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Committee on Commerce, Science, & Transportation
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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 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

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

[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) 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

[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).

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 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

[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).

[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.

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 voicemail 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.

[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.

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 $1500 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 violation? 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

[17] 47 U.S.C. § 227(b)(3).

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

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% 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

[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).

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 policies 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

[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* 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* http://www.hrsa.gov/healthit/txt4tots/environmentalscan.pdf.

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

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]

[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.

- *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]
- *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

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[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).

[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% of young adults (ages 25-29) lived in wireless only households. Also, 67.8% 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% for those 35–44; 40.8% for those 45–64; and 19.3% 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*

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

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from the National Health Interview Survey, January-June 2015, at 6 (Dec. 2015), *available at* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201512.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.

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 making 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[]

[41] 12 C.F.R. § 1024.39(a).

[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.

monitor accounts for fraud."[46] In fact, the FDIC research concluded that underbanked consumers may prefer texts to emails 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. Email, you have to go in and actually be checking your email 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]

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[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/.

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:

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.

[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).

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

[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).

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 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% 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

[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).

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]

[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*

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 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% of persons in default "were not successfully contacted by telephone during the 360 day collection effort."[64]

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).

[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.

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]

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[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.

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 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

[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.

[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.

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 desireable 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 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.