHLQUIST. The—she has some examples of ones that didn't. I have processes and procedures in place with most of my clients, where this is—it works for 99 percent of the time, but you have human error, you have something that doesn't happen. You might have a vendor that hasn't been following the company's procedures and policies and didn't record the Do Not Call. And companies don't want to call the people that aren't their clients. We're trying to call our customers to convey information to those customers. There's no desire to continue to call someone who's not a customer with this information.

Senator MCCASKILL. Doesn't feel like that on the receiving end. It doesn't feel like that. I'm just telling you. That's not the perception consumers have.

Thank you, Mr. Chairman.

The CHAIRMAN. All right.
We'll go to the other half of the Missouri duo here.
Senator BLUNT. Exactly.
The CHAIRMAN. Senator Blunt.

STATEMENT OF HON. ROY BLUNT,
U.S. SENATOR FROM MISSOURI

Senator BLUNT. Well, thank you, Chairman.
What I think Attorney General Zoeller said was that half of the robocalls come from out of the country. What could we do about that?
Mr. ZOELLER. Senator, I—that's a great question. And again, between, you know, addressing this with the FCC, which has the regulatory authority, and the carriers, which I'll agree with the Senator, your colleague, that they do have some ability. They've pointed to one another for years. So, up until recently, I've always been critical of the FCC and their failure to regulate. The carriers have always said, "We're nervous about whether we have the ability to use the technology." Now that they've passed the rule, which we've long asked for, the ball is back to the carriers to say, "Why aren't you using the technology that's currently available to block some of these"—and we're not talking about any of the types of calls that you're hearing about. These are the massive calls that literally call everybody in a—in an area code. So, when I get the complaint, I literally tell people, "Don't feel too special, because they called 9,999 other people that same minute." So, it's only the FCC and the carriers. Somewhere in that finger-pointing is the answer to your question.
Senator BLUNT. Well, it seems to me that one of the things you said is exactly the crust of what we are talking about here. We're talking about two different problems. We're talking about massive robocalls, half of them, based on your information, from outside the country. Then the other thing is people legitimately trying to contact someone whose number they either no longer have or never had given to them in the correct way. Surely, there's some way we can separate this discussion to where we deal with these problems in the way they ought to be dealt with.
You know, Ms. Desai, I've heard that some banks, for instance, no longer even try to notify on what they would see as a routine problem that I'd like to be notified of, such as some activity in my account that doesn't seem to make sense, but they don't notify me, because they think they might be calling a number that they're not sure of? Is that a real problem?
Ms. DESAI. Yes. And the American Bankers Association actually submitted a filing on exactly that issue. I mean, it is a problem. And, you know, it—we—I wish it was as easy as just simply getting consent. But, once you have consent, you have to be able to rely on that consent. And the problem with TCPA liability, the way it has been interpreted, is that you cannot any longer rely on that consent, because there's no way of knowing if a number has been reassigned. And that's why there are increasing numbers of banks and other institutions that are afraid to make routine calls or send routine messages.

Senator BLUNT. Does anybody on the panel know? How long does it take to reassign a number? If I give up my cell phone number, is there a definite period that that can't be available to anybody else? Or how long does is it take before somebody else is answering the number I used to have that I gave the hospital or I gave the bank or I gave the college—how long might it be before somebody else has that number?

Ms. WAHLQUIST. Senator, it depends on the provider of the cell phone number. I think it can be as short as 30 days. Some providers wait 6 months before reassignment. It's just kind of a hodgepodge. And part of the problem also is, the business doesn't know who the cell phone provider is on any given number. You wouldn't know the timeframe in which it's switching out.

Senator BLUNT. Well, say we had a rule that you couldn't do it any quicker than 6 months. Anybody that got my cell phone number earlier than 6 months wouldn't have any certainty that it was still my number. Is that right? Until they called it. Ms. Saunders, does that sound right to you?

Ms. SAUNDERS. Yes, sir. But, I think the cell phone companies may not agree to wait 6 months, because some cell phone companies have a smaller batch of numbers that they're going to want to recirculate. But, I—if I might——

Senator BLUNT. You might.

Ms. SAUNDERS.—I think that several of us agree on this panel that one way of dealing with the calls to reassigned numbers is for there to be a mandatory database that all cell phone companies participate in that would allow callers to access and ask, "When was the last time this particular phone number was transferred?" And once that answer is provided, the caller would know whether or not they had valid consent. And the problem with the situation now is, apparently there are no full databases that are—that include all the cell phone companies. So, I think several of us on different sides of this issue have all been encouraging both the cell phone companies and the FCC to either voluntarily do this or mandate it. But, that would solve a lot of the litigation against the wrong—about the wrong-number calls.

Senator BLUNT. It just seems to me, Mr. Chairman, that we've got two very different problems here. One, it's really easy to be outraged about. And in the Missouri delegation, Senator McCaskill usually deals with the outrage better than I do. And I appreciate that. And I like to see that happen.

Senator MCCASKILL. It's called good cop, bad cop.

Senator BLUNT. Well, maybe so. And the other one is a problem that we're all very sympathetic to. If we could figure out how to divide this discussion into those two categories, we're much more likely to find a solution to both problems than not. And I hope we can figure out how to do that.

The CHAIRMAN. Thank you, Senator Blunt. And that suggestion is one we may want to explore and take a look at if everybody sort of agreed that that would make sense. I know, definitely in the Missouri delegation, if I have to call somebody, I'm going to call the good cop.

[Laughter.]

The CHAIRMAN. Somebody doesn't like unsolicited phone calls.

I have up next—Senator Klobuchar and then Senator Daines.

STATEMENT OF HON. AMY KLOBUCHAR,
U.S. SENATOR FROM MINNESOTA

Senator KLOBUCHAR. OK, very good. Thank you very much. Thank you, Mr. Chairman, and thank you, Senator Nelson, for your leadership on this, as well as Senator Markey and many others.

So, I'm a cosponsor of the HANGUP Act to repeal a provision from the Bipartisan Budget Act of 2015 allowing robocalls to cell phones for the collection of debt owed to the government.

Ms. Saunders, in your testimony, you estimate that this provision would impact 61 million people. You also point out that, in many cases, debt collectors do not have accurate information about who owes the debt.

Mr. Zoeller, you testified that 90 percent of the debt-collection complaints your office received last year were because the caller was harassing the wrong person.

In both of your opinions, how significantly does the provision undermine existing robocalling protections? Because I can tell you, when—we just did the senior tour around Minnesota, our staff and in my own experiences meeting with people, robocalls are still one of the number one things that they list as something that they're very angry about. They get sucked into things they don't want to. And, well, you know all about it.

So, Ms. Saunders?

Ms. SAUNDERS. We think this—the provision is very dangerous. One of the concerns—one of the many concerns that I have heard is that the FTC and other government agencies, such as Attorney General Zoeller's, tell people not to answer any robocalls. The FTC has said publicly, repeatedly, "The IRS won't call you." But, now, because the IRS can hire debt collectors and because the IRS debt collectors can robocall without consent, that advice from the FTC is no longer available. And yet, how do people who are receiving the scam calls know the difference? And so, I can go on, but I—the problem is——

Senator KLOBUCHAR. Right.

Ms. SAUNDERS.—tremendous, and it is not a good resolution to allow consumers who owe money to be called more.

Senator KLOBUCHAR. Yes.

Attorney General Zoeller?

Mr. ZOELLER. You know, and I'll add to that. My earlier focus about—you know, in carving out the exception, we may well have lost the ability to defend the TCPA as a constitutional matter, because, again, in our experience, going up through the—Indiana and then the 7th Circuit Court of Appeals, it was because we did not distinguish between the types of calls being prohibited that it was neutral. Once you've started to carve this out—and I think it's—it almost goes back to the point about looking at these things differently. The very different part about creating a better defense, we're not against defending, and I think it would go a long way to eliminate some of the—let's say, the frivolous litigation. And I'm not here to defend the trial bar. But, I think, to create a better de-

fense, as opposed to an exception—once you've got these exceptions, our ability to defend these statutes really is compromised. So——

Senator KLOBUCHAR. And you point to a rise in the phone scams involving government impersonation. And I know that often these scams involve someone spoofing to try to fool a victim into thinking they're someone calling from the government. And if we don't pass this HANGUP Act, or some kind of strong antispoofing legislation, do you think you would see more of this going on?

Mr. ZOELLER. Well, I got a little bit numb to it until they started to spoof using Office of the Indiana Attorney General.

Senator KLOBUCHAR. Well, there you go.

Mr. ZOELLER. So, I'll stand as outraged.

Senator KLOBUCHAR. OK. That's pretty bad. So, you've actually had people use your own office name? And what were they calling to say that they wanted to do?

Mr. ZOELLER. Well, there were a number of issues. But, again, the fact that I was constantly telling people, you know, to be careful of this—the spoofing, and that you can't really rely on it. They can put any number up there. OK, it's another violation of the law. But, by the time they were using mine, it was because we were so public about, "Of course, you can trust the Office of the Attorney General." So, what little credibility my office tries to maintain and trust——

Senator KLOBUCHAR. Yes.

Mr. ZOELLER.—was being used against us.

Senator KLOBUCHAR. Exactly.

It has been 13 years now since the Do Not Call Registry was started. While there are more than 222 million numbers registered, it shows that the public is incredibly supportive of this concept. There are also more complaints than ever. Robocalls and text spamming have proliferated due to advanced technologies, which were discussed here earlier. Again, to both of you, we know that more needs to be done to protect consumers from fraudsters and robocalls. What, in your opinion, are the most significant limitations of the Do Not Call Program in addressing the current robocalling problem?

Ms. SAUNDERS. I think we've mentioned it here, and it's the spoofing problem. And while I very much appreciate Senator Nelson's bill on antispoofing, we really think that the law needs to be much more heavy-handed and require that the cell phone—that all of the phone companies adopt antispoofing technology. I find it very hard to believe, in this day and age, with the advanced——

Senator KLOBUCHAR. When the technology is out there.

Ms. SAUNDERS. The technology——

Senator KLOBUCHAR. So, you would pass Senator Nelson's bill and then also add in this?

Ms. SAUNDERS. Yes. Yes, ma'am.

Senator KLOBUCHAR. All right.

Attorney General?

Mr. ZOELLER. Well, while we're doing that, you know, the idea of having some ability to stop all the illegal ones that are being done from overseas, I think that's something that, you know, technology has gotten us into this problem, and we really need to focus on how can it get out. So, when the FCC passed their recent regu-

lation, I know the carriers were concerned that they were going to require the use of the technology to block the overseas calls. When that wasn't in there, I know they all had a sigh of relieve. But, quite frankly, we were all hoping that it would be in there.

Senator KLOBUCHAR. Got it. And I'm not going to do anything more. I'm over my time. But, as you know, I've been doing a lot on the call-completion issue and dropped calls. And so, I'll put something on the record on that. We're hoping to have a markup soon.

Thank you.

The CHAIRMAN. OK, we're going to—Senator Daines, then Senator Blumenthal.

STATEMENT OF HON. STEVE DAINES,
U.S. SENATOR FROM MONTANA

Senator DAINES. Thank you, Mr. Chairman.

I brought along a phone from 1992. The size of it is only exceeded by its weight. It would make a good boat anchor. And this is 25 years old, and it is approximately the same time TCPA was enacted. We can see how far technology has come from this device to what I have in my hand, my iPhone 6, that's reduced the need for a lot of phone calls because of the power of the knowledge here, where I can make an airline reservation, I can do my online banking, I can SnapChat Cory Booker. I can do a lot of things here on my iPhone 6.

But, as we've heard today, now 25 years later, unwanted phone calls are still among the top consumer complaints. And even when consumers do file lawsuits for violations, it seems like the trial lawyers are the only ones that truly benefit. In fact, I've heard the TCPA has even been referred to the "Total Cash for Plaintiffs Attorneys."

Ms. Wahlquist, consumers are still receiving unwanted calls. In your testimony, in fact, you said the average payout to the trial lawyers on a case in 2014—I believe it was $2.4 million, while the consumer average payout was $4.12. Is the TCPA really helping consumers today?

Ms. WAHLQUIST. Senator, I just really don't think that it is. The abuses that are happening on the litigation side mean that it's really become a lawyer-driven statute, when we have the suits for it. And it—the kinds of calls that are driving everyone crazy—and I get them, too—the spoofed calls and—that's not what is getting—nobody would sue for that. There's no money, there's no pocket at the end of it.

So, for example, I have a restaurant client that had an opt-in put on their menu, "If you want to get our coupons, you know, on a weekly basis, text us this and we'll start sending them to you." And this purely opt-in thing that a lot of young people joined up for and were doing, one text message that was sent, that one plaintiff's lawyer brought a suit on, and suddenly my client is facing $32 million in statutory damages for that single text message that went to the club, and stopped the club. Nobody's getting the coupons anymore. And this kind of thing doesn't benefit consumers. Now nobody's getting their coupons.

Senator DAINES. In a state like Montana, we have a lot of small businesses. They're not trying to call their customers to sell them products they don't need. They're not inundating them with texts and faxes. But, they are trying to reach their customers to remind them of appointments or alert them to a potential service disruption.

Ms. Desai, is it reasonable to ask small businesses to comply with the 2015 TCPA order?

Ms. DESAI. I think the interpretations provided by the FCC in 2015 were particularly damaging for small businesses. They shouldn't have to check a database to see if the number that they were provided by their own customer has suddenly been reassigned. They probably can't afford to do so. And if they did, it wouldn't give them an accurate answer anyway.

I think it's expensive for a small business to have to turn to manual dialing in order to reach their customers.

Senator DAINES. I grew up in a small business. My mom and dad run a little construction business. Their compliance department would be my mom and dad, versus a large business, where a compliance department could be an entire wing of the headquarters of a building.

Ms. DESAI. Yes.

Senator DAINES. So, what kinds of compliance costs and challenges would these small businesses face?

Ms. DESAI. Well, you know, in order to be completely sure that they're using a dialing equipment that won't trigger TCPA liability, they'd have to invest in a rotary phone, if they could find one. They would have to try to figure out on a regular basis, whether the numbers that they've been provided consent to call are still accurate.

I don't have dollar figures for you. I don't know. Even my large clients, who have thousands of employees, have a difficult time trying to figure out how to manage TCPA risk. I can't imagine what a small company would have to do.

Senator DAINES. Mr. Lovich, I want to bring up this issue of rural healthcare. Again, a lot of states who serve on this committee are from more rural States. And if you've visited Montana, hospitals are simply not around every corner. Patients really rely on technology to communicate with their doctors. Oftentimes, 30, 40, 50, 60 miles away, even further, from a hospital. Can you explain how today's application of the TCPA impacts patients in rural communities who do not have easy access to a clinic?

Mr. LOVICH. Certainly. Thank you, Senator.

I would think that the impact on a rural community would be even more devastating than one in a metropolitan community. The interaction between the physician and the patient and the healthcare provider is a sacred relationship. And if there isn't an ability to, for example, follow up on inpatient care, to provide instructions with regard to further care, remind people about prescription pickups, remind people about appointments, it all would be devastating to the effectiveness of the healthcare that's provided.

One of the things that the healthcare community is trying to do is cut down on readmissions. That is a tremendous drain on the

healthcare system, is when a patient isn't adequately treated the first time because of the rush to discharge them. With adequate instruction, adequate interaction between the caregiver and the patient, readmissions will reduce, and therefore the overall cost of healthcare will go down.

The inability to use the most current technology to pursue that end is devastating to the industry and just causes more cost and more administrative draining of revenue that, again, impacts on patient care, it reduces the availability of the caregiver to the patient, and that is the essence of the relationship in—with regard to healthcare.

Senator DAINES. Thank you, Mr. Lovich.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Daines.

And I'd just want to know where the Senator from Montana came up with that Vanilla Ice vintage mobile phone there, because that's——

Senator DAINES. Mr. Chairman——

The CHAIRMAN. Please tell me you got that in a museum and you aren't collecting——

Senator DAINES. We did. And it's heavy enough—I see you doing curls in the gym every morning with this thing.

[Laughter.]

The CHAIRMAN. Thank you, Senator Daines.

Senator Blumenthal.

STATEMENT OF HON. RICHARD BLUMENTHAL, U.S. SENATOR FROM CONNECTICUT

Senator BLUMENTHAL. Thanks, Mr. Chairman.

If there is a form of consumer complaint that is common and passionate among the people of Connecticut, it is unwanted calls, whether from telemarketers or local officials or politicians. And among those calls, the most aggravating and annoying are the robocalls. If we overlook the anger and aggravation caused by these calls, we are doing a grave disservice to the people of America, and they want stronger measures, like the ones that I and Senator Markey have proposed, that give consumers, essentially, more control over the calls they receive. That's essentially it. Whether it's through a private right of action or stronger consumer protection from government authorities, there's no question in my mind that the present law needs to be updated and upgraded to provide better, swifter, stronger protection, because this problem is only going to increase.

Mr. Zoeller, you do now what I used to do for 20 years, and a lot of your mandate is consumer protection. Are you finding an increase in the number of complaints, as I have received, for example, from a 76-year-old woman in Dayville, Connecticut, who says to me, "I'm weary of all the robocalls that I receive. Can't the Senate address this issue?"—which seems to be noncontroversial, to me. A 76-year-old research scientist. I have reams of complaints from people who are upset about these calls. Quote, "Every day, I get unwanted robocalls. Most annoying, I have reported these to the No Call List people, but nothing is done." That's the reason

that we have a private right of action. Public authorities are doing perhaps less than they should. What's your experience?

Mr. ZOELLER. Well, Senator, as a former Attorney General, as well as Senators Ayotte and Sullivan, you all kind of remember the days where we literally did have some protection. And, I think, particularly in Indiana and Missouri, which had the strongest of all Do Not Call laws, we literally had quiet at home. So, I think, going from the perspective where people knew that they could be stopped, they understood that something was going right, their government had protected them, to the point where now the vast majority have taken out their landlines, and when I tell them, "Believe it not, the U.S. Congress is thinking about opening up new exemptions to allow robocalling to cell phones," they're outraged. So, again, not to say that it might diminish the high standing that the Congress has held by the public, but you really risk the fear that people are going to come here with pitchforks and torches, because this is a very passionate—and I've got plenty of those same stories. So, you're right on the money.

Senator BLUMENTHAL. Well, I've heard the verbal pitchforks, and worse. And I think you're absolutely right. For a Congress that has done so little, to now do something so bad as to dilute the consumer protection laws would be absolutely outrageous. The calls I get are not normally outraged, but incredulous.

Let me ask Ms. Saunders, What do you think is preventing the implementation of call-blocking software by the phone companies? Because, again, giving consumers control, empowering consumers, is basically the goal of these laws. It's not to restrict calls that consumers want. It's to enable consumers to stop the calls that they find bothersome, annoying, intrusive, invasive, and worse.

Ms. SAUNDERS. I don't know the answer to that question, Senator. I think you'll need to ask the phone companies why they won't employ those call-blocking methodologies. I would point to the example of what this Congress did 40 years ago, when it passed the Consumer Credit Protection Act, putting the burden on banks for losses when credit cards—when there were credit—when there was credit-card fraud. And, because the banks had that burden, the banks have been very vigorous in developing antifraud protections, so there are very little losses, because the losses that are suffered are then suffered by the banks. If the phone companies had the same losses that were—resulted from robocalls, especially overseas telemarketing spammers, they would be very quick to employ very vigorous antispoofing and call—robocall-blocking technologies.

Senator BLUMENTHAL. Thank you.

My time has expired. I have many more questions and many more comments. I will put them in the record.

I do believe that the present penalties in the TCPA are inadequate as a deterrent for the bad actors and repeated violators. And I hope that we can strengthen, not weaken, this important Federal measure.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Blumenthal.

Senator Markey.

STATEMENT OF HON. EDWARD MARKEY,
U.S. SENATOR FROM MASSACHUSETTS

Senator MARKEY. Thank you, Mr. Chairman, very much.

I enjoy this conversation, because we're kind of in the wayback machine, to a certain extent, when Senator Daines holds up a cell phone from 1992. Because, when I authored this law in 1991—I am the author of it—it was because there was an epidemic of calls that were going into people's homes. There were no laws. And so, people were almost afraid to look at their phone at night, because it would just start to ring at about 6 o'clock, and it wouldn't stop until 9:30 or 10 o'clock at night. So, we had to put a law on the books. I was the Chairman of the Telecommunications Committee. It's my law.

And, to Senator Daines' point about the primitive nature of the phone which he had in his hand, I also knew that we were putting in 200 megahertz of spectrum so that we could create the third, fourth, fifth, and sixth cell phone license in America, that we would go digital, and everyone would have one in their pocket by the year 1995. So, that's how quickly that all changed. So, we were building in—I was building in anticipatory consumer protections.

Now, when people hold this phone in their pocket right now and it starts to ring, people say, "It's probably somebody I know. I think I'll take the call on my wireless device. I think I'll take it." Why? Because the protections in that law in 1991 are very high for wireless devices. It's probably somebody you know. That's what you think. But, when that phone is ringing at home at night, even today, that landline phone, people look at it, almost terrorized, "It could be somebody I don't know. It could be somebody who's going to harass me. It could be somebody that's still calling me the same way they were in 1991 or 2001." And that's the truth.

Now, should we change the laws to make it easier to call people on these wireless devices? I don't think so. Because it's personal. It's on you. How much of an intrusion would that be on people, to have that phone going off all day long with these robocalls? And, by the way, what happens, of course—Senator McCaskill was right on the point here—these firms have moved overseas, yes. But, who is paying them? People in America are paying people in India to be harassing people so they can get around the laws. That's what's going on. We should try to figure out how to make the laws tougher so that these offshore overseas calls are harder to make.

So, if I can, Ms. Saunders—and perhaps I was influenced by the fact that I did work for the National Consumer Law Center when I was in law school, so maybe I was infected by this philosophy of, "The consumer should be protected first." I was there the first year the Consumer Center was established, working there as a law student researcher.

So, can you talk a little bit about this concept of consent and whether or not it might be possible, actually, to have the information come in by e-mails or the consumer would be able to respond by e-mails rather than having the phone be ringing, the wireless or home phone? Are there ways of dealing with this issue that are much less intrusive on the consumer in our country?

Ms. Saunders?

Ms. SAUNDERS. Yes, there are. I think the first point really needs to be made is that there's not a constitutional right to make

robocalls. And before the automated systems developed, businesses communicated quite well with their customers through manual dialed calls or e-mails or, in the olden days, snail mail. And I remember getting calls from my credit card company, where they—I actually had a person on the line who said, "There's a suspicious activity. Is this your—really your credit card use?" And there's no reason that that can't be used when the business is not sure about who actually has consented and currently owns the phone.

Senator MARKEY. Well, let me——

Ms. SAUNDERS. But——

Senator MARKEY.—Ms. Saunders, and you, Attorney General Zoeller—we're talking about, last year, a relaxation of the laws, in terms of being able to call people who have debts. And it's people with student loans. There are 40 million of them in America. Now it's easier to harass them by phone. Can you each talk about that and what might be better ways, you know, for people to be communicated with who have debts in our country?

Attorney General Zoeller?

Mr. ZOELLER. Well, again, I think, at the beginning, when people sign up for debt, you know, to get their opt-in as part of the, you know, transaction. And again, I'll agree that we could make that defense, so, you know, I'm not here to defend, again, the plaintiffs' bar. So, tightening up a better line of defense. But, I would point out that it's the exceptions that I'm nervous about. And again, when we went up to the 7th Circuit, it was clear that, because we had no exceptions, the political free speech against personal privacy, two very important constitutional rights, and we won, based on the fact that it was not limiting free speech. There are plenty of opportunities to speak, just not by ringing the phone. So, be careful of the difference between that defensive side, which, again, we would support bolstering—don't make exceptions because you've suddenly picked winners and losers, and the courts won't allow that—limitations on free speech.

Senator MARKEY. With your indulgence, Mr. Chairman, could I ask Ms. Saunders to respond to a little bit——

Ms. SAUNDERS. The idea that calling a debt—a consumer that owes a debt multiple times will assist them in paying back the debt is somewhat flawed. I think the record is full of examples of both consumers who owe the debt and consumers who don't owe the debt being called numerous times, robocalled, which is harassing and abusive. It's also not particularly helpful and against the—and not—not in furtherance of good public policy to bother people into paying a debt.

Senator MARKEY. And again, in last year's Budget Act, there was a provision snuck in—snuck in—to a must-pass piece of legislation that makes it much easier for debt collectors to call consumers—students—40 million students who owe student loans, and makes it a lot easier for them to do that. And I've introduced the HANGUP Act that would just stop that. It's absolutely irresponsible.

And I ask unanimous consent, Mr. Chairman, to add two letters to the record, one from 25 attorneys general, led by Attorney General Zoeller, who is testifying here today, and one from 16 consumer groups who have all written in support of the HANGUP Act, so that——

The CHAIRMAN. Without objection, it will be entered into the record.

Senator MARKEY. And I appreciate that, Mr. Chairman.

[The information referred to follows:]

MISSOURI
ATTORNEY GENERAL
CHRIS KOSTER

INDIANA
ATTORNEY GENERAL
GREG ZOELLER

February 10, 2016

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

Dear Senator Thune and Senator Nelson:

On behalf of the consumers of the signatory states, we write to urge the Committee on Commerce, Science, and Transportation to pass the ''Help Americans Never Get Unwanted Phone calls Act of 2015'' or ''HANGUP'' Act. The HANGUP Act repeals a recent amendment to the Telephone Consumer Protection Act (TCPA) allowing debt collection robocalls to consumers' cell phones. By passing the HANGUP Act, the federal government has the opportunity to stop the barrage of debt collection robocalls that can be misdialed, at times harassing and frustrating our citizens who pay for such calls to their cellular numbers.

Each year, the largest number of consumer complaints our offices receive are about unwanted telemarketing calls, with robocalls and debt collection calls at the top of the list. Prior to the amendment, the TCPA prohibited all robocalls to cell phones. This prohibition protected consumers and provided a mechanism to combat these unwanted calls. As amended, the TCPA now permits citizens to be bombarded by unwanted and previously illegal robocalls to their cell phones if the calls are made pursuant to the collection of debt owed to or guaranteed by the United States. It is inappropriate to grant debt collectors the right to harass citizens simply because the debt has a nexus to the federal government when the law specifically prohibits all other private and public entities, including political callers, from doing so.

As state Attorneys General, we are on the front lines of consumer protection for millions of Americans harassed by unwanted and unwelcome robocalls. Our offices work diligently to prosecute those who violate state and federal laws intended to prevent such calls. However, the recent amendment to the TCPA is a step backward in our law enforcement efforts.

The Federal Communications Commission ("FCC") recognizes the proliferation of robocalling and the need to combat these unwanted calls. On June 18, 2015, the FCC formally adopted a rule change which states that federal law does not prohibit telecommunication service providers from offering, upon a

customer's request, services intended to block unwanted calls. This clarification moved enforcement efforts forward and armed consumers with ways to prevent unwanted calls.

The Committee on Commerce, Science, and Transportation has the opportunity to further advance these efforts and provide citizens with much needed protection from unwanted calls. By passing the HANGUP Act to repeal the TCPA amendment, citizens will benefit from the prohibition of all robocalls to cell phones, regardless of the content of the call. We urge you to act without delay.

Respectfully,

Greg Zoeller
Indiana Attorney General

Chris Koster
Missouri Attorney General

Mark Brnovich
Arizona Attorney General

Cynthia H. Coffman
Colorado Attorney General

George Jepsen
Connecticut Attorney General

Karl A. Racine
District of Columbia Attorney General

Doug Chin
Hawaii Attorney General

Derek Schmidt
Kansas Attorney General

Andy Beshear
Kentucky Attorney General

Janet Mills
Maine Attorney General

Brian Frosh
Maryland Attorney General

Maura Healey
Massachusetts Attorney General

Lori Swanson
Minnesota Attorney General

Jim Hood
Mississippi Attorney General

Tim Fox
Montana Attorney General

Joseph Foster
New Hampshire Attorney General

Hector Balderas
New Mexico Attorney General

Eric T. Schneiderman
New York Attorney General

Roy Cooper
North Carolina Attorney General

Ellen F. Rosenblum
Oregon Attorney General

Peter F. Kilmartin
Rhode Island Attorney General

Herbert H. Slatery, III
Tennessee Attorney General

Sean Reyes
Utah Attorney General

William H. Sorrell
Vermont Attorney General

Robert W. Ferguson
Washington Attorney General

Copy: The Honorable Paul Ryan, Speaker, United States House of Representatives
The Honorable Nancy Pelosi, Minority Leader, United States House of Representatives
The Honorable Mitch McConnell, Majority Leader, United States Senate
The Honorable Harry Reid, Minority Leader, United States Senate

November 2, 2015

Re: Consumer Groups Support of the **HANGUP** (Help Americans Never Get Unwanted Phone calls) Act

Dear Senator:

The undersigned national groups advocate for low and moderate-income American consumers. We write to support strongly Senator Markey's bill – the **HANGUP** (Help Americans Never Get Unwanted Phone calls) Act – to repeal the recent enactment of Section 301 in the budget bill, which will allow collectors of debt owed to or guaranteed by the United States to make robodialed and prerecorded calls and texts to cell phones without explicit consent.

Section 301 of the budget bill opens the door to unwanted robocalls to cell phones for student loan borrowers, veterans, farmers, mortgage borrowers, taxpayers, and others with debt backed by the federal government. The provision would also allow robocalls to borrowers' relatives, their references, as well as any unrelated person who has the reassigned cellphone number of these parties.

Section 301 removes the current requirement for a caller to have the consent of the called party before making autodialed or prerecorded calls or texts for the collection of debts owed or guaranteed by the federal government.

Section 301 will only foster more abuses from an industry already known for its abuses of consumers. Cell phone calls can distract people while driving, interrupt them at their jobs, and needlessly impose a cost on struggling families by using up scarce minutes. Though the provision is limited to debts owed or guaranteed by the federal government, millions of consumers will be affected, including graduates who can't pay their loans due to a terrible job market, homeowners who are behind in mortgages, and people who are in tax disputes with the Internal Revenue Service. Families who have lost their homes to foreclosure could be exposed to cell phone calls for years if the delinquency on their mortgage is sold to debt buyers.

The Federal Communications Commission received more than 215,000 complaints related to unwanted calls in 2014 and this past June, the Commission adopted stronger regulations to better protect consumers from unwanted robocalls and texts. Unfortunately, Section 301of the budget bill threatens those protections for many Americans.

The **HANGUP** (Help Americans Never Get Unwanted Phone calls) bill will undo the damage and restore TCPA protections to American cell phone users. We fully support it and urge you to contact Senator Markey's office to cosponsor this important legislation. If you have any questions, please address them to Margot Saunders of the National Consumer Law Center, MSaunders@nclc.org.

Thank you very much for your support.

Sincerely,

Alliance for a Just Society

Americans for Financial Reform

Center for Digital Democracy

Consumer Action

Consumer Federation of America

Consumers Union

The Institute for College Access & Success and its Project on Student Debt

Mid-Minnesota Legal Aid

NAACP

National Association of Consumer Bankruptcy Attorneys

National Consumer Law Center on behalf of its low-income clients

National Association of Consumer Advocates

North Carolina Justice Center

Woodstock Institute

US PIRG

Virginia Poverty Law Center

The CHAIRMAN. Thank you.

Senator MARKEY. We thank all of you for being here today.

The CHAIRMAN. Thank you, Senator Markey.

Senator Nelson, anything for the—OK.

Let me just ask one last question. And again, this kind of gets at the point of other regulatory bodies. And, Ms. Desai, you, I think, indicated that some don't have the same view as the FCC when it comes to communicating with consumers via cell phone. Have other regulators seen consumer benefits in communicating with consumers via mobile phone or text message?

Ms. DESAI. Oh, sure. Yes, thank you for the question.

The Consumer Financial Protection Board has an early intervention rule that encourages out-bound communications. The Home Affordable Modification Program, the Federal Deposit Insurance Corporation, the Federal Trade Commission, the Consumer Product Safety Commission have all discussed the benefits of out-bound communications, both by call and by text. There are also State laws that require out-bound communications, because they see the value in that. For example, with utilities.

The CHAIRMAN. Well, I just want to make, kind of, one final point, and that is, nobody is proposing that consumers shouldn't have the right to stop unwanted calls at any point. Even with the Obama robocall carve-out that was mentioned a couple of times today that passed last fall, the FCC's proposed rules would allow consumers to demand that a caller stop calling immediately, even in that particular circumstance.

And I also want to be very clear, there is, I believe, and I think you heard it here today, strong bipartisan interest in ensuring that consumers are protected from harassing robocalls. The problem we have is that the TCPA is no longer working as well as it should. As we've heard, all of us are plagued by unwanted calls, even on our cell phones, which is, I think, the point that Ms. Saunders is getting at. At the same time, you have legitimate companies that are facing needless lawsuits, and consumers are being denied information that they need. And I think what this cries out for is a balanced solution.

And your input today and testimony, I think, has been very helpful in elevating these issues and getting a discussion. Frankly, for that matter, I thought hearing some—perhaps some common ground when it comes to, you know, the bad, the harassing, the bad actors and the good actors, and perhaps we'll be able to find a way to come up with some solutions that reflect that common ground.

So, I want to thank you all very much for being here.

Senator MARKEY. Could—Mr. Chairman, is——

The CHAIRMAN. Yes.

Senator MARKEY.—is it possible I can ask one more question? Then that would be it.

The CHAIRMAN. I kind of expected that would happen, so, Senator Markey, one more question.

Senator MARKEY. And I appreciate that. And I know it's an unwanted intrusion.

The CHAIRMAN. It's never unwanted.

Senator MARKEY. But, I thank you.

Last year's surface transportation bill, the FAST Act, included a provision requiring the IRS to hire private debt collectors to collect certain unpaid taxes, Attorney General. That means that the IRS is going to be hiring many people to go after those who may be unable to pay their taxes. This provision, coupled with the TCPA carve-out in the budget deal, will open the floodgates to private debt collectors robocalling and robotexting millions of Americans. The enactment of the two provisions coincide with the rise of tax and debt-collection scams as a serious problem, costing Americans millions and millions of dollars. Last year, bogus tax scams and fake debt collectors topped the Better Business Bureau's list of top scams of 2015, with over 32 percent of all scam reports about phony tax and debt collectors.

So, Attorney General, will these two changes in the budget and transportation laws on robocalls and robotext provisions make it harder for consumers to protect themselves from fraudulent tax and debt collectors?

Mr. ZOELLER. Well, there's no question of looking at those two, coupled together, that there was this kind of interest. And again, like the Chairman said, it was put into the must-pass budget. So, I think this idea of making the carve-out exception really puts consumers at risks, because we've told people, you know, "The IRS will not call you." And that's—"Don't worry, if that you do get the call." So, this is not going to be a very effective tool to try to go after people, other than the harassment that—if that's supposed to get things done.

And I guess I would leave it that, again, this carve-out with the exception is going to make the constitutional question about whether the Federal Government has now made winners and losers in an area which is really covered with free speech. So, you may have really killed the whole TCPA by that carve-out.

Senator MARKEY. Yes. So, they become electronic kind of Luca Brasis, you know, as debt collectors, which is bothering you all night long.

Ms. Saunders, do you agree with the Attorney General?

Ms. SAUNDERS. Yes, I do.

Senator MARKEY. OK, thank you.

I appreciate it, Mr. Chairman, very much. I think we should——

The CHAIRMAN. Thank you, Senator Markey.

Senator MARKEY.—tread carefully into this.

The CHAIRMAN. We do very much thank you for being here, taking the time, and for responding to our questions. And we will keep the hearing record open for 2 weeks, during which time Senators are asked to submit any questions for the record. And, upon receipt, we would ask all of you if you could submit your written answers to the Committee as soon as possible.

So, thank you all for being here.

This hearing is adjourned.

[Whereupon, at 11:45 a.m., the hearing was adjourned.]

A P P E N D I X

May 17, 2016

Hon. JOHN THUNE,
Chairman,
Senate Committee on Commerce,
Science, and Transportation,
Washington, DC.

Hon. BILL NELSON,
Ranking Member,
Senate Committee on Commerce,
Science, and Transportation,
Washington, DC.

To the Members of the U.S. Senate Committee on Commerce, Science, and Transportation:

We, the undersigned student loan organizations, commend the Committee for holding this hearing, "The Telephone Consumer Protection Act at 25: Effects on Consumers and Business," to examine class action litigation abuses under the Telephone Consumer Protection Act (TCPA). The TCPA, which was enacted over 25 years ago, was well-intentioned legislation aimed at protecting the privacy of American consumers against abusive telemarketing calls. The law has not kept up with technology and was implemented at a time when cell phones were a luxury and fees were commonly assessed for individual calls. This is no longer the case. According to a recent study from the Centers for Disease Control and Prevention,[1] nearly one-half of American homes (47.4 percent) had only wireless telephones during the first half of 2015—an increase of 3.4 percent over the last year. This number is even higher for those age brackets more likely to have student loans—more than two-thirds of adults aged 25–29 (71.3 percent) and aged 30–34 (67.8 percent) live in households with only wireless telephones.

In recent years, the TCPA's original purpose has been corrupted by widespread and abusive class action litigation where the plaintiffs' lawyers are the only big winners. Lawsuits have increased by over 940 percent between 2010 and 2015, often against legitimate businesses such as student loan servicers that are attempting to contact borrowers to provide important information, not to make telemarketing calls. As a result of this wide-spread litigation, some companies that have prior consent are considering not using automated call technology to contact borrower cell phones. If this occurs, even more struggling borrowers will not receive helpful information such as deadline reminders and repayment guidance that could prevent unnecessary student loan delinquency or defaults.

We also commend the Congress for including a provision in the Bipartisan Budget Act of 2015 (BBA) that would exempt from the TCPA calls made using automated call technology to cell phones "to collect debt owed to or guaranteed by the United States." This important provision will help student loan borrowers nationwide by enabling Federal student loan servicers and collectors to effectively contact and communicate with those who are struggling, to help borrowers navigate the often-confusing array of student loan repayment options, and to provide tailored solutions to prevent unnecessary delinquencies and defaults. Our members are not just calling borrowers to say "pay up;" they can offer real relief to struggling borrowers. The BBA provision is an important step in helping us communicate more effectively, and is an important beginning to TCPA reform.

We were very disappointed that the Notice of Proposed Rulemaking (NPRM) issued by the Federal Communications Commission (FCC) does not fully recognize the importance of allowing student loan servicers the ability to call and text student loan borrowers in order to help them avoid the negative and costly consequences of delinquency and default. The NPRM proposes to arbitrarily limit the exemption to three (3) contact attempts per month, regardless of whether we reach the borrower or not. It would also subject these calls to the FCC's recent rule on reassigned num-

[1] Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2015,* National Center for Health Statistics (Dec. 1, 2015). *http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201512.pdf*

bers, permitting only one call to a reassigned number before exposure to TCPA liability occurs. It commonly takes a number of call attempts simply to establish live contact with a borrower, and multiple live contacts to help the borrower enroll in an appropriate repayment plan, resolve a delinquency or, in the case of defaulted borrowers, to establish a rehabilitation program to cure their default and repair their credit.

Under the provisions of the proposed rule, servicers and collectors will, in most instances, be unable to make live contact with a borrower before it is too late to help keep them out of delinquency or default, or to help those in default to rehabilitate their loans. As the rulemaking progresses, we look forward to providing the FCC with our specific recommendations to improve the proposed rule so that it focuses on most effectively helping student and parent borrowers. As stated, we believe a special case can and should be made to help Federal student loan borrowers.

Today's hearing serves as an important first step in telling the troubling litigation story under the TCPA, and in laying the groundwork for continued meaningful reform of the statute which was initiated by the BBA. We remain committed to working with this Committee to advance important reforms that will modernize the TCPA and allow us to better serve our student loan borrowers.

Sincerely,

DEBRA J. CHROMY, ED.D.,
President,
Education Finance Council (EFC).

JAMES P. BERGERON,
President,
National Council of Higher Education Resources (NCHER).

WINFIELD P. CRIGLER,
Executive Director,
Student Loan Servicing Alliance (SLSA).

May 17, 2016

Hon. JOHN THUNE,
Chairman,
Committee on Commerce, Science, and Transportation,
United States Senate,
Washington, DC.

Hon. BILL NELSON,
Ranking Member,
Committee on Commerce, Science, and Transportation,
United States Senate,
Washington, DC.

Dear Chairman Thune and Ranking Member Nelson:

We, the undersigned organizations, commend the Committee for holding today's hearing to examine class action litigation abuses under the Telephone Consumer Protection Act (TCPA). The TCPA, which was enacted over 25 years ago, was well-intentioned legislation aimed at protecting the privacy of everyday Americans against abusive telemarketing calls.

But the TCPA has become an engine for abusive class action litigation that has become widespread. The numbers are staggering. Last year alone, 3,710 TCPA lawsuits were filed in Federal court, and between 2010 and 2015, case filings increased by over 940 percent.

Given that the TCPA has not been meaningfully amended by Congress since 1991, countless well-intentioned businesses and organizations (small and large) who legitimately try to communicate with employees, members or customers find themselves defending abusive class action litigation. The alleged liabilities appear in many forms and are usually based on expansive legal theories that Congress never intended when it first enacted the TCPA.

Today's hearing serves as an important first step to tell the troubling litigation story under the TCPA. We remain committed to working with this Committee to advance important reforms that will bring a 20th Century solution in line with 21st Century challenges.

Sincerely,

ACA International
American Association of Healthcare Administrative Management (AAHAM)
American Financial Services Association (AFSA)
American Insurance Association (AIA)
Coalition of Higher Education Assistance Organizations (COHEAO)

Consumer Bankers Association (CBA)
Electronic Transactions Association (ETA)
Financial Services Roundtable (FSR)
Florida Chamber of Commerce
Florida Justice Reform Institute (FJRI)
Indiana Chamber of Commerce
Las Vegas Metro Chamber of Commerce
Missouri Chamber of Commerce and Industry
Montana Chamber of Commerce
National Association of Chain Drug Stores (NACDS)
National Association of Mutual Insurance Companies (NAMIC)
National Restaurant Association (NRA)
National Retail Federation (NRF)
Newspaper Association of America (NAA)
Oregon Liability Reform Coalition (ORLRC)
Professional Association for Consumer Engagement (PACE)
Retail Industry Leaders Association (RILA)
Satellite Broadcasting and Communications Association (SBCA)
SLSA Private Loan Committee
South Carolina Civil Justice Coalition (SCCJC)
State Chamber of Oklahoma
Student Loan Servicing Alliance (SLSA)
Texas Civil Justice League (TCJL)
U.S. Chamber of Commerce (USCC)
U.S. Chamber Institute for Legal Reform (ILR)
Washington Liability Reform Coalition
Wisconsin Manufacturers & Commerce (WMC)
West Virginia Chamber of Commerce

cc: Members of the Committee on Commerce, Science, and Transportation

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PREPARED STATEMENT OF AMERICA'S HEALTH INSURANCE PLANS (AHIP)

America's Health Insurance Plans (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. AHIP advocates for public policies that expand access to affordable health care coverage to all Americans through a competitive marketplace that fosters choice, quality, and innovation.

We appreciate this opportunity to comment on the Telephone Consumer Protection Act of 1991 (TCPA) and how it affects the ability of health plans to communicate with and provide vital information to their customers. We want to highlight the following three points:

- Telephonic communications play an essential role in supporting the innovative strategies through which health plans are working to improve health outcomes for their enrollees.
- It is important to modernize the TCPA to account for changes in the health care and telecommunications markets over the past 25 years. Specifically, the law needs to be implemented in a way that allows health plans to focus on affirmative outreach and include essential communications relating to appointment and exam confirmations 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 health care instructions.
- We are concerned about the Federal Communications Commission's (FCC) 2015 TCPA Order that would prohibit HIPAA-defined covered entities (*e.g.,* health plans and health care clearinghouses) from fulfilling their statutory, regulatory and/or commercial contract obligations to place time-sensitive health care calls to members to support and enhance critical health care services and to ensure that members have the information necessary to make well-informed decisions regarding their health care.

Telephonic Communications Are a Valuable Tool in Improving Patient Care

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 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.

Communicating with health plan enrollees is essential to the success of the strategies health plans have developed to improve health care quality and health 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 compliance with treatment regimens, encourage healthy activities, and improve the management of chronic conditions. These telephone messages are permitted, under certain circumstances, by an exemption from the TCPA's restrictions on unsolicited phone calls.

A May 2014 report [1], 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 send phone calls of one minute or less, or text messages consisting of 160 characters or less, 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.

Implementation of the TCPA Needs to Keep Pace With Changes in the Health Care and Telecommunications Markets

The TCPA was approved by Congress and signed into law in 1991. Over the past 25 years, the TCPA has played a useful role in shielding consumers from many unsolicited phone calls, including those using automated and pre-recorded messages. As we noted above, an exemption from the law's restrictions is provided for certain types of telephone messages that health plans use to promote the health and well-being of their enrollees. At the same time, health care communications conducted by telephone are subject to the privacy, security, and marketing protections of HIPAA. Patients should feel confident that when they receive telephonic communications from their health plans, their personal health information will receive the same level of protection that is assured in other circumstances.

Unfortunately, the current TCPA exemption draws an arbitrary and antiquated distinction between the use of land line telephone numbers and cell phone numbers. Due to the complexity of the exemption—and its use of outdated definitions—health plans are reluctant to contact enrollees by cell phone, except in limited cases where they have proof that the enrollee has granted prior express consent for such communications. As a result, the TCPA health care exemption is essentially meaningless

[1] "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.

for health plans that, as part of their quality improvement efforts, would like to send telephone messages to a cell phone. At a time when cell phones are replacing land lines in many households, these restrictions on the ability of health plans to contact enrollees on a cell phone have impeded the delivery of important medical care messages to certain at-risk populations and in some cases have barred health plans from completing quality-focused outreach that is required under state law.

This policy is highly problematic, particularly in light of research findings that clearly demonstrate that telephonic communications on health care services are successful in improving quality and leading to better health outcomes. According to the HHS report mentioned above, a "substantial body of research" has shown that text messaging programs can:

- Bring about changes in behavior that are helpful in improving short-term smoking cessation outcomes and improving short-term diabetes management and clinical outcomes;
- Improve patients' compliance with recommended treatments, including adhering to prescribed medications and showing up for doctor appointments; and
- Improve immunization rates, increase knowledge about sexual health, and reduce risky behaviors related to HIV transmission (although the literature is less definitive in these areas).

Further, the restrictive interpretation of the TCPA regarding health-related calls puts the TCPA at odds with the requirements of certain government programs, particularly Medicaid, in which state agencies either mandate or strongly encourage that health plans reach out to members to provide new member welcome calls and reminders to reestablish Medicaid eligibility. These state agencies also encourage plans (often through financial incentives) to take proactive efforts to improve quality through outreach to members, including many of the types of calls and texts noted above.

Recognizing the advances that have occurred over the past 25 years in both the health care system (*i.e.,* the use of text messaging through mobile health programs) and in the telecommunications market (*i.e.,* the expanded use of cell phones), we believe it is time for Congress and the FCC to revisit the TCPA and reevaluate whether the current implementation approach is serving the best interests of consumers.

We urge the Senate Commerce, Science, and Transportation Committee and the FCC to reconsider the parameters of the TCPA's current health care exemption. By updating this policy to reflect the realities of the modern era—through a solution that creates parity between land lines and cell phones—policymakers can remove barriers to the delivery of important communications that have the potential to significantly improve health outcomes for consumers.

PREPARED STATEMENT ON BEHALF OF THE AMERICAN BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION, CREDIT UNION NATIONAL ASSOCIATION, FINANCIAL SERVICES ROUNDTABLE, INDEPENDENT COMMUNITY BANKERS OF AMERICA, AND NATIONAL ASSOCIATION OF FEDERAL CREDIT UNIONS

Chairman Thune, Senator Nelson, 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,[4] Independent Consumer Bankers of America (ICBA),[5] and National Association of Federal Credit

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[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.

[5] The Independent Community Bankers of America®, the Nation's voice for more than 6,000 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership.

Unions[6] (collectively, the Associations) appreciate the opportunity to submit a statement for the record for this hearing on the effects of the 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. 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 or FCC) 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 that is purported 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. 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 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 make three 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 Significance 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 percent of U.S. households are now "wireless-only," with that percentage rising to over 70 percent for adults between 25 and 29.[7]

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[6] 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.

[7] STEPHEN J. BLUMBERG & JULIAN V. LUKE, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, CTR. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR HEALTH STATISTICS, WIRELESS SUBSTITUTION: EARLY RELEASE OF ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY, JAN-

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 (FDIC) 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.[8] 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.[9] The Bureau of Consumer Financial Protection (Bureau) 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.[10]

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. 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,[11] 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 customers' mobile devices, to alert customers 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.[12] 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

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UARY–JUNE 2015 (2015), available at *http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201512.pdf* (Tables 1 & 2).

[8] 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.*

[9] 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.*

[10] 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).

[11] 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.*

[12] 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.

process is automated.[13] 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 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.[14]

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 percent 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 customers to take action and avoid late fees, accrual of additional interest, or negative reports to credit bureaus. 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.[15] 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. Significantly, the Commission's consent requirement is in conflict with the Bureau'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—effi-

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[13] 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 percent. *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.*

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

[15] 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.*

ciently make the calls required by the Bureau's rules to the approximately 50 percent of consumers with wireless numbers only.

(4) Customer Service Calls

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.

(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 Effectively 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 of the House Committee on Energy and Commerce 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." [16]

There are two primary ways in which the TCPA, as interpreted by the FCC, 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." [17] Significantly, financial institutions, unlike the abu-

[16] H.R. Rep. 102–317 (1991).
[17] 47 U.S.C. § 227(a)(1) (emphasis added).

sive telemarketers from which Congress intended to protect consumers, are interested only in calling the telephone numbers of *actual* customers and members and have no desire or incentive to dial numbers generated randomly or in sequence.

However, the Commission greatly expanded the scope of the devices classified as an autodialer beyond those 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.[18] 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 FCC, 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.[19] 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 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,[20] and yet there is no public wireless telephone directory or tool available to identify numbers that have been reassigned. As discussed below, Congress should mandate the establishment of a database of reassigned numbers to assist callers with contacting consenting consumers at those consumers' current number.

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

We urge Congress to reform the TCPA to ensure that financial institutions and other callers can make important, and often time-sensitive, calls to consumers. A statute designed to provide consumers with a right to pursue an individual claim against an unlawful telemarketer in small claims court and without the need for an attorney[21] 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

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

[19] 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.

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

[21] *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 t hat 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).

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.

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 of 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 have eviscerated that balance, preventing financial institutions and others from serving consumers who wish to communicate by cell phone. Congress should protect consumers' ability to receive important, and often time-sensitive, calls by reforming the TCPA.

NAVIENT
Washington, DC, June 1, 2016

Hon. JOHN THUNE,
Chairman,
Committee on Commerce, Science, and Transportation,
United States Senate,
Washington, DC.

Hon. BILL NELSON,
Ranking Member,
Committee on Commerce, Science, and Transportation,
United States Senate,
Washington, DC.

Dear Chairman Thune and Ranking Member Nelson,

Thank you for the recent hearing on the Telephone Consumer Protection Act of 1991 (the "TCPA") and its impact on consumers and businesses.[1] When your Committee announced the hearing, Navient looked forward to a fulsome discussion regarding a variety of stakeholder concerns regarding the TCPA, including how the statute is hindering efforts to protect consumers who are often prevented from receiving important, time-sensitive non-marketing information. We also expected that you would hear about the growing number of unreasonable challenges that organizations face in complying with the TCPA, and how this Congress's recent passage of the Bipartisan Budget Act of 2015 (the "Budget Act")[2] can spur much-needed assistance to Federal student loan borrowers. Given the complexity of the student loan system and the numerous options available to borrowers in repayment, this discussion is critically important.

While there were many important issues addressed in the hearing, we were disappointed that there was not a fuller discussion of the importance of contact with Federal student loan borrowers and the impediments that the TCPA imposes to reaching and helping struggling and at-risk borrowers. Rather than exploring how the Budget Act can help prevent Federal borrowers from advancing in delinquency or defaulting, we were dismayed by some of the misinformation provided to the Committee regarding Federal student loan borrowers, based on preconceived notions of—and inaccurate testimony related to—"robocalls."

We are hopeful that this submission will supplement the record with information not provided during the hearing; address several erroneous statements made during the hearing; and highlight rules that the FCC has proposed that will undermine the clear directive this Congress gave the agency and, if adopted, will cause further harm to student loan borrowers.

We hope that the Committee will consider this additional information as it continues its important work regarding the TCPA and the Budget Act.

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[1] *The Telephone Consumer Protection Act at 25: Effects on Consumers and Business: Hearing Before the S. Comm. on Commerce, Science, & Transportation,* 114th Cong. (2016) ("2016 TCPA Hearing").

[2] *See* Bipartisan Budget Act of 2015 § 301, *codified at* 47 U.S.C. § 227 (2016) (the "Budget Act").

Our Shared Goal in Helping Borrowers

Navient is the Nation's largest student loan servicer and a partner to millions of Federal student loan borrowers. Navient does not set or even influence the interest rates or terms for Federal student loans; those are set by Congress. We also do not set the tuition rates or enrollment fees, which are set by colleges and universities. Nor do we set the penalties for non-payment. Instead, our role is to work with borrowers after they have selected the school of their choice and incurred a debt. We help borrowers navigate the overly complex array of repayment options as they work towards successfully repaying their loans. There are now more than 50 options available to borrowers, including deferment, forbearance, and forgiveness, with 16 repayment programs (nine of which are based on income, as discussed below).

And Navient is a dedicated and successful partner. Overall, Federal student loan borrowers who enter repayment and have Navient as their servicer are *38 percent less likely* to default than borrowers who use other Federal student loan servicers.

Mr. Chairman, Navient is one of the businesses "trying to do the right thing and play by the rules."[3] We too understand the frustration that comes when the phone rings and the voice on the other line is a prerecording claiming that we just won a "free" cruise.[4] Your sentiment harkens back to the TCPA's enactment, legislation adopted to curb abusive telemarketing calls.[5] But Federal student loan servicers are different from telemarketers offering a free cruise, and the TCPA's implementation should reflect this simple truth.

In the first quarter of 2016, the total value of Federal student loans in default reached $121 billion.[6] Statutorily mandated penalties for default are harsh and include wage garnishment (without the need for a court order), offset of Federal tax refunds, and loss of eligibility for Federal financial assistance. These are in addition to the impact to the borrower's credit file. Calls and text messages from student loan servicers are proven, effective reminders that help millions of Americans. And keeping borrowers on track has tangible benefits such as making it easier to pass a pre-employment credit check, obtain housing, or secure financing for other essential products and services.

Myths About the TCPA are Harming Borrowers and Other Consumers

The purpose for the hearing was to "understand whether [the] TCPA is inadvertently hurting the good actors and consumers."[7] The bad news is that it is. The worse news is that seemingly well-minded organizations are advocating for policies that threaten to harm consumers and prevent Federal student loan servicers from providing borrowers with critical, time-sensitive information that can help avoid financial catastrophe.

For example, during the hearing, the Committee received testimony that the "best estimate of the total number of people who could be negatively impacted by [the Budget Act's amendments to the TCPA] is over 61 million people," including an estimated 41.8 million Federal student loan borrowers.[8] This is a red herring that exponentially overstates the number of affected borrowers. Recall that the Budget Act amendments to the TCPA only impact borrowers for which callers did not already have prior express consent to call. Navient already has consent to autodial 90 percent of the Federal student loan borrowers that it services, so the Budget Act amendments only pertain to the remaining borrowers.

Moreover, the Committee received testimony that "[m]any, if not most, of the households living below the poverty line rely on pay-as-you-go, limited-minute prepaid wireless products."[9] Again, this is a red herring. In the first instance, unanswered calls typically do not trigger any expense to the wireless subscriber. Second, *less than one percent* of the borrowers that Navient services: (1) use a prepaid cell phone; (2) have not provided Navient with consent to contact; and (3) are delinquent

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[3] *See* 2016 TCPA Hearing, Statement of Sen. John Thune, Chairman, S. Comm. on Commerce, Science, & Transportation ("Chairman Thune Statement").

[4] *Id.*

[5] *See* S. Rep. No. 102–178, at 2 (1991); H.R. Rep. No. 102–317, at 1 (1991). The House Report, for example, noted that "[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy" and that "[m]any consumers are outraged [at] the proliferation of intrusive, nuisance calls to their homes from telemarketers." H.R. Rep. No. 102–317, at 1 (1991).

[6] *See* Dept. of Ed., Fed. Student Aid Data Ctr., *Direct Loan and Federal Family Education Loan Portfolio by Loan Status, https://studentaid.ed.gov/sa/about/data-center/student/portfolio* (last visited May 24, 2016).

[7] Chairman Thune Statement at 1.

[8] 2016 TCPA Hearing, Statement of Margot Saunders, Of Counsel, National Consumer Law Center ("NCLC").

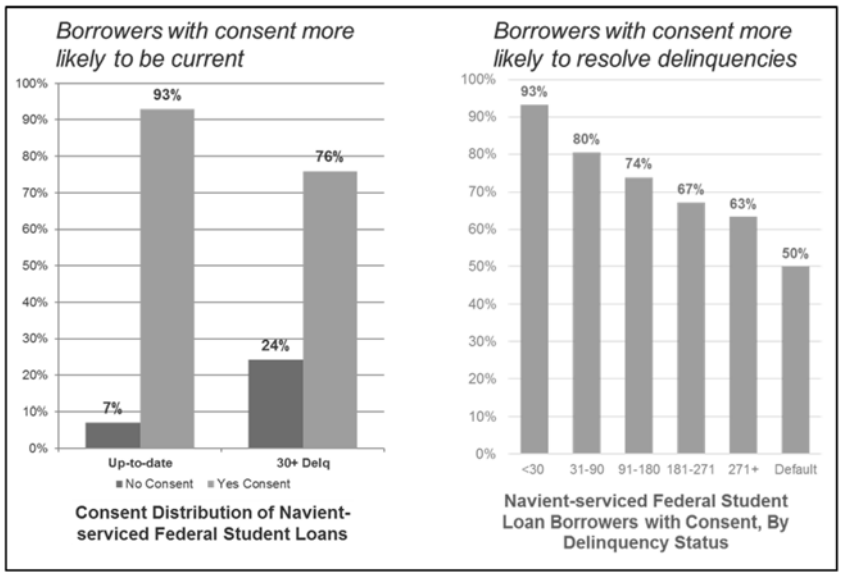
[9] *Id.* at 4. Even though no citation was provided, we currently have no reason to disagree with this claim.

on their Federal student loan obligations. The idea that allowing student loan servicers to help borrowers avoid delinquency and default—and the Federal penalties stemming from delinquency and default—will result in massive numbers of individuals losing "access to health care, transportation, emergency, and other essential services" and falling victim to "social isolation" [10] borders on hysterics.

NCLC testified that the major causes of consumer delinquency are unemployment, illness and marital problems.[11] While this may be true, it does not support restricting attempts to reach Federal student loan borrowers. Unlike other forms of consumer credit, there are numerous options for borrowers to resolve delinquencies and avoid default. In some cases, such as repayment plans based on income, the payment obligation can be as low as $0. *More than 90 percent of the time that Navient has a live conversation with a borrower, the customer is able to resolve his or her delinquency.* But the converse is also true: 90 percent of borrowers that we service who default on their student loans *do not* have a live conversation with us beforehand, despite our best efforts to reach them. Based on these facts, we should be promoting, not hindering, efforts to connect servicers with borrowers, particularly when default prevention options such as deferments due to unemployment or a temporary total disability are available.

Included within the 50 different options available to borrowers are nine different income-driven repayment ("IDR") plans. These plans allow borrowers to base their monthly payment on their discretionary income, adjusted for family size. The monthly payment can be as low as $0. Currently, one in four Direct Loan borrowers that Navient services is enrolled in an IDR plan.

Live contact with struggling borrowers is key to helping them navigate the multitude of options and the complexity of the repayment system. Because of the TCPA's restrictions, we are less able to reach and assist borrowers who have not given us consent to contact them on their cell phones. As mentioned above, we can autodial nine out of 10 of the Federal student loan borrowers we service today. And these borrowers are far more likely to be current. Indeed, borrowers who we are not able to autodial are more likely to be delinquent and default. Only 50 percent of borrowers who default have provided consent to call them on their cell phones. It bears repeating—if we are able to speak with these struggling borrowers, nine out of 10 will not default. Yet, today's interpretations of the TCPA impose hurdles to providing these borrowers the very information that they need.



In sum, there is a strong and direct correlation between Navient's ability to contact borrowers and the likelihood that a borrower will avoid the serious con-

[10] *Id.* at 5.
[11] *Id.* at 16–17.

sequences of delinquency or default on a student loan, and the TCPA makes it much more difficult for Navient to contact those borrowers.

The FCC is Undermining this Congress's TCPA Directives

Fortunately, last year this Congress took swift action to allow Federal student loan servicers to continue to help borrowers in need while also maintaining important consumer protections. In no uncertain terms, Congress exempted from the TCPA calls to collect debts owed to or guaranteed by the United States. But Congress gave to the FCC the task of implementing regulations. Unfortunately, the FCC's proposed rules, if adopted, would do little to help millions of Federal student loan borrowers lower their risk of default. The proposals suffer from several key flaws.

First, the FCC proposes limiting the exemption to calls made after a borrower is already delinquent, contrary to Congress's plain language which makes no distinction between delinquent and non-delinquent borrowers.[12] Navient regularly makes calls to certain non-delinquent borrowers that are aimed at keeping a borrower on track (and thus for the purpose of "collecting" the debt). While Federal student loan servicers have no interest or need to call borrowers in general who are current on their loans, there are important instances when outreach is key:

- *Borrowers who are approaching deadlines or changes in status:* There are many instances, such as deferments, forbearances, and the grace period between school and repayment, where a borrower may be approaching a new payment status. Some of these borrowers—especially those at risk of delinquency—benefit from early outreach to make sure they are aware of their repayment options. One example of an at-risk borrower is one who has previously defaulted and has returned to repayment through loan rehabilitation. Navient reaches out to these borrowers early—before delinquency—to make sure that they stay on track and are able to access the right repayment plan for them.
- *Income-driven repayment enrollment:* IDR is a great option for many borrowers, but they must apply on-line at the Department of Education or fill out a paper application to enroll in an IDR plan. The Department of Education requires Federal servicers to call borrowers whose applications are incomplete or denied to help them complete their application, regardless of their delinquency status. In addition, Navient calls previously delinquent borrowers who have indicated that they plan to enroll in IDR but for whom we have not received a complete application. Neither of these outreach attempts to borrowers without consent would be allowed under the FCC's proposed rule.
- *IDR reenrollment:* Borrowers are required to reenroll annually in IDR plans. Navient places reminder calls to borrowers whose annual reenrollment deadline is approaching to make sure they submit their paperwork before their payments increase.

The intent of the Budget Act provision is to ensure that Federal student loan borrowers are aware of their options regardless of whether or not they are delinquent. It was certainly not the legislation's intent to prevent reaching out at key times before—or after—delinquency to help a borrower stay on track.

Second, the FCC proposes not including within the exemption calls to reassigned wireless numbers.[13] This is untenable. College students change telephone numbers frequently, and Navient prevent entirely calls to reassigned numbers. If the new holder of a reassigned number refuses to answer a call or respond to a text message informing Navient that the number no longer belongs to the borrower, Navient is left in the indefensible and unenviable position of either attempting additional contacts using the number (and risk facing litigation) or giving up on contacting the borrower.

Finally, the FCC proposes to severely limit the number of exempted calls to *three per month—whether or not the called party answers the phone.*[14] The FCC's proposal has no basis and is far more restrictive than the *three calls per week* that NCLC urged the Consumer Financial Protection Bureau to allow in the context of the Fair Debt Collection Practices Act.[15] Indeed, the FCC's limits are more restrictive than the four attempts in three weeks that the Department of Education is now requiring

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[12] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Notice of Proposed Rulemaking, FCC 16–57 ¶¶ 8–9 (rel. May 6, 2016) ("*NPRM*").

[13] *Id.* ¶ 14.

[14] *Id.* ¶ 18.

[15] *See* APRIL KUEHNHOFF & MARGOT SAUNDERS, NATIONAL CONSUMER LAW CENTER, DEBT COLLECTION COMMUNICATIONS: PROTECTING CONSUMERS IN THE DIGITAL AGE 4 (June 2015), available at *http://bit.ly/1LQxpDK.*

servicers to undertake to reach Direct Loan borrowers whose IDR applications are incomplete.

The FCC's efforts to effectively eliminate the exemption are contrary to Congress's clear directive in passing the Budget Act (and contrary to the Administration's long-standing efforts to include the exemption as part of the budget). In the end, the FCC's rules—if adopted—would hurt, rather than help, borrowers and other taxpayers.

Congress had good reasons for adopting the TCPA in 1991, but preventing Federal student loan servicers such as Navient from helping student loan borrowers avoid delinquency and default was not one of them. The Budget Act's amendments to the TCPA open the door for servicers to help borrowers avoid delinquency and default while supporting responsible use of Federal taxpayer dollars. We encourage the Committee to keep these goals in mind as it continues to oversee the FCC's implementation of Section 301 of the Budget Act and the TCPA.

Respectfully submitted,

SARAH E. DUCICH,
Senior Vice President,
Public Policy and Government Relations,
Navient.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO HON. GREG ZOELLER

Question 1. Would a concrete standard for revocation of consent in the TCPA regulations, as there is for the FDCPA, FCRA, and other banking laws, be helpful in reducing the types of contact intended to be prohibited by the TCPA?

Answer. Opting out of receiving robocalls and other unwanted contacts should require no more effort than pressing a button or telling a caller to stop calling. The FDCPA requires a consumer to notify a debt collector in writing that the consumer wishes the debt collector to cease further communication. The FCRA allows a consumer to opt out of certain credit offers by notifying the credit reporting agency in writing or via a mechanism maintained by the agency. It is burdensome to notify a debt collector in writing to cease communications, especially when the consumer is not the debtor they are seeking.

Question 2. Mr. Zoeller, you and a number of other attorneys general sent a letter to this committee urging support for the HANGUP Act, arguing that it was necessary because, "As amended, the TCPA now permits citizens to be bombarded by unwanted and previously illegal robocalls to their cell phones if the calls are made pursuant to the collection of debt owed to or guaranteed by the United States." Is that your understanding of what will necessarily be allowed as a result of the Federal Communications Commission's implementation?

Answer. Yes, it is. The majority of debt collection complaints are from non-debtors who receive unwanted calls intended for other people. Many of these complainants report multiple calls despite informing the callers that they are not the debtor.

Question 3. What are some of the benefits and challenges of moving forward with a mandatory reassigned numbers database?

Answer. Benefits might include fewer calls to consumers who acquire numbers that formerly belonged to debtors. Challenges include the cost of maintaining and updating the database and protecting it from unscrupulous telemarketers and scammers.

Question 4. Is there a helpful way to distinguish between random or sequential telemarketing calls and texts versus calls or texts to numbers originally provided by customers that have been subsequently reassigned?

Answer. I think not, assuming both types of calls are unwelcome and possibly illegal.

Question 5. Are texts less intrusive than phone calls? If so, would it make sense to have reduced penalties for text message violations of the TCPA in order to encourage contact through text messaging rather than phone calls?

Answer. Anyone who has been awakened by the insistent buzzing of a text arriving in the middle of the night can attest that texts are not less intrusive than calls. Also, many people, especially those on discounted or pre-paid wireless plans. are charged for texts.

Question 6. Are you aware of any negative consequences resulting from the Commission's 2015 Omnibus Declaratory ruling, including the movement of call centers overseas?

Answer. The movement of call centers overseas was a trend long before 2015. As for consequences of the FCC's 2015 ruling, we would like to see telecommunications providers move more quickly to provide more extensive call-blocking services for consumers, and solutions that would stop illegal calls before they got through to residential lines.

Question 7. Is there a database on which callers can reasonably rely that identifies numbers that have been reassigned?

Answer. I believe there are third party providers who market this information, but I have not had occasion to research them.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DEB FISCHER TO HON. GREG ZOELLER

Question 1. The FCC's 2015 order for TCPA reassigned numbers allows one call across an entire enterprise, even if it has multiple subsidiaries, before a caller can be liable for contacting a consumer. This is the case even though there is a no reassigned number list available to check, and the caller will often have no knowledge that a numbers has been reassigned. Is there a reason the caller should not be required to have "actual knowledge" that the called number is not that of the initial person? What reasonable means can a caller take to ensure a number has or has not been assigned?

Answer. In its Order, the FCC noted that there are solutions in the marketplace to inform callers of reassigned numbers. A caller can easily avoid having "actual knowledge," and that is why the FCC deemed it reasonable to assume the caller has "constructive knowledge" after one post-reassignment call. Assuming that the caller is a debt collector, then the caller can use a live operator to contact the debtor. It is only when callers attempt to contact debtors en masse via robocalls that they run afoul of the TCPA.

Question 2. Throughout your written testimony, you highlight many negative instances of "robocalling," many of which involve harassing telemarketing calls. I think we can all agree that we dislike telemarketing calls and that we would prefer that consumers not receive them. However, there can be uses for robocalling that can benefit consumers. For example, there are student loan providers and servicers in Nebraska who try to contact students who are at risk of defaulting on their student loans to help them rather than harass them. In your opinion, are there any times that robocalls should be permissible under the TCPA, such as where consumers might need or want to receive the calls?

Answer. In my experience, consumers want to receive a robocall when school is canceled due to a snow emergency, or their prescription medicine is ready to be picked up at the pharmacy. Most other robocalls are looked upon as unwelcome, impersonal intrusions into their privacy.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. STEVE DAINES TO HON. GREG ZOELLER

Question. I appreciate your remarks during the hearing about the need for policymakers to "tighten the line of defense" for TCPA litigation.

Last month I filed an amendment to the FCC Reauthorization Act which would incentivize businesses to voluntarily implement compliance programs to govern the activities taken by the independent, third-party dealers and service providers. Under my amendment, if a business has implemented robust compliance programming then that business could raise evidence of these measures as an affirmative defense during a private right of action. This would go a long way towards clarifying uncertainty that has arisen regarding the attachment of vicarious liability—uncertainty that is inhibiting more businesses from implementing these highly effective compliance programs.

If the TCPA were amended to include language that would incentive businesses to voluntarily implement TCPA compliance programs that would govern the activities of independent, third-party service providers, would such a modification constitute a "better defense" that would spur greater business compliance with TCPA, and fewer TCPA violations? Why or why not?

Answer. In my opinion, a defense is better than an exemption. An affirmative defense places the burden on the business to prove it has complied with the law. A compliance program would be preferable to businesses turning a blind eye to how its third party lead generators are contacting consumers.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. MARIA CANTWELL TO HON. GREG ZOELLER

Question. True Blue, a Tacoma, Washington-based company is focused on getting blue collar workers back to work. It matches unskilled and underemployed people seeking work with local businesses that have short medium and long term job opportunities.

If the worker consents in writing, True Blue makes the match by sending a text message called a "work alert" to the worker giving the details of the job offer including wage, location and expected time commitment. The worker texts back yes or no depending on his or her interest.

If the worker has not consented in writing to receiving "work alerts" he or she must show up at a worker recruiting center at 5 a.m. and wait for work.

In 2014, a former client brought suit on behalf of a class of workers claiming that True Blue had been texting him and others without permission.

An examination of their "work alert" notification system revealed that due to recordkeeping error, several hundred workers that had opted out of the "work alert" text notifications system continued to receive text messages.

The lawsuit is still pending. But because the Telephone Consumers Protection Act is a strict liability statue which mandates $500 per text message violation, True Blue is facing a decision that could put potentially put it out of business.

There are whole classes of stakeholders such as schools, non-profit social service agencies, medical offices, employment agencies, etc. . . that may reach out to their clients or customers using text messages or auto dialers to perform a service like remind them of medical appointments, inform them of job opportunities, pass on schedule information and give updates on available benefits or the status of applications.

In some cases, these types of entities may run afoul of the Telephone Consumer Protection Act because of mere recordkeeping error.

While this not desirable, it seems different than the type of harm that consumers experience when being bombarded with marketing materials from an entity trying to sell something.

Making entities like this subject to large fines and court judgments doesn't seem like the result we want.

I don't want to weaken consumer protections under Telephone Consumer Protection Act (TCPA) but I do want the law to direct the harshest penalties for the most egregious violations that impact consumers.

Some state and Federal consumer protection laws have "good faith" or "bona fide error" exceptions. Is there a role for those types of exceptions to the TCPA without weakening consumer protection? If so how would should it be applied?

Answer. Thank you for giving me the opportunity to respond to your questions.

I do not presume to interject my opinion concerning a case that is currently pending before the court. I will base my response on the Telephone Consumer Protection Act itself, and not on any particular case.

Since 1991, the TCPA has prohibited the use of automatic telephone dialing systems (autodialers) or artificial or prerecorded voice messages for calling emergency telephone lines, health care facilities (including patient rooms), telephone numbers assigned to wireless services, and services for which the consumer is charged for the call. In its February 2012 Report and Order, the FCC confirmed that the prohibition encompassed both voice calls and text messages. *In re Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 27 FCC Rcd. 1830, 1832 (2012).

Crafting legislation that differentiates between good and bad unsolicited text messages in every case will be a great challenge if pursued. Regardless of the content of the message or the intention of the sender, the harm is the same: Interruption of the consumer's day (or night), intrusion on the consumer's privacy and costs to consumers who pay for texts. Therefore, I believe that inserting "good faith" or "bona fide error" exceptions into the TCPA prohibitions against robocalls and unsolicited texts would weaken consumer protection and leave the TCPA vulnerable to Constitutional challenges. If the TCPA must be amended, it would be better to consider an affirmative defense option rather than an exception.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CORY BOOKER TO HON. GREG ZOELLER

Question 1. According to the PEW Research Center, 13 percent of Americans with a household income under $30,000 are smartphone dependent. These individuals do not have the luxury of owning both a landline and a mobile telephone. In addition,

many of these individuals lack Internet access. The Telephone Consumer Protection Act (TCPA) provides important protections to consumers to prevent them from receiving unwanted phone calls. This is not merely a matter of annoyance: low income communities who rely on cell phone service have a limited number of voice minutes and if they were barraged with unwanted calls, it could seriously impact their livelihood or even safety in the event of an emergency.

Can you speak to the disparities in reliance on wireless phone service that exist in your state and across the country?

Answer. I do not have any direct information about the reliance on wireless phone service. However we have discovered some specific data about Hoosier households. As of 2014, 95 percent of Hoosier households with annual income under $30,000 had some form of telephone service. (Federal Communications Commission, Universal Monitoring Service Report, 2015, Table 6.8).

In 2014, approximately 47 percent of Indiana households were wireless-only. (U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, National Health Interview Survey Early Release Program, Table 1, Released 02/2016).

Question 2. Do you believe that landline phones with unlimited minutes should have the same regulations as mobile phones, which are often limited in their call time?

Answer. I believe that all telephone users are entitled to protection from unwanted calls, regardless of whether the phone is a cell phone or a landline. It is important to remember that many scams are conducted by contacting people over their phones. Many of our elderly people fall victim to scams that were initiated over a landline. This is why I have been calling on the major telephone carriers to provide call-blocking technology that would stop the mass amount of calls from getting through their systems and into individuals' landlines. The more we can stop the calls from coming through, the less fraud that will be perpetrated on our citizens.

Question 3. As you know, the TCPA is a complex statute. It is my understanding that some stakeholders, including companies large and small, have found that mistakes can happen even when they recognize the importance of TCPA compliance to minimize consumer harm. Many of these businesses choose to invest in programs that help ensure compliance by implementing training, monitoring, and enforcement mechanisms. How can businesses of all sizes maximize compliance with the TCPA?

Answer. Businesses can begin by recognizing 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, and in Indiana, companies are expected to 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 may or may not wish to receive such calls.

Question 4. Do you think compliance programs are a good investment for companies that use third party service providers? Why or why not?

Answer. Without knowing the cost and efficacy of the compliance program, I cannot make a determination. However, any 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, is potentially a good investment.

Question 5. As you know, debt collection negatively impacts many Americans who are already financially insecure. It is incumbent upon Congress to ensure that there are clear rules governing the practice of debt collection. Earlier this year, Senator Mike Lee and I introduced the Stop Debt Collection Abuse Act, which clarifies that debt buyers are debt collectors; expands the definition of consumer debt; and limits egregious fees. In addition, reports show that thirty-party debt collectors collecting on behalf of local and state governments have in some cases violated the Fair Debt Collection Practices Act. Our bill would address this issue by examining the use of debt collectors by local and state governments.

While the Stop Debt Collection Abuse Act takes some steps at the Federal level to directly protect consumers, I am concerned that practices at the state and local level are making the situation worse. Can Congress address these problems at the state and local level? If so, how?

Answer. Indiana's law does not distinguish between a private company collection action and a state or local government collection action. Federal involvement in this manner would be counter to what many states have done on their own, and if there would be additional Federal regulation, it must ensure it does not weaken any state's statute in this regard.

Question 6. Under pressure to tighten budgets, Congress has turned to debt collection as a way to regain lost revenue. In October, a provision was tucked into must-pass budget legislation that created a new exemption to the TCPA. This exemption allows debt collectors working on behalf of the Federal Government to contact individuals without their consent. What precedent does this set for debt collection by local and state governments?

Answer. Along with 24 of my fellow Attorneys General, I support S. 2235, the HANGUP Act, which would eliminate the exemption allowing Federal debt collectors to robocall cell phones. If the exemption is allowed to stand, then even more erosion of consumers' protection from unwanted calls and texts is likely.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO BECCA WAHLQUIST

Preliminary comment from Ms. Wahlquist

Thank you for the opportunity to provide further information in response to questions for the record. As I noted during my testimony at the Commerce Committee Hearing on May 18, 2016, abusive litigation brought under the Telephone Consumer Protection Act ("TCPA") is harming American businesses that earnestly seek to comply with that law. Businesses large and small find themselves targeted by TCPA litigation designed to enrich professional TCPA plaintiffs and the cadre of TCPA-focused plaintiffs' lawyers who seek staggering statutory damages for communications not required to have caused any actual damage to anyone. These businesses are not engaged in the spam, randomly and sequentially dialed telemarketing that the TCPA was designed to curb.

I hope my further discussion below of this litigation abuse can highlight the need for legislative action to revise antiquated provisions of the TCPA and factor in modern technologies (*i.e.,* smartphones) that were never anticipated when the TCPA was enacted in 1991.

Question 1. Would a concrete standard for revocation of consent in the TCPA regulations, as there is for the FDCPA, FCRA, and other banking laws, be helpful in reducing the types of contact intended to be prohibited by the TCPA?

Answer. The FCC majority's pronouncement in its July 2015 Order that consumers who had provided a business with prior express consent to make certain types of autodialed/prerecorded calls could revoke prior consent at any time and by any means (including informing a store clerk at a storefront location that consent was being revoked) has put American businesses in an untenable position. Businesses have no realistic way to collect and record such revocations. Moreover, there is no mention in the TCPA of revocation for a "prior consent", and thus no direction for how such a revocation should be made by a consumer.

A concrete standard for revocation (such as that established in the FDCPA and other laws) would be helpful both to consumers and to businesses. Consumers would know that their revocation requests would be received and processed by the business, and businesses would have notice when revocation requests were made via the required channels. The standard could then require that a business process and implement the revocation request within a set timeframe, such as 15 days for calls or 3 days for text messages (which can also be stopped immediately through a "STOP" reply to a text). Consumers would have a means to control the communications they opt to receive from companies, and businesses could ensure that procedures and practices existed to comply with requests made in accordance with the concrete standard.

Establishing a means and method for revocation is particularly important to curb litigation abuse. Since the FCC majority's order in July 2015, companies have found themselves being "set up" with revocation requests made in unorthodox means or with unclear language that would not alert a representative or an automated system that the consumer wishes to revoke prior express consent for certain communications. With a concrete standard for revocation in place, only those companies that ignore revocation requests made via those established procedures would face TCPA liability for continued communications placed after the time to process and implement requests has passed. And companies who do the right thing will have a clear standard to follow.

Question 2. Attorney General Zoeller and a number of other attorneys general sent a letter to this committee urging support for the HANGUP Act, arguing that it was necessary because, "As amended, the TCPA now permits citizens to be bombarded by unwanted and previously illegal robocalls to their cell phones if the calls are made pursuant to the collection of debt owed to or guaranteed by the

United States." Is that your understanding of what will necessarily be allowed as a result of the Federal Communications Commission's implementation?

Answer. I appreciated the opportunity to address the Committee on the TCPA and its impact on American businesses; the HANGUP Act is beyond the scope of my testimony, which was limited to the TCPA. As to the position of the Attorney General, I note that I was very encouraged at the hearing by Attorney General Zoeller's discussion of the need for TCPA affirmative defenses for companies that strive to comply with this law and that develop policies, procedures, and training to ensure compliance.

Question 3. What are some of the benefits and challenges of moving forward with a mandatory reassigned numbers database?

Answer. While a reassigned database is a good idea in theory, actual implementation could be challenging. For example, it is difficult to see how any such database could be created and maintained by the government absent enormous expenses of time and resources. Further, similar databases are being explored in the private sector.

Importantly, a reassigned number database does not resolve all liability—it would do nothing to help businesses who received a telephone number that was wrongly-provided by a consumer from the very start, or whose consumers are sharing telephone numbers across family plans and changing phones within those plans without notice to the phone provider.

What well-intentioned American businesses need is not a future and partial solution to TCPA litigation; companies need more immediate help through the implementation of affirmative defenses into Section 227(b) that exist already in Section 227(c)'s private right of action section, and through legislative clean-up of the TCPA to include provisions that exist in every similar Federal statute providing a private right of action (*i.e.,* statute of limitation and damages caps). The final section of my written testimony provided earlier to the Committee addresses several updates to the TCPA that could provide meaningful reform.

Question 4. Is there a helpful way to distinguish between random or sequential telemarketing calls and texts versus calls or texts to numbers originally provided by customers that have been subsequently reassigned?

Answer. It is important to distinguish between the two types of calls described in this question: random and sequentional telemarketing calls were the intended target of Section 227(b) of the TCPA, which is likely why that section does not include the affirmative defenses provided in Section 227(c), as there would be no defense for a company attempting to reach its own customers at customer-provided numbers if the company was randomly reaching out to any and every telephone number generated by the kind of ATDS in use in 1991.

On the other hand, calls or texts to customer-provided telephone numbers that have been reassigned to different consumers are entirely different. The recipient of a call or text to a customer-provided number includes receiving targeted communications designed to reach a company's actual customer. The company cannot benefit from, and would not want to send, such targeted messages (generally transactional and customer-specific information) to a wrong party.

As to whether or how the two types of calls described in this question could potentially be distinguished by an entity such as a telephone service provider, I do not have the technical expertise to know whether such a distinction could be made, let alone who could make it. But I do know that Congress in 1991 could never have envisioned companies facing such staggering financial liability for reaching out, with modern technologies, to customer-provided numbers that the company, in good faith, believes are being made with that customer's prior express consent, to the customer's given point of contact.

Question 5. Are texts less intrusive than phone calls? If so, would it make sense to have reduced penalties for text message violations of the TCPA in order to encourage contact through text messaging rather than phone calls?

Answer. It is clear from the legislative history of the TCPA that text messages were not envisioned at the time it was drafted (nor could they be, when no cellular telephone capable of receiving a text message existed in 1991). Technology has advanced, and the advent of text messaging has provided a new and less intrusive means for communications. Rather than involving a series of loud rings, and the need for the recipient to pick up a telephone line to speak with a caller, a text message provides a communication that can be seen with a glance, at the recipient's convenience. Furthermore, companies sending text message communications to customers can enable systems to recognize a "STOP" reply to that text message quickly and efficiently, so that a consumer can easily and almost immediately stop further text communications if they become unwanted.

Given the nature of text messages, and the fact that the TCPA has no provision addressing this type of communication that was not conceived of in 1991 (when even e-mail was a novel thing used by few), it could make sense for the TCPA to be updated to specifically address text messaging and whether and how penalties should apply (for example, if a company continues to send text messages after a customer has revoked prior consent). Of course, affirmative defenses should be provided to protect a company from staggering financial liability in the event of a mistake or good faith error (such as the affirmative defenses in Section 227(c) for violations of the Do Not Call provisions).

As for a reduction in per-message potential liability for text messages versus telephone calls, while such a provision could make sense and could be implemented given the nature of text messages, the most important revision in terms of liability is a cap on the available individual and class damages available under the TCPA, as detailed in the written testimony I provided earlier to the Committee. Indeed, a per-text damages reduction, even to a number such as $25 per text message, does little to help a company with millions of customers when a class action is filed. For example, if damages were set at $25 per text (or 5 percent of the current per message liability), a lawsuit claiming that five text messages were sent over the course of a year in violation of the TCPA to each of a company's 20 million customer-provided numbers would immediately put a minimum of $250 million at issue in a classwide litigation.

Question 6. Are you aware of any negative consequences resulting from the Commission's 2015 Omnibus Declaratory ruling, including the movement of call centers overseas?

Answer. While I do not have direct knowledge of the movement of call centers oversees in response to the July 2015 Order, I have heard anecdotal evidence of such events. What I can speak to, with personal knowledge, is the significant increase in TCPA litigation after that Order was issued.

TCPA litigation is flooding and crowding Federal courts, threatening businesses with annihilating damages, and offering no real benefit to the consumers who constitute putative class members in actions designed to provide significant attorneys' fees to the counsel bringing TCPA class actions. I discuss these trends in the written testimony I provided in advance of the May 18, 2016, hearing.

Question 7. Is there a database on which callers can reasonably rely that identifies numbers that have been reassigned?

Answer. There are several companies within the private sector that are making strides towards providing solutions to companies that will mitigate risk of TCPA lawsuits caused by calls to reassigned telephone numbers. The Committee has heard of Neustar, and I am also aware of a newer company—Early Warning—that has developed its own solution to identify when a telephone number may have changed hands after being provided to a company. We can anticipate that private sector companies will continue to develop databases and tools to mitigate TCPA risks, and that larger businesses (in particular) will be able to contract to use such tools. However, it is important to note that even if every *reassigned* telephone number eventually could be flagged via such a solution, a business is still at risk of calling a "wrong" number because it was wrongly provided at the start by the customer (*e.g.,* the customer transposes two digits, or gave a friend's number), or because a family plan masks the identity of the actual user of a telephone.

I am currently defending a number of TCPA cases brought in circumstances in which a reassigned number database could not have been helpful. For example, one class action suit is headed by a mother who provided a company with a telephone number that was later given by her to her teenage daughter (who received the calls at issue); the family-plan telephone number is owned by the mother and bills paid by the mother, so any search would show that number still belongs to the mother/customer. I am also defending a class action suit brought by someone whose telephone number was erroneously provided by a customer as her own number so that from the very start, the company had a wrong number that was never reassigned. Such lawsuits highlight the need for affirmative defenses to be added to Section 227(b) to protect companies who implement compliance policies, procedures, and training and who make communications in good faith to customer-provided numbers, as well as the need for caps on available damages under the TCPA for individual and class litigations.

Question 8. What action could Congress or the Federal Communications Commission take to help callers avoid costly discovery/litigation in cases where they have not violated TCPA?

Answer. Congress should explore modernizing the TCPA to help businesses avoid costly discovery and litigation in TCPA lawsuits by providing affirmative defenses

for Section 227(b) claims, and capping available statutory damages for this no-actual-harm-needed statute, as detailed in my previously provided written testimony. Moreover, Congress can make a significant difference through discovery rules on proportionality, so that the recipient of a single call cannot seek discovery into all telephone calls placed by a company within the previous four years, if that person's own claim can be refuted via discovery focused only on the call that person received.

Congress could also help American companies by shifting some of the cost burdens involved in pulling class-wide discovery on millions of communications to the TCPA plaintiffs' firms, who are seeking that information in a bid to accumulate a significant enough number of at issue calls to force class-wide verdicts or settlements (from which those firms plan to seek significant fees and costs). If the person requesting such classwide discovery was required to pay the costs companies incur to accumulate and provide that information, then abusive litigation would be curbed and litigation more likely to have merit would proceed.

Question 9. Are you aware of any small businesses that have gone out of business as a result of the legal fees or settlements associated with a TCPA litigation?

Answer. I am personally aware of many small business whose existence were threatened by the TCPA. For example, one current small-business client of mine is losing sleep over the thought that if we are not successful in our early defenses, it may need to bankrupt its business and let its six full-time employees go because of the limited funds it has available to defend the putative class action brought against it.

Similarly, I have spoken with the owner of a Detroit company with thirty employees who would have had to shutter its businesses if it lost in a lawsuit brought for some targeted faxes it sent to its customer list, with a Pennsylvania family-owned plumbing company deciding whether it needed to bankrupt in light of similar TCPA litigation, and with a Florida husband-and-wife start up debating whether to use its entire family savings account to fund its defense of a TCPA suit.

So while (thankfully) none of my small business clients have gone out of business as the result of TCPA litigation, given the onslaught of TCPA litigation and the number of small businesses targeted in such litigation across the country, I would not be surprised to find that various small companies have closed up shop when faced with the expense of defending TCPA litigation.

Question 10. Are you aware of any small businesses that have gone out of business as a result of the legal fees or settlements associated with a TCPA litigation?

Answer. I incorporate herein my response to Question 9 above.

Question 11. In the recent CFPB Notice of Proposed rulemaking for arbitration, the CFPB appears to recognize the challenges small businesses have when faced with TCPA related class action litigation. In the rule they note, ". . . the Bureau recognizes the concern expressed by SERs, among others, that particular statutes may create the possibility of disproportionate damages awards." Do you have similar concerns about how the statutory damages associated with TCPA litigation can threaten small businesses?

Answer. I have long been concerned with how uncapped statutory damages associated with TCPA litigation can threaten small businesses; as I noted in response to Question 9 above, I have spoken with various small business owners whose first knowledge of the TCPA came through service of a class action complaint seeking damages that would bankrupt even a larger and established company. I have one client accused of sending a single text message to 64,000 persons without prior consent (despite the company's belief that it was sending that text only to people who had affirmatively asked for that message). That single transmission has led to a putative class action suit seeking $96 million in trebled damages available under the TCPA (even though this class action is the only complaint that was filed regarding that single text message).

With the uncapped statutory damages available under the TCPA, a transmission of 5,000 facsimiles sent in a targeted advertising campaign by a small business (many of which transmissions were received as e-mails via the recipient's fax server) would, for example, lead to a minimum of $2.5 million in TCPA damages. This is a staggering amount of liability for a small business to face. Given such numbers, small American businesses are forced into hefty individual settlements with putative class representatives in order to avoid the costs of defense and the risks of annihilating damages-settlements that alone, even at "small" amounts such $25,000, are enough to threatened the continued growth and success of that business.

Thus, the legislative revisions I outlined in my original written testimony are needed for small American businesses as much as they are needed for the larger companies often targeted by TCPA suits.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. DEB FISCHER TO BECCA WAHLQUIST

Question. The FCC's 2015 order for TCPA reassigned numbers allows one call across an entire enterprise, even if it has multiple subsidiaries, before a caller can be liable for contacting a consumer. This is the case even though there is a no reassigned number list available to check, and the caller will often have no knowledge that a numbers has been reassigned. Is there a reason the caller should not be required to have "actual knowledge" that the called number is not that of the initial person? What reasonable means can a caller take to ensure a number has or has not been assigned?

Answer. The FCC majority's 2015 Order did businesses no favor in providing a safe harbor under Section 227(b) of a single call for businesses who believe they are reaching out to a customer, but who instead are unknowingly contacting a different person because a telephone number was reassigned or wrongly provided in the first place. I believe that the FCC thought that this single call exemption would mirror the one-call safe harbor provision in Section 227(c), in which the statute itself makes clear that a person must receive two calls placed in violation of Do Not Call rules before being able to bring a private action under that section of the TCPA for all but the first call. But when it comes to Section 227(c), companies have a Federal Do Not Call list and their own internal Do Not Call lists to check against, and thus are on notice as to what numbers cannot receive telemarketing calls. This "one free call" actually provides for a single mistaken call (made despite DNC list membership) before litigation can be brought.

However, as to Section 227(b), and texts or calls that are autodialed/prerecorded and placed to cellular phones, a company has no guarantee that a phone number provided by its customer remains in possession of, or is primarily used by, that customer. So the "one free call" doesn't provide leniency for a single mistake; while there might be an indication from that single call that the telephone number no longer belongs to the intended recipient (*i.e.,* someone answers and informs the caller that it is a wrong number), in most circumstances the company will learn nothing from that call that would provide notice that the telephone number has changed. Thus, actual knowledge of reassignment should be required before a caller can be held liable under the TCPA for making additional calls to a reassigned number.

Knowledge cannot be presumed, and the FCC majority recognized that it will be impossible for businesses to know to a certainty that a telephone number has been reassigned simply from calling that number, instead noting in its July 2015 Order several "indicators" that could be helpful in learning of a reassignment. But my experience with companies doing their best to comply with the TCPA, and who only reach out to their own customers, is that often these indicators (*i.e.,* a voice-mail providing a different person's name than the customer in its greeting) are not present.

I note that most businesses do contractually require customers to update their contact information if it should change, but there is no way to ensure that customers will do so. And the FCC's "solution" to the fact that a company often cannot know when a number has changed is no solution at all: in footnote 302 of the July 2015 Order, the FCC opines that American businesses calling a wrong number because a customer did not update its information should consider suing those customers. *See In re Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 30 F.C.C.Rcd. 7961, n. 302 (2015) ("The failure of the original consenting party to satisfy a contractual obligation to notify a caller about such a change does not preserve the previously existing consent to call that number, but instead creates a situation in which the caller may wish to seek legal remedies for violation of the agreement."). This is hardly a consumer-friendly approach to the problems of TCPA litigation abuse.

So, the problem is that there is no way to guarantee that a customer-provided telephone number has not changed hands (particularly when it is passed from one family member to another in a group-paid family plan). The "one call" safe harbor provides no real protection. American businesses are left without any reasonable method to avoid TCPA liability, further highlighting the need for specific affirmative defenses within Section 227(b) that would protect good-faith callers who implement compliance policies, procedures, and training, as detailed in my written testimony provided in advance of the May 18, 2016, hearing.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO MARGOT SAUNDERS

Question 1. Would a concrete standard for revocation of consent in the TCPA regulations, as there is for the FDCPA, FCRA, and other banking laws, be helpful in reducing the types of contact intended to be prohibited by the TCPA?

Answer. It would certainly be helpful for consumers to be provided with notice of their right to cancel, or revoke consent under the TCPA. The FDCPA does not have a right to cancel or revoke consent. It does provide consumers with the right to cease communications, under 15 U.S.C. § 1692c(c). That right is helpful, but not as valuable as one might think because (a) consumers are not provided notice of this right, and (b) consumers are often afraid to request that all communication cease because they fear that such a request will spur litigation.

The FDCPA also provides consumers with a right to be free from communications which are at "inconvenient" times pursuant to 15 U.S.C. § 1692c(a). This right does not require a written notice from the consumer for it to be exercised and is generally interpreted as providing a bright-line test for collectors on when not to call consumers.

The FCRA does not have a revocation of consent requirement of which I am aware.

Question 2. Attorney General Zoeller and a number of other attorneys general sent a letter to this committee urging support for the HANGUP Act, arguing that it was necessary because, "As amended, the TCPA now permits citizens to be bombarded by unwanted and previously illegal robocalls to their cell phones if the calls are made pursuant to the collection of debt owed to or guaranteed by the United States." Is that your understanding of what will necessarily be allowed as a result of the Federal Communications Commission's implementation?

Answer. The Federal Communications Commission is in the midst of a rulemaking on exactly this issue. Based on the proposals articulated in its Advance Notice of Proposed Rulemaking, we are hopeful that the final regulations will only permit a limited number of calls to debtors who have not consented, and that the consumer will have the right to stop unwanted calls. But we will not know what the limitations on the calls will be, if any, until the final regulations are promulgated.

Question 3. What are some of the benefits and challenges of moving forward with a mandatory reassigned numbers database?

Answer. The industry of callers has professed difficulties complying with the FCC's 2015 Omnibus Order because they say there is no reasonable way for them to know when the phone numbers have been reassigned to new people. The chief benefit of a mandatory reassigned numbers database is that it would provide a near-perfect way for callers to determine which numbers have been reassigned since they obtained consent to call those numbers.

A database would be fully accurate and relatively inexpensive to operate and access by the caller if it has the following components:

1. All cell phone providers would be required to participate.
2. Each cell phone provider would give timely information about all cell phone numbers under its control for which there is a change in ownership.
3. The information provided to the database would simply be—on each reporting date—any telephone number that had been returned to the cell phone company (because it was dropped or abandoned or terminated) since the previous reporting date.
4. The providers would submit these reports within a short time—likely one or two one days—from the date that the number was dropped.
5. Callers could access the database easily online and simply query: "For telephone number XYZ, when was the last time it changed ownership?" There would be no big data dump from the database, just the simple answer to the question, which would be along the following lines: "Number XYZ most recently changed ownership on ABC date."
6. The fees charged to callers for accessing the information in the database would pay for the maintenance of the database.

The challenge to a fully effective database is simply having all of the cell phone companies agree to establish such a database and participate in it.

The reassigned number problem need not really be a problem. A relatively simple solution is within reach.

Question 4. Is there a helpful way to distinguish between random or sequential telemarketing calls and texts versus calls or texts to numbers originally provided by customers that have been subsequently reassigned?

Answer. I am not sure that there is. This question seems to be mixing apples and oranges. Whether callers are calling random or sequential numbers goes to the issue of whether their calling methodologies meet the coverage requirements under the TCPA because the automatic dialing system used has that capacity (under 47 U.S.C. § 227(a)). The issue of whether of number has been reassigned goes to whether the person who receives the call has provided consent to be called, as is required if the call is made to a cell phone and is not for an emergency purpose (under 47 U.S.C. § 227(b)(1).

Question 5. Are texts less intrusive than phone calls? If so, would it make sense to have reduced penalties for text message violations of the TCPA in order to encourage contact through text messaging rather than phone calls?

Answer. There are some minimal differences between the two, but texts are invasive of consumers' privacy just as calls are. We do not think there should be different standards.

Question 6. Are you aware of any negative consequences resulting from the Commission's 2015 Omnibus Declaratory ruling, including the movement of call centers overseas?

Answer. I am not aware of any negative consequences.

Question 7. Is there a database on which callers can reasonably rely that identifies numbers that have been reassigned?

Answer. My understanding is that there are several databases and other programs in the marketplace that either specifically provide the answer to the question of whether the number is reassigned, or provide other assistance to callers on this issue. Just a few of these examplse include:

- Early Warning, a data exchange company,[1] whose website indictates that this company runs a database that can be accessed by callers to determine the status of each of the numbers they want to call.
- Another company appears to be Do-Not-Call-Protection,[2] which promises to help callers ensure they are calling the parties that provided consent.
- A company called Payfone[3] also offers a "solution [which] applies custom logic to the 8 million+ daily phone number and mobile operator change events in order to determine whether or not phone number ownership has changed."[4]
- Neustar indicates that it provides solutions for TCPA potential liability by providing access to "Neustar's unparalleled phone data repository. The solution provides users with the most accurate, comprehensive and up-to-date consumer and business data in the industry—updated every 15 minutes from over 250 sources, including the Nation's leading telecommunications service providers."[5]

However, the best option to protect callers from liability for calling reassigned numbers would be for a database to be established in which all cell phone providers are required to participate. (Please see my answer to Chairman Thune's question # 3 on this point.)

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DEB FISCHER TO MARGOT SAUNDERS

Question 1. In your testimony, you state that "Congress deliberately created statutory penalties in the TCPA to ensure compliance." You also mention that these unwanted calls are increasing. Do you have data to indicate the amount of fines and awards that have been collected as a result of the increase in unwanted calls?

Answer. I do not have specific data on the amount of fines and awards collected as the result of the increase in unwanted calls. I know that even as industry is complaining about TCPA litigation, the number of unwanted calls is increasing. This is evident from the escalating number of complaints to government agencies about these unwanted calls. As I said in my updated testimony: an average of 184,000 complaints were made to the Federal Trade Commission (FTC) every month in 2015

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[1] For more information, see Early Warning's website at *http://www.earlywarning.com/about-us.html.*

[2] *http://www.donotcallprotection.com/blog/reassigned-numbers-right-party-verification-tcpa.*

[3] *http://www.payfone.com/numberverification/*

[4] *Id.*

[5] *https://www.neustar.biz/resources/whitepapers/understand-tcpa-law-and-mitigate-risk.*

about robocalls.[6] The problem of unwanted robocalls is escalating: the FTC reported more than 2.2 million complaints about unwanted robocalls in 2015—over two and a half times as many complaints as there were in 2010.[7] More than half of these calls occurred after the consumer had already requested that the company stop calling.[8] Indeed, in the first four months of 2016, the complaint numbers have spiked again, increasing to an average of over 279,000 a month, which will produce a yearly rate of over 3.3 million complaints.[9]

So it seems that even though the litigation is increasing, and more fines and awards have been collected, these are still not sufficient to provide incentives to the calling industry to comply with consumers' wishes to be free from these unwanted robocalls.

Question 2. Throughout your written testimony, you highlight many negative instances of "robocalling," many of which involve harassing telemarketing calls. I think we can all agree that we dislike telemarketing calls and that we would prefer that consumers not receive them. However, there can be uses for "robocalling" that can benefit consumers. For example, there are student loan providers and servicers in Nebraska who try to contact students who are at risk of defaulting on their student loans to help them rather than harass them. In your opinion, are there any times that robocalls should be permissible under the TCPA, such as where consumers might need or want to receive the call?

Answer. Robocalls are entirely legal once the consumer has consented to receive them. 47 U.S.C. § 227(b)(1)(A). Moreover, according to the student loan servicing industry, over 90 percent of student loan debtors have consented to receive these calls.[10] Student loan servicers wishing to call the debtors for whom they do not have consent should manually dial these consumers until they receive consent. If the servicing industry believes that the calls will be so helpful to consumers, then it is their job to reach out to them. However, they should do so in accordance with the TCPA. There is no inherent right for callers to use autodialers or prerecorded voice messages.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. STEVE DAINES TO MARGOT SAUNDERS

Question 1. Today's students are graduating college with more debt than ever. Some of them go out into the workforce and forget about their student loans, or ignore them because they think they can't afford the payments. Because of the TCPA, loan servicing companies are not able to call the students to help them with a payment plan and unfortunately some end up defaulting on their loans. When the students default on their loans and ask "why didn't someone call me"—what can we tell them? Is there any middle ground that can be reached that allows us to help our students without opening up the flood gates for unwanted calls?

Answer. Robocalls are entirely legal once the consumer has consented to receive them. 47 U.S.C. § 227(b)(1)(A). Moreover, according to the student loan servicing industry, over 90 percent of student loan debtors have consented to receive these calls.[11] Student loan servicers wishing to call the debtors for whom they do not have consent should manually dial these consumers until they receive consent. If the servicing industry believes that the calls will be so helpful to consumers, then it is there job to reach out to them. However, these should do so in accordance with the TCPA. There is no inherent right for callers to use autodialers or prerecorded voice messages.

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[6] Federal Trade Commission, National Do Not Call Registry Data Book, FY 2015, at 5 (Nov. 2015).

[7] *Id.* at 4.

[8] *Id.* at 5.

[9] The 2016 figures for robocall complaints to the FTC's Do Not Call Registry were supplied by the FTC's Bureau of Consumer Protection on May 12, 2016. The 2016 annualized complaint data was determined by averaging the total complaints received in the first four months and then multiplying that monthly average by twelve.

[10] *See* Comments of Navient Corporation to the Federal Communications Commission, June 6, 2016 at 6, available at *https://ecfsapi.fcc.gov/file/60002098245.pdf.* ("We already have consent to autodial nine out of 10 of the Federal student loan borrowers whose loans we service today, ...")

[11] *See* Comments of Navient Corporation to the Federal Communications Commission, June 6, 2016 at 6, available at *https://ecfsapi.fcc.gov/file/60002098245.pdf.* ("We already have consent to autodial nine out of 10 of the Federal student loan borrowers whose loans we service today, ...")

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. MARIA CANTWELL TO MARGOT SAUNDERS

Question. True Blue, a Tacoma, Washington based company is focused on getting blue collar workers back to work. Its matches unskilled and underemployed people seeking work with local businesses that have short medium and long term job opportunities.

If the worker consents in writing, True Blue makes the match by sending a text message called a "work alert" to the worker giving the details of the job offer including wage, location and expected time commitment. The worker texts back yes or no depending on his or her interest.

If the worker has not consented in writing to receiving "work alerts" he or she must show up at a worker recruiting center at 5 a.m. and wait for work.

In 2014, a former client brought suit on behalf of a class of workers claiming that True Blue had been texting him and others without permission.

An examination of their "work alert" notification system revealed that due to recordkeeping error, several hundred workers that had opted out of the "work alert" text notifications system continued to receive text messages.

The lawsuit is still pending. But because the Telephone Consumers Protection Act is a strict liability statue which mandates $500 per text message violation, True Blue is facing a decision that could put potentially put it out of business.

There are whole classes of stakeholders such as schools, non-profit social service agencies, medical offices, employment agencies, etc. . . that may reach out to their clients or customers using text messages or auto dialers to perform a service like remind them of medical appointments, inform them of job opportunities, pass on schedule information and give updates on available benefits or the status of applications.

In some cases, these types of entities may run afoul of the Telephone Consumer Protection Act because of mere recordkeeping error.

While this not desirable, it seems different than the type of harm that consumers experience when being bombarded with marketing materials from an entity trying to sell something.

Making entities like this subject to large fines and court judgments doesn't seem like the result we want.

I don't want to weaken consumer protections under Telephone Consumer Protection Act (TCPA) but I do want the law to direct the harshest penalties for the most egregious violations that impact consumers.

Some state and Federal consumer protection laws have "good faith" or "bona fide error" exceptions. Is there a role for those types of exceptions to the TCPA without weakening consumer protection? If so how would should it be applied?

Answer. I understand the frustration that one might feel if the facts of the case were as has been explained to you, and your recommendation for a good faith defense. But we investigated this case, and the allegations in the complaint are that the consumer was texted seven times a day for multiple days, that he repeatedly requested True Blue to stop the texts, but it refused. He even went into a branch location and was told they can't stop the texts.

Here is a record of the dates and times of the texts that the consumer received, *after* the consumer had repeatedly requested that they be stopped:

> Defendants continued to repeatedly text Plaintiff on his cellular telephone ending in 3379 again on May 5, 2014 (6:32 a.m., 9:20 a.m., 12:24 p.m., 3:30 p.m., 4:28 p.m., 6:40 p.m., and 6:42 p.m.), May 6, 2014 (8:07 a.m., 8:15 a.m., 8:15 a.m., 10:37 a.m., 11:03 a.m., 12:30 p.m., and 12:52 p.m.), May 7, 2014 (5:27 a.m., and 1:23 p.m.), May 8, 2014 (6:15 a.m., 9:12 a.m., 2:50 p.m., 2:58 p.m., 3:51 p.m., 3:52 p.m., and 4:09 p.m.), May 9, 2014 (5:32 a.m., 7:30 a.m., 8:32 a.m., 11:20 a.m., 1:17 p.m., 1:19 p.m., and 3:10 p.m.), May 10, 2014 (1:44 p.m.), May 12, 2014 (5:43 a.m., 8:29 a.m., 10:55 a.m., 1:23 p.m., 2:01 p.m., 2:14 p.m., and 5:09 p.m.), May 13, 2014 (9:53 a.m., 9:55 a.m., 1:53 p.m., and 3:34 p.m.), May 14, 2014 (8:38 a.m., 8:38 a.m., and 9:00 a.m.), May 15, 2014 (8:12 a.m., 8:28 a.m., 8:29 a.m., 9:32 a.m., 9:49 a.m., and 9:52 a.m.), and May 16, 2014 (9:05 a.m., 9:57 a.m., 10 a.m., and 4:16 p.m.).

The problem is that it is simply too inexpensive to make these calls and texts. This means that any human intervention, such as going into the system to cancel the calls or texts to a particular phone number costs more money than simply continuing the calls or texts, even when the person receiving the calls has repeatedly asked for them to be stopped. The point of the strict liability standard in the TCPA is to create incentives for businesses to pay attention to these issues, so that the unwanted calls and texts *are* stopped.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. AMY KLOBUCHAR TO MARGOT SAUNDERS

Question. Ms. Saunders, I have been very active in pushing the FCC and carriers to identify solutions and aggressively move forward to end the problems with rural call completion. I am glad to have a commitment from Chairman Thune to markup my Improving Rural Call Quality and Reliability Act of 2015 soon. I find a striking similarity between the bad actors placing robocalls and the bad actors that are not completing calls to rural areas. In both cases fraudsters are constantly finding new ways to exploit consumers. Our laws must ensure consumers' phones ring when they need it and silent when they want privacy. What policies or actions do you believe will be the most effective in getting ahead of fraudsters?

Answer. At this point, we think the most important step that can be taken is to require the telephone companies to employ technologies that eliminate caller id-spoofing. That single requirement—if sufficiently well enforced—will, we believe stop much of the fraud occurring over the telephone lines. There are good bills pending in both the House and the Senate that we believe will accomplish this. Senator Schumer's bill: S. 3026—ROBOCOP Act is the Senate bill and H.R. 4932 is the equivalent House bill on the same subject.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CORY BOOKER TO MARGOT SAUNDERS

Question 1. As you know, debt collection negatively impacts many Americans who are already financially insecure. It is incumbent upon Congress to ensure that there are clear rules governing the practice of debt collection. Earlier this year, Senator Mike Lee and I introduced the Stop Debt Collection Abuse Act, which clarifies that debt buyers are debt collectors; expands the definition of consumer debt; and limits egregious fees. In addition, reports show that thirty-party debt collectors collecting on behalf of local and state governments have in some cases violated the Fair Debt Collection Practices Act. Our bill would address this issue by examining the use of debt collectors by local and state governments.

While the Stop Debt Collection Abuse Act takes some steps at the Federal level to directly protect consumers, I am concerned that practices at the state and local level are making the situation worse. Can Congress address these problems at the state and local level? If so, how?

Answer. We very much appreciate your introduction of the Stop Debt Collection Abuse Act, and we share your concern about abuses at the state and local level. We see no legal reason why the language in your bill should not be made equally applicable to debts owed state and local governments. So long as the collectors of those state and local debts use the instrumentalities of commerce (telephone, the Internet or the U.S. Postal Service) to collect the debt, then it would be legal and constitutional for the Federal Government to regulate these activities.[1]

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[1] The Commerce Clause justifies Congress in exercising legislative power over certain state and local activities under Article 1, Section 8, Clause 3 of the U.S. Constitution. The Supreme Court's landmark decision in *United States* v. *Lopez,* 514 U.S. 549, (1995), definitively identifies and describes "three broad categories of activity that Congress may regulate under its commerce power." Lopez, 514 U.S. at 558. (channels of interstate commerce; instrumentalities of interstate commerce, or persons or things in interstate commerce; and those activities having a substantial relation to interstate commerce).

As supported by a number of Supreme Court decisions, "Congressional power to regulate the channels and instrumentalities of commerce includes the power to prohibit their use for harmful purposes, *even if the targeted harm itself occurs outside the flow of commerce and is purely local in nature." United States* v. *Ballinger,* 395 F.3d 1218, 1226 (11th Cir. 2005) (emphasis added); see *e.g.,* Lopez, 514 U.S. at 558–59. For example, see *United States* v. *Robinson,* 62 F. 3d 234, (8th Cir. 1995), where the Eighth Circuit held that the Federal carjacking statute, 18 U.S.C. § 2119, dealt with an "item of interstate commerce," and thus did not require a separate showing of effect on interstate commerce. Robinson, 62 F. 3d at 236–37.

Courts have interpreted "instrumentalities of interstate commerce" to include things like the telephone, the Internet, and the U.S. Postal Service. *See e.g., United States* v. *Pipkins,* 378 F.3d 1281, 1295 (11th Cir. 2004) (naming "pagers, telephones, and mobile phones" as instrumentalities of interstate commerce); *United States* v. *Panfil,* 338 F.3d 1299, 1300 (11th Cir. 2003) (referring to the Internet as an "instrument of interstate commerce"); *American Library Ass'n* v. *Pataki,* 969 F. Supp. 160, 173 (S.D.N.Y. 1997) (analyzing the interstate and economic nature of the Internet and concluding that it is an instrumentality of interstate commerce); *United States* v. *Riccardelli,* 794 F.2d 829, 831 (2nd Cir. 1986) (explaining that "[u]se of the United States mails, whether to mail a letter across the street or across the nation" has historically been recognized as an "exclusively Federal instrumentality"). Under the second category of activity that Congress may regulate under its commerce power, a telephone or the Internet is still

Question 2. Under pressure to tighten budgets, Congress has turned to debt collection as a way to regain lost revenue. In October, a provision was tucked into must-pass budget legislation that created a new exemption to the TCPA. This exemption allows debt collectors working on behalf of the Federal Government to contact individuals without their consent. What precedent does this set for debt collection by local and state governments?

Answer. It does not set any precedent for the debt collection activities of debts owed to local and state governments. The Budget Act amendments only provided an exemption from the requirement for robocalls to cell phones to have consent for calls to collect debts owed to or guaranteed by the Federal Government. All other debt collection calls—whether owed for private debt or owed to state or local governments—are still subject to the requirements of the Telephone Consumer Protection Act that non-emergency calls robocalls to cell phones are only legal if the caller has consent to call the cell phone from the owner or the user of the cell phone.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO RICHARD LOVICH

Question 1. Would a concrete standard for revocation of consent in the TCPA regulations, as there is for the FDCPA, FCRA, and other banking laws, be helpful in reducing the types of contact intended to be prohibited by the TCPA?

Answer. A clearly articulated standard for when consent is considered to have been revoked is sorely lacking in the current application of the TCPA. This goes hand in hand with a severely lacking definition of "prior express consent" itself. The less ambiguity in the statute, the less likely it will be for well-meaning entities such as health care providers to run afoul of the law. For example, currently if a number whose owner originally granted consent is transferred, the health care provider attempting to fulfill its statutory and regulatory duty to follow up with patients, remind them of appointments and follow-ups, and provide information on prescription readiness, will be completely unaware of that transfer. The FCC's current interpretation allows the caller only one call to the reassigned number. Even if that call is not connected or if the information concerning transfer is not obtained, the next innocent call is actionable.

Also, in order to clearly define when "prior express consent" is revoked, one must determine from whom it was originally obtained. Under the FCC's 2015 TCPA decision, an incapacitated patient whose consent is obtained from a family member may have that consent revoked immediately upon his becoming capable of responding. This may not be the most opportune time for a care giver to obtain consent or inquire whether consent has been withdrawn, as the person is recovering from a serious condition. This is what makes healthcare providers and their related entities unique in this movement to clarify the TCPA. The healthcare context, the TCPA issues, and specifically the issue of consent is directly related to the ability of the patient to communicate. It is thus impacted by the health of the patient and the ability of the provider to provide adequate care.

Concrete standards for both consent and revocation also allow the hospital to develop and articulate protocols to avoid running afoul of the law. Violation in this regard should have an intent component in order not to penalize otherwise innocent callers. As you may recall from my testimony, the Affordable Care Act requires providers to follow up with patients and provide adequate health information to cut down on readmissions. In addition, regulations applicable to charitable hospitals require communication of eligibility for rate discounts. These statutory and regulatory requirements cannot be effectively met without posing an unreasonable risk of liability for violation of the Act.

With clear standards for revocation, the number of unwanted contacts will be significantly decreased as the hospital has absolutely no interest, either medically or economically, in contacting people it has not treated. Hospitals do not recruit people to be sick nor do they attempt to worsen health conditions in order to get more business. This again sets them apart from enterprises who use robocalls for the purposes the Act was originally targeting.

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recognized as an "instrumentality of interstate commerce" even if it is not used to communicate across state lines. Lopez 514 U.S. at 558. Accordingly, if instrumentalities of interstate commerce (such as the telephone, the internet, or the U.S. Postal Service) are used even purely intrastate by state and local debt collectors to collect debt owed to state and local governments, then the Federal Government could still constitutionally regulate such activities under the Stop Debt Collection Abuse Act.

Question 2. Attorney General Zoeller and a number of other attorneys general sent a letter to this committee urging support for the HANGUP Act, arguing that it was necessary because, "As amended, the TCPA now permits citizens to be bombarded by unwanted and previously illegal robocalls to their cell phones if the calls are made pursuant to the collection of debt owed to or guaranteed by the United States." Is that your understanding of what will necessarily be allowed as a result of the Federal Communications Commission's implementation?

Answer. The Bipartisan Budget Agreement of 2015 provision that allows the use of robocalls to collect debts owed to or guaranteed by the Federal Government illustrates the shortcomings of the TCPA as applied in the modern world. If it makes sense in the area of federally backed debt it makes even more sense in the healthcare sector where compliance with the TCPA as currently articulated is a tremendous financial burden that takes precious resources away from patient care. If Congress felt that it was important enough to protect Federal debt calls, is it even arguable that the health of Americans is equally if not more important?

The provision provides for an economical and efficient way to communicate essential information to help citizens concerning their student loans, tax, and other Federal debt. Based on available data, the amendment should not create a significant number of additional calls along the lines being forecast by opposition groups.

Information aids those affected. If the provision were expanded to health care providers and their related entities, the rights and needs of patients would be significantly increased and strengthened.

Question 3. What are some of the benefits and challenges of moving forward with a mandatory reassigned numbers database?

Answer. The benefits here are clear for callers who are statutorily mandated to make such calls and who face high penalties if they innocently call a number on which they previously obtained consent.

Healthcare entities fulfilling their legal obligation to provide essential health related information to a patient are exposed to great liability when the patient from whom they obtained consent for cell phone communication no longer has the number assigned to them. There is currently no effective way for the health care provider community to know of the transfer.

The regulatory scheme currently grants one free call attempt. If that call is unproductive in obtaining the information that the number has been reassigned, the patient the hospital is seeking to reach will be deprived of the essential information to maintain health.

In addition to this direct negative patient impact, the current language of the statute and its regulatory interpretation is an open invitation to costly litigation. The person to whom a number is transferred has no legal obligation at any time to inform the hospital that the number has been transferred and that no consent has been granted post transfer. Because of the FCC's decision, the recipient of the transferred number can continue to receive calls meant for patient care and information, not inform the hospital of the transfer, and sue for each call after the first one.

The ability to reference a reassigned numbers database will help reduce the potential for caregivers to be exposed to TCPA liability for seeking to help patients.

It is anticipated that privacy issues will be advocated by opponents to this solution. However, either the TCPA has to be amended and overhauled or an effective way for care givers to determine reassignment must be provided. Otherwise, the Act is nothing more than a full employment bill for the plaintiff's bar.

Question 4. Is there a helpful way to distinguish between random or sequential telemarketing calls and texts versus calls or texts to numbers originally provided by customers that have been subsequently reassigned?

Answer. A simple approach is to require the caller to give notice that the call is for a legitimate purpose, much like the notice requirement under the FDCPA. The FDCPA provides language indicating that if you are not the debtor please disregard the call and that the purpose of the call is the collection of a debt. Adopting similar language for the TCPA would protect the consumer who receives a reassigned number to know immediately not take the call or delete the text.

Question 5. Are texts less intrusive than phone calls? If so, would it make sense to have reduced penalties for text message violations of the TCPA in order to encourage contact through text messaging rather than phone calls?

Answer. Like e-mails or paper mail, a text message can be completely ignored and easily deleted once the recipient determines it is of no interest or is not directed at them. They are read at the recipient's convenience and are easily deleted. Thus any sanction for an innocently sent text in furtherance of the hospital's duty to communicate with a patient should not be sanctioned.

Question 6. Are you aware of any negative consequences resulting from the Commission's 2015 Omnibus Declaratory ruling, including the movement of call centers overseas?

Answer. The negative aspect of the ruling is in its failure to take significant action to protect healthcare providers. The request was to exempt healthcare related entities from the reach of the Act. Instead the ruling failed to do so, only providing a very narrow exemption that is difficult to meet and may exclude certain healthcare related entities. Thus having been requested to make the change and failing to do so, the FCC has handed the plaintiff's bar another weapon. That FCC refusal to exempt the healthcare community endorses frivolous lawsuits against healthcare providers. It establishes that hospitals are to be lumped together with the worst element of telemarketing.

In addition, the overbroad interpretation of "automatic telephone dialing system," failure to address the need for a more concrete definition of "prior express consent," unworkable standard for addressing calls to reassigned numbers, lack of an intent element to acts violating the Act, and the clear lack of investment by the FCC in the needs of the healthcare community are all negative consequences of the ruling.

Healthcare entities continue to run the risk of costly litigation in fulfillment of their statutory and regulatory duties. This imposes a tremendous economic burden on the healthcare industry as time, money and energy has to be expended whether the litigation is valid or not. Instead of being able to take advantage of technology, hospitals must make decisions as to how to allocate resources. Every dollar spent, every minute expended in defending frivilous lawsuits or in not using autodialers, is a dollar and a minute not spent on patient care. Those dollars add up to thousands if not millions and those minutes trun into hours, weeks, days and longer.

The ruling also failed to require the recipient of a reassigned number to notify the caller of the reassignment. This results in the recipient being able to simply allow the caller to continue to call, not tell them of the reassignment, and then sue on each violation for each call after the first.

Question 7. Is there a database on which callers can reasonably rely that identifies numbers that have been reassigned?

Answer. We are not aware of any such databases.

Question 8. Why can't callers simply rely on consent?

Answer. "Prior express consent" has never been defined, and no uniform standard has been developed. As applied to health care providers, consent seems like an easy thing to obtain but as with all areas of human endeavor circumstances arise making it difficult.

One issue is who can provide consent. According to the FCC, if a patient is incapacitated and his family member provides consent, such consent is revoked upon the patient's return to capacity. This recovery may not occur while the patient is still in the hospital.

A second issue involvesthe multilingual American patient population. Does the consent form have to be printed in all available languages? Does an interpreter need be provided to explain the consent form so as to avoid but not eliminate the possiblity of a lawsuit down the line over whether the consenting party understood the import of the consent.

Most importantly, because we rely on the use of language, there will always be opportunistic attorneys who will prey upon innocent companies whose language can be manipulated, and what language cannot be manipulated? If the statute provided consent language that was above reproach, and provided a mechanism whereby consent could be concretely established, then the caller could rely upon the consent given.

Question 9. Are you aware of any small businesses that have gone out of business as a result of the legal fees or settlements associated with a TCPA litigation? In the recent CFPB Notice of Proposed rulemaking for arbitration, the CFPB appears to recognize the challenges small businesses have when faced with TCPA related class action litigation. In the rule they note, ". . . the Bureau recognizes the concern expressed by SERs, among others, that particular statutes may create the possibility of disproportionate damages awards." Do you have similar concerns about how the statutory damages associated with TCPA litigation can threaten small businesses?

Answer. The healthcare industry has its small businesses just like most areas of endeavor. In healthcare, the small community hospital is often the lifeblood for care in rural and small communities not served by a large metropolitan medical center or an academic medical center attached to a large university. The struggles of the small community hospitals, with the lack of bargaining power with large commercial insurance companies, and large governmental payor populations, are very real. The

difference between providing necessary healthcare to a rural community and shutting the doors of the hospital is often a very thin line.

Add to the these issues an obligation to contact each patient in follow up to decrease readmissions, provide eligibility information for charitable and discount programs (both areas required by statute), while at the same time being prohibited from using technology to efficiently perform these tasks, and you are left with a hospital that has to decide to maintain the nurse/patient ratio or to hire boiler rooms full of phone callers in order to deliver information. Resources are finite, and each telephone staff member who performs no other task represents an additional level of lost patient care. The economic stress is tragic mostly because it is fully avoidable.

Disproportionate damage awards are also devastating to small hospitals. The hospital has no need or economic incentive to make telemarketing calls. Thus its calls are all patient education and information-driven. The hospital fulfilling its statutory and regulatory duty innocently calls a reassigned number more than once, where the holder of the number (under no obligation to inform the hospital of the reassignment) receives more than one call and sues. This is not justice and is a far cry from the original purposes of the Act.

Not all robocalls are annoying and intrusive telemarketing calls. Health care related calls go to the essence of the patient's well being. Resources devoted just to defending such lawsuits are devastating to the care giver community.

What we will see, at a time where healthcare is at the forefront of the national agenda, is a consolidation and loss of hospital facilities, causing greater scarcity of our most precious resource-the ability to care for those in need.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ROY BLUNT TO RICHARD LOVICH

Question 1. Healthcare represents roughly one quarter of our Nation's economy but is unique in a number of ways both due to its bifurcated regulation and reimbursement but also in its personal impact on consumers.

Given those facts, how is the FCC gathering information from the impacted healthcare patients and providers to inform its regulatory processes?

Answer. We are not aware of any efforts by the FCC to gather such information in the TCPA context.

Question 2. Further, how concerned is the FCC's leadership that rigorous regulation of such specific tools like auto-dialing will inhibit the ability of healthcare providers to reach out to their patients, assist patients in accessing care and improve patient adherence to care plans—and in a less intrusive manner that most patients prefer?

Answer. FCC leadership seems completely unconcerned about how the regulation of specific tools negatively impacts the patient. Instead, the approach taken by the FCC has been to lump healthcare related entities into the same basket as telemarketers for many aspects of the TCPA. Heart transplant surgeons are apparently no better than scam telemarketers.

The Bipartisan Budget Agreement of 2015 exempted the collection of Federal debt from the TCPA and shows a logical and rational approach to this issue. Federal debt collection is immensly important, and so is healthcare. The damage awards, class action suits, defense costs, and untold thousands of hours of productive time stolen from patients and devoted to the nonsensical pursuit of avoiding a frivolous TCPA claim cannot be the right outcome. Instead, the TCPA should be modernized, consistent with HIPAA, to allow consumers to receive necessary and vital non-telemarketing health care communications.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO MONICA S. DESAI

Question 1. Would a concrete standard for revocation of consent in the TCPA regulations, as there is for the FDCPA, FCRA, and other banking laws, be helpful in reducing the types of contact intended to be prohibited by the TCPA?

Answer. Yes. A clear, concrete standard for revocation benefits consumers, by providing them with an effective means for reducing unwanted calls and messages, and benefits businesses, by allowing uniformity and consistency in effectuating opt outs. However, the current standard for revocation set out by the Federal Communications Commission (FCC) is unworkable and an invitation to set litigation traps. In the 2015 TCPA Order, the FCC stated that a person may revoke consent under the

TCPA by any means that is "reasonable" considering the "totality of the facts and circumstances," including "orally or in writing" and at "in-store" locations.[1] Further, a caller "may not limit the manner in which revocation may occur."[2] Callers need to be able to rely on uniform revocation procedures, not an open-ended, case-by-case approach. But the FCC has provided no means for callers and consumers to be certain that revocation will be effective. For example, in his dissent from the 2015 TCPA Order, Commissioner Pai questioned how any retail business could comply with the FCC's revocation standard, asking: "Would a harried cashier at McDonald's have to be trained in the nuances of customer consent for TCPA purposes? . . . Could a customer simply walk up to a McDonald's counter, provide his contact information and a summary 'I'm *not* lovin it,' and put the onus on the company? The prospects make one grimace." A concrete standard that helps ensure effective revocation would remove the uncertainty created by the FCC and benefit consumers and businesses.[3]

Question 2. Attorney General Zoeller and a number of other attorneys general sent a letter to this committee urging support for the HANGUP Act, arguing that it was necessary because, "As amended, the TCPA now permits citizens to be bombarded by unwanted and previously illegal robocalls to their cell phones if the calls are made pursuant to the collection of debt owed to or guaranteed by the United States." Is that your understanding of what will necessarily be allowed as a result of the Federal Communications Commission's implementation?

Answer. No. The FCC has proposed specific rules to limit the number and type of calls that can be made pursuant to the exemption for calls "made solely to collect a debt owed to or guaranteed by the United States."[4]

Question 3. What are some of the benefits and challenges of moving forward with a mandatory reassigned numbers database?

Answer. Under the FCC's interpretation of "called party," it is literally impossible to comply with the TCPA. The FCC acknowledged in the 2015 TCPA Order that "callers lack guaranteed methods to discover all reassignments immediately after they occur."[5] As a result, and because telephone numbers are reassigned so frequently,[6] companies face significant risk under the TCPA as it has been interpreted by the FCC to impose liability for calls to reassigned numbers even where the company had no knowledge of the reassignment. An accurate reassigned number database would allow companies to determine whether a number in the database has been reassigned, thereby preventing unwanted calls to the new holder of the number. There should be a TCPA safe harbor associated with the use of such a database.

The database must be mandatory for all carriers. There are currently voluntary databases in which carriers may choose whether to submit number reassignment information, and those databases are incomplete and sometimes inaccurate. Implementing a reassigned number database that includes all carriers may require Congressional action.

Question 4. Is there a helpful way to distinguish between random or sequential telemarketing calls and texts versus calls or texts to numbers originally provided by customers that have been subsequently reassigned?

Answer. Congress did, in fact, distinguish between random or sequential telemarketing calls—prohibiting them through the TCPA—and calls made in good faith to a number that has been reassigned—by providing a specific exemption from TCPA liability for calls made with the prior express consent of the called party.[7] Congress intended this distinction to have meaning—otherwise it would have not provided for such an exemption. I am not aware of any existing reassigned number database or other service that captures all reassignments. I think that it is critical for purposes of the discussion about TCPA reform, though, to distinguish the 'bad actors' (such as scammers making millions of illegal robocalls) from compliance-fo-

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[1] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02–278, Report and Order, FCC 15–72, ¶¶47, 64, n. 233 (2015) (2015 TCPA Order).

[2] *Id.* ¶47.

[3] *See ACA Int'l et al.*, v. *FCC et al.,* No. 15–1211, Brief for Respondents, at 64 n. 16 (D.C. Cir., filed Jan. 15, 2016) (Government Respondents in the appeal of the 2015 TCPA Order stated that the FCC's ruling "did not address whether contracting parties can select a particular revocation procedure by mutual agreement").

[4] *See* 47 U.S.C. §227(b); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Notice of Proposed Rulemaking, CG Docket No. 02–278, FCC 16–57, ¶1 (May 6, 2016).

[5] 2015 TCPA Order ¶85.

[6] By one estimate, roughly 37 million telephone numbers are reassigned each year. Alyssa Abkowitz, *Wrong Number? Blame Companies' Recycling,* The Wall Street Journal (Dec. 1, 2011).

[7] *See* 47 U.S.C. §227(b)(1).

cused companies that are trying to send their customers timely communications that they want and have requested, but are getting penalized for doing so when the number has been reassigned without their knowledge. The best way to protect callers who are making calls in good faith, and to prevent the chilling of such calls so that consumers can keep receiving the calls they expect to receive, is to interpret "called party" as Congress must have intended—as "expected" or "intended" recipient.

Question 5. Are texts less intrusive than phone calls? If so, would it make sense to have reduced penalties for text message violations of the TCPA in order to encourage contact through text messaging rather than phone calls?

Answer. Yes—text messages are less intrusive than phone calls. Consumers can choose when and whether to respond. Consumers are able to block texts from specific senders easily, and can easily delete texts. Text messages do not "interrupt" conversations or meals. Text messages do not "tie up" phone lines. Text messages are often part of a "bucket" plan.

By its explicit text, the TCPA does not apply to text messaging—it only applies to "calls". However, the FCC has found that "calls" under the TCPA refers to both voice calls and to text messages.[8]

In the first instance, Congress could make clear that the TCPA is only applicable to calls, not to text messages, consistent with the statute as it is written.

Another approach would be to provide for reduced damages for text messages sent without consent of the party receiving the text. And, Congress could eliminate strict liability for strict liability for text messages sent without the consent of the recipient.

Question 6. Are you aware of any negative consequences resulting from the Commission's 2015 Omnibus Declaratory ruling, including the movement of call centers overseas?

Answer. Companies face substantial, even potentially ruinous liability as a result of the FCC's interpretations of the TCPA, particularly with respect to the agency's treatment of reassigned numbers and ATDS equipment. I have heard anecdotally that more and more companies are considering moving call centers overseas, so that manually dialed calls can be made at less expense.

Question 7. Is there a database on which callers can reasonably rely that identifies numbers that have been reassigned?

Answer. No. As noted above, the FCC acknowledged that "callers lack guaranteed methods to discover all reassignments immediately after they occur."[9] The FCC stated that "at least one database can help determine whether a number has been reassigned;" however, the leading database provider stated in the record that it is "not aware of any authoritative telecommunications database that links all consumer names with their telephone numbers."[10] This underscores the importance of creating a comprehensive reassigned number database.

Question 8. What is the most difficult challenge facing your clients with respect to TCPA compliance?

Answer. The lack of any guaranteed means of determining whether a number has been reassigned is the most difficult aspect of TCPA compliance for the companies that I have worked with. The FCC found in the 2015 TCPA Order that after a caller makes one attempt to call or text a number that has been reassigned, the caller is liable for any subsequent calls, even if the caller is completely unaware that the number was reassigned.[11] As a result, companies face significant, even ruinous liability for a problem that they simply cannot control because there is no guaranteed means to learn of number reassignments.

The FCC's boundless interpretation of the types of calling equipment regulated by the TCPA—"automatic telephone dialing systems" ("ATDS")—has also created significant compliance challenges for companies. Although ATDS is specifically defined in the statute,[12] the FCC found in the 2015 TCPA Order that any equipment for

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[8] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02–278, Report and Order, 18 FCC Rcd 14014 ¶ 165 (2003).

[9] 2015 TCPA Order ¶ 85.

[10] 2015 TCPA Order ¶ 86; *see also* Letter from Richard L. Fruchterman, Associate General Counsel to Neustar, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02–278, at 1 (Feb. 5, 2015).

[11] 2015 TCPA Order ¶¶ 89–93.

[12] 47 U.S.C. § 227(a)(1). Under the statute, an ATDS is defined as equipment with a specific "capacity"—the "capacity" to "store or produce telephone numbers to be called, using and random or sequential number generator; and . . . to dial such numbers." *Id.* The FCC found in the 2015 TCPA Order that "capacity" included the "potential ability" of the equipment, such that (as discussed above), any equipment for which there is "more than a theoretical potential that

which there is "more than a theoretical potential that the equipment could be modified to satisfy the [statutory] definition" is *also* an ATDS.[13] In other words, according to the FCC, if the equipment could be modified in the future to become an ATDS, then it is treated as if it is an ATDS—even if it has not been modified.

Even more problematic, the only example provided by the FCC of telephone equipment that did not qualify as an ATDS is a "rotary-dial phone," and the FCC even suggested that under its interpretation, a smartphone could be considered an ATDS.[14] The FCC's approach has left companies unsure about how to determine whether their calling equipment implicates the TCPA. As one amicus curiae in the appeal of the FCC's 2015 TCPA Order noted, "[i]t is unclear who exactly would be qualified to conduct such an analysis—perhaps a philosopher?"[15] The FCC's limitless interpretation is contrary to the specific definition in the statute, and offers little usable guidance for compliance.

Question 9. Do any other regulators have a different stance on communicating with consumers via cellphone than the FCC? Have other regulators seen consumer benefits in communicating with consumers on their cellphone via text message?

Answer. Yes. The following are just a few examples that I have found:

- The Consumer Financial Protection Bureau (CFPB) has recognized, that especially for "economically vulnerable consumers," tracking transactions through mobile technologies such as text messaging may help consumers "achieve their financial goals" and can "enhance access to safer, more affordable products and services in ways that can improve their economic lives."[16]
- The Federal Deposit Insurance Corporation (FDIC) released a request for comment that stated that text message alerts give consumers "Access to account information;" "Help[] consumers avoid fees;" and "Help[] monitor accounts for fraud."[17] In fact, the FDIC research concluded that underbanked consumers may prefer texts to e-mails when receiving alerts because texts are "Faster," "Easier to receive," "Attention grabbing," and "Quicker and easier to digest."[18]
- The Consumer Product Safety Commission's product safety "Recall Checklist" recommends that companies send "text messages to customers" as part of an "effective and comprehensive product safety recall."[19]
- The Federal Trade Commission has emphasized the importance of proactive communications in connection with data breaches and is urging required notifications.[20]

Question 10. What action could Congress or the Federal Communications Commission take to help callers avoid costly discovery/litigation in cases where they have not violated TCPA?

Answer. As discussed above, Congress should establish a reassigned number database accompanied by a TCPA safe harbor for callers that use the database. This safe harbor would, for example, exempt from liability calls made inadvertently to a number that had been reassigned if the caller had checked the database prior to making the call. This would help to reduce or eliminate TCPA risk associated with calls to

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the equipment could be modified to satisfy the [statutory] definition" is also an ATDS. 2015 TCPA Order ¶ 19. This decision is contrary to the statute and has created significant compliance challenges for industry, and Congress should clarify, consistent with the statute, that "capacity" in the definition of an ATDS is limited to the equipment's "present" or "current" ability.

[13] 2015 TCPA Order ¶ 18.

[14] 2015 TCPA Order ¶ 18.

[15] *ACA Int'l* v. *FCC,* No. 15–1211, Brief of Amicus Curiae Communication Innovators In Support of Petitioners, at 15 (filed Dec. 2, 2015).

[16] CFPB, *CFPB 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.*

[17] Federal Deposit Insurance Corporation, *Qualitative Research for Mobile Financial Services for Underserved Consumers,* at 19 (Oct. 30, 2015), available at *https://www.fdic.gov/about/comein/2015/come-in-2015.pdf.*

[18] *Id.* at 21.

[19] *See* Consumer Product Safety Commission, *Recall Guidance, Recall Checklist* (last visited May 16, 2016), available at *http://www.cpsc.gov/en/Business—Manufacturing/Recall-Guidance/.*

[20] See Prepared Statement of Edith Ramirez, *Protecting Personal Consumer Information from Cyber Attacks and Data Breaches,* Before the Senate Committee on Commerce, Science, and Transportation, 113th Cong., at 2 (Mar. 26, 2014) (explaining that the "FTC supports Federal legislation that would strengthen existing data security standards and require companies, in appropriate circumstances, to provide notification to consumers when there is a security breach"), available at *https://www.ftc.gov/system/files/documents/public_statements/294091/ramirez_data_security_oral_statement_03-26-2014.pdf.*

reassigned numbers, which is a significant source of liability under the TCPA that callers have no means of effectively preventing.

Question 11. Why can't callers simply rely on consent?

Answer. The FCC has made it impossible for callers to rely on consent. According to the FCC, when the consenting party relinquishes her telephone number, callers can be liable for any subsequent calls to that number after one attempted call or text, even if the caller was completely unaware of the reassignment.[21] This is extremely problematic because almost 37 million telephone numbers are reassigned each year (which is roughly 101,000 reassignments *per day*).[22] And, as the FCC has acknowledged, there is no guaranteed means for callers to discover a reassignment,[23] meaning that companies may be unaware that the number provided to them by a customer was reassigned until the company is served with a lawsuit. Regardless, the FCC found in the 2015 TCPA Order that after a caller makes one attempt to call or text a number that has been reassigned, the caller is liable for any subsequent calls, even if the caller is completely unaware, and has no way of knowing, that the number was reassigned.[24]

This approach makes it impossible to rely on consent provided by customers. A workable approach that acknowledges that there is no guaranteed means to know if a number has been reassigned would be to find that callers that have the consent of the "intended" or "expected" recipient of the call or text are not liable under the TCPA. However, the FCC rejected this approach in the 2015 TCPA Order.[25]

Question 12. Are you aware of any small businesses that have gone out of business as a result of the legal fees or settlements associated with a TCPA litigation?

Answer. I know that all businesses, and particularly small business, face significant compliance challenges as a result of the FCC's interpretations of the TCPA, though I am not personally aware of any small businesses that have gone out of business specifically as a result of TCPA litigation.

Question 13. In the recent CFPB Notice of Proposed rulemaking for arbitration, the CFPB appears to recognize the challenges small businesses have when faced with TCPA related class action litigation. In the rule they note, ". . . the Bureau recognizes the concern expressed by SERs, among others, that particular statutes may create the possibility of disproportionate damages awards." Do you have similar concerns about how the statutory damages associated with TCPA litigation can threaten small businesses?

Answer. Yes. Under the TCPA, there is strict liability for each call made in violation with no limit on total damages. The FCC has determined that text messages are "calls" subject to TCPA damages. As a result, every single call made or text message sent by a business could result in $500 to $1,500 in damages, even for innocent conduct such as inadvertently making a call or sending a text to a reassigned number.[26] Considering that almost 37 million telephone numbers are reassigned each year,[27] and there is no way for companies to know whether a number has been reassigned, there is certainly a concern that a small business could incur significant, even ruinous liability for unintentional TCPA violations. Indeed, this concern is greater for small businesses than larger companies, because small businesses may not be able to afford the teams of lawyers and reassigned number database services that large companies use to help mitigate risk under the TCPA.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. DEB FISCHER TO MONICA S. DESAI

Question. The FCC's 2015 order for TCPA reassigned numbers allows one call across an entire enterprise, even if it has multiple subsidiaries, before a caller can be liable for contacting a consumer. This is the case even though there is a no reassigned number list available to check, and the caller will often have no knowledge that a numbers has been reassigned. Is there a reason the caller should not be required to have "actual knowledge" that the called number is not that of the initial

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[21] *See* 2015 TCPA Order ¶¶ 89–93.

[22] Alyssa Abkowitz, *Wrong Number? Blame Companies' Recycling,* The Wall Street Journal (Dec. 1, 2011).

[23] *See* 2015 TCPA Order ¶ 85.

[24] 2015 TCPA Order ¶¶ 89–93.

[25] 2015 TCPA Order ¶ 72.

[26] 47 U.S.C. § 227(b)(3).

[27] Alyssa Abkowitz, *Wrong Number? Blame Companies' Recycling,* The Wall Street Journal (Dec. 1, 2011).

person? What reasonable means can a caller take to ensure a number has or has not been assigned?

Answer. "Actual knowledge" should be the standard before TCPA liability is imposed for a wrong number call. The FCC's finding that, after one unanswered call or text to a particular number, the caller should assume that the number has been reassigned, is absurd. Specifically, the FCC found that companies can be liable for calls or texts to reassigned numbers even if they are unaware that the number has been reassigned, and further that after one attempt to call or text a reassigned number, whether or not the call or text "yield[s] actual knowledge of reassignment, . . . the caller [has] constructive knowledge" that the number has been reassigned.[28] But the FCC's finding fails to acknowledge that there are myriad reasons why a call or text may be unanswered other than a number reassignment, for example: the recipient of the call may be busy; the ringer may be off; the power may be out or the phone's battery may be dead; or the recipient may not have a voice-mail set up or may use the default message (typically an automated reading of the number), among other possibilities.

The FCC's finding also fails to recognize the agency's own acknowledgment that, in fact, "callers lack guaranteed methods to discover all reassignments immediately after they occur."[29] The current databases that can help determine whether a number has been reassigned are incomplete, and can be inaccurate. And the "options" that the FCC suggested for learning about reassigned numbers—such as periodically sending an e-mail or mail to the consumer check to make sure that the number has not been reassigned—will not enable callers to discover all reassignments, and could be annoying to consumers.[30]

The best solution to these problems would be for Congress or the FCC to clarify that the "called party" under the TCPA refers to the "intended" or "expected" recipient of the call.[31] Defining "called party" as "intended recipient" gives meaning to the statutory exemption for calls made with the consent of the called party. And, critically, the "intended recipient" approach would not give callers free reign to make calls to reassigned numbers—once a caller has actual knowledge that a number has been reassigned, then the caller no longer has consent to call the number and must stop calling.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. STEVE DAINES TO MONICA S. DESAI

Question. We heard at the hearing about excessive litigation, uncertainty, and enforcement challenges businesses and governments face as a result of today's application of the TCPA. How can Congress act to update the TCPA to better target the real bad actors and relieve legitimate businesses from the burdens they face today, while still protecting consumers?

Answer. There are several actions that Congress could take to lessen the impact of the TCPA for legitimate businesses and maintain or even improve protections for consumers.

First, Congress should emphasize that when it provided an exemption for calls made with the prior express consent of the called party, it did not intend for that exemption to be illusory, and should clarify that the "called party" under the TCPA refers to the "intended" or "expected" recipient of the call.[32] Companies are frequently sued under the TCPA when they call a number provided to them by a customer but that number has since been reassigned without the caller's knowledge. Problematically, the FCC has interpreted the TCPA to impose liability for calls to reassigned numbers even where the caller had no knowledge of the reassignment.[33] This finding fails to recognize the FCC's own acknowledgment that "callers lack guaranteed methods to discover all reassignments immediately after they occur."[34] Congress should therefore clarify that "called party" means "intended recipient," which would provide an opportunity for callers to learn that a number has been reassigned *before* they are subject to liability under the TCPA. Critically, this approach would not give callers free reign to make calls to reassigned numbers—once

[28] 2015 TCPA Order ¶ 72.
[29] 2015 TCPA Order ¶ 85.
[30] *See* 2015 TCPA Order ¶ 86.
[31] *See* 47 U.S.C. § 227(b)(1)(A).
[32] *See* 47 U.S.C. § 227(b)(1)(A).
[33] The FCC further determined that "called party" means the "current subscriber" or the "non-subscriber customary user of the phone." 2015 TCPA Order ¶ 72.
[34] 2015 TCPA Order ¶ 85.

a caller is aware that a number has been reassigned, then the caller no longer has consent to call the number and must stop calling.

Second, Congress should establish a database that enables callers to identify numbers that have been reassigned. As the FCC has acknowledged, callers lack guaranteed means of discovering a number reassignment.[35] Congress should also provide a safe harbor that excuses inadvertent calls to reassigned numbers if the caller makes active use of the database. This solution would provide relief to legitimate businesses and reduce the number of unwanted calls received by consumers.

Third, Congress should affirm that the TCPA's restriction on the use of "automatic telephone dialing systems" (ATDS) only applies to ATDS equipment as it is defined in the statute.[36] Although "ATDS" is specifically defined in the statute, the FCC found that any equipment for which there is "more than a theoretical potential that the equipment could be modified to satisfy the [statutory] definition" is *also* an ATDS.[37] The only example that the FCC provided of equipment that would not be considered an ATDS under this standard is a "rotary-dial phone," and the FCC even indicated that a smartphone would be subject to the TCPA under its interpretation.[38] This limitless interpretation is contrary to the specific definition provided by Congress in the statute.[39] Congress should affirm that the TCPA's restriction on the use of ATDS equipment only applies to ATDS equipment as it is defined in the statute.

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[35] *Id.*
[36] *See* 47 U.S.C. § 227(a)(1).
[37] 2015 TCPA Order ¶ 18.
[38] 2015 TCPA Order ¶¶ 18, 21.
[39] *See* 47 U.S.C. § 227(a)(1).

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