Questions for the Record from Chairman 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?*

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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).

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-focused 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.

[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).

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

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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.

companies. Although ATDS is specifically defined in the statute,[12] the FCC found in the 2015 TCPA Order 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.[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

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[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 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.

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."[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 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]

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[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.
[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.

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 $1500 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.

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[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).

Questions for the Record from Senator Deb Fischer
To
Monica S. Desai

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: "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 voicemail 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 email 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.

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[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).

Questions for the Record from Senator Steve Daines
To
Monica S. Desai

Question 1. *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 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

[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.
[35] *Id.*
[36] *See* 47 U.S.C. § 227(a)(1).
[37] 2015 TCPA Order ¶ 18.
[38] 2015 TCPA Order ¶¶ 18, 21.

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.

[39] *See* 47 U.S.C. § 227(a)(1).