

Testimony before the  
SENATE COMMITTEE ON COMMERCE, SCIENCE & TRANSPORTATION

Regarding

**The Importance of the Telephone Consumer Protection Act to Safeguard Consumers**

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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  
MFY Legal Services**

**May 18, 2016**

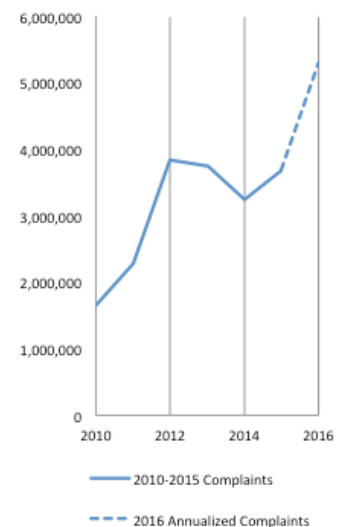
## The Importance of the Telephone Consumer Protection Act to Safeguard Consumers

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<sup>1</sup> (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.<sup>2</sup>**

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.”<sup>3</sup> An average of 298,000 complaints were made to the Federal Trade Commission (FTC) every month in 2015 about robocalls.<sup>4</sup> Indeed, some estimate that 35 percent of all calls placed in the U.S. are robocalls.<sup>5</sup> 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.<sup>6</sup> Almost half of these calls (1,823,897) occurred after the consumer had already requested that

FTC Yearly Complaints for Unwanted Calls



<sup>1</sup> 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.

<sup>2</sup> A description of all the groups on whose behalf this testimony is provided is included in an Appendix.

<sup>3</sup> *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>.

<sup>4</sup> Federal Trade Commission, National Do Not Call Registry Data Book, FY 2015, at 5 (Nov. 2015).

<sup>5</sup> *Rage Against Robocalls*.

<sup>6</sup> Federal Trade Commission, National Do Not Call Registry Data Book, FY 2015, at 4 (Nov. 2015).

the company stop calling.<sup>7</sup> 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.**<sup>8</sup>

Congress passed the Telephone Consumer Protection Act<sup>9</sup> (TCPA) in 1991 in direct response to “[v]oluminous consumer complaints about abuses of telephone technology—for example, computerized calls dispatched to private homes.”<sup>10</sup> 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.<sup>11</sup> 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<sup>12</sup> 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 to cell phones. But for

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<sup>7</sup> Federal Trade Commission, National Do Not Call Registry Data Book, FY 2015, at 5 (Nov. 2015).

<sup>8</sup> 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.

<sup>9</sup> 47 U.S.C. § 227.

<sup>10</sup> *Mims v. Arrow Fin. Servs., L.L.C.*, 132 S. Ct. 740, 744 (2012).

<sup>11</sup> 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).

<sup>12</sup> *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].

the exception created in the Budget Act last October,<sup>13</sup> the TCPA permits these calls *only if* the consumer has given “prior express consent” to receive them.<sup>14</sup> 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 . . .”<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

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<sup>13</sup> 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).

<sup>14</sup> 47 U.S.C. § 227(b)(1)(A)(iii).

<sup>15</sup> TCPA, Pub. L. No. 102-243, 105 Stat. 2394 (1991) §§ 12-13.

<sup>16</sup> 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).

<sup>17</sup> 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).

<sup>18</sup> Universal Service Administrative Company, 2014 Annual Report 9 (2014).

<sup>19</sup> 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).

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.<sup>20</sup>

**Texts are as intrusive as calls.** The TCPA's prohibitions against unwanted communications apply to both phone calls and texts.<sup>21</sup> 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 email messages are the most frequently used forms of non-personal communication for adult Americans."<sup>22</sup> 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

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<sup>20</sup> 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/](http://www.cdc.gov/motorvehiclesafety/distracted_driving/) (last accessed Jan. 14, 2016) ("Each day 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.").

<sup>21</sup> 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).

<sup>22</sup> 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>.

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.*<sup>23</sup> – 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*<sup>24</sup> – 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.*<sup>25</sup> – 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*<sup>26</sup> – 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.*<sup>27</sup> – 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.*<sup>28</sup> – Hundreds of text messages despite the consumer’s dozens of requests for the company to stop.
- *Beal v. Wyndham Vacation Resorts, Inc.*<sup>29</sup> – Dozens of robocalls to the consumer’s cell phone, which continued even after her repeated requests to stop calling.

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<sup>23</sup> 629 Fed. Appx. 369 (3d Cir. 2015).

<sup>24</sup> 746 F.3d 1242 (11th Cir. 2014).

<sup>25</sup> 727 F.3d 265 (3d Cir. 2013).

<sup>26</sup> 113 F. Supp. 3d 718 (S.D.N.Y. 2015), *appeal filed*, No. 15-2474 (2d Cir. Aug. 6, 2015).

<sup>27</sup> 57 F. Supp. 3d 639 (N.D. W. Va. 2014).

<sup>28</sup> 2013 WL 6185233 (W.D. Wash. Nov. 26, 2013).

<sup>29</sup> 956 F. Supp. 2d 962 (W.D. Wis. 2013).

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*,<sup>30</sup> *King*,<sup>31</sup> *Moore*<sup>32</sup>); 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*,<sup>33</sup> *King*,<sup>34</sup> *Moore*<sup>35</sup>); and that the consumer could not revoke consent (*see Osorio*,<sup>36</sup> *Gager*,<sup>37</sup> *King*,<sup>38</sup> *Beal*,<sup>39</sup> *Munro*<sup>40</sup>). 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

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<sup>30</sup> 629 Fed. Appx. at 371.

<sup>31</sup> 113 F. Supp. 3d at 722, 725.

<sup>32</sup> 57 F. Supp. 3d at 652-55.

<sup>33</sup> 746 F.3d at 1252.

<sup>34</sup> 113 F. Supp. 3d 718 at 722, 725.

<sup>35</sup> 57 F. Supp. 3d at 648-49.

<sup>36</sup> 746 F.3d at 1255-56.

<sup>37</sup> 727 F.3d at 272.

<sup>38</sup> 113 F. Supp. 3d 718 at 726.

<sup>39</sup> 956 F. Supp. 2d at 977.

<sup>40</sup> 2013 WL 6185233, at \*3-4.

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<sup>41</sup> and that 3.5 million complaints about unwanted calls were made to the FTC in 2015,<sup>42</sup> there were only 3,710 TCPA lawsuits filed in 2015.<sup>43</sup>

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.<sup>44</sup> 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.<sup>45</sup>) 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.

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<sup>41</sup> See 2015 TCPA Declaratory Ruling and Order ¶ 1.

<sup>42</sup> Federal Trade Commission, National Do Not Call Registry Data Book, FY 2015, at 4 (2015).

<sup>43</sup> 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>.

<sup>44</sup> 629 Fed. Appx at 371.

<sup>45</sup> 47 U.S.C. § 227(b)(3)(C).



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 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.<sup>46</sup>

## 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

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<sup>46</sup> “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).

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.<sup>47</sup>

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.<sup>48</sup> In *Dominguez*, Yahoo sent 27,809 texts, and maintained that it did not have to stop because it had consent from a prior subscriber.<sup>49</sup> 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](http://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.<sup>50</sup>

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<sup>47</sup> *Cooper v. Nelnet*, 6:14-cv-00314-GKS-DAB (M.D. Fla.).

<sup>48</sup> 746 F.3d at 1246.

<sup>49</sup> 629 Fed. Appx. at 371.

<sup>50</sup> 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.<sup>51</sup>

**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.<sup>52</sup> 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.<sup>53</sup>
- *Percora v. Santander*: 50 calls<sup>54</sup>
- *Scott v. Reliant Energy Retail Holdings, L.L.C.*: at least 100 calls.<sup>55</sup>

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

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<sup>51</sup> 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).

<sup>52</sup> See 2015 TCPA Declaratory Ruling and Order at 8006-10, ¶¶ 85-92.

<sup>53</sup> Case No. 4:14-cv-03141 (S.D. Tex).

<sup>54</sup> Case No. 5:14-cv-04751-PSG (N.D. Cal.)

<sup>55</sup> Case No. 4:2015-cv-00282 (S.D. Tex).

to 99 percent accuracy in identifying cellular numbers).<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup> Autodialers are equipped to record "triple-tone" signals that identify a number that 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.<sup>59</sup>

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 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.

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<sup>56</sup> 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).

<sup>57</sup> 15 U.S.C. §§ 1601 *et seq.*

<sup>58</sup> *See* Numbering Resource Optimization, CC Docket No. 99-200, Report and Order, 15 FCC Rcd. 7574, 7590, ¶ 29 (2000).

<sup>59</sup> *See* 2015 TCPA Declaratory Ruling and Order at 38 n.303.

**“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.<sup>60</sup> 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.”<sup>61</sup> 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.”<sup>62</sup> “Reasonably predictable” fair market rent is part of the standard for distinguishing between a lease and a sale.<sup>63</sup> When the parties have not agreed upon a time for an action to be taken, it is to be taken within a “reasonable time.”<sup>64</sup> 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.

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<sup>60</sup> See 2015 TCPA Declaratory Ruling and Order ¶ 47.

<sup>61</sup> U.C.C. §§ 1-201, 1-304.

<sup>62</sup> U.C.C. § 2-206.

<sup>63</sup> U.C.C. § 1-203.

<sup>64</sup> U.C.C. § 1-205.

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 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.<sup>65</sup>
- **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).<sup>66</sup>
- **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.<sup>67</sup>
- **Agriculture Loans.** The U.S. Department of Agriculture (USDA) offers various kinds of loan programs, including direct and guaranteed loans for single/multi-family 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.<sup>68</sup>
- **IRS Taxpayer Delinquent Accounts.** Since 2004, the number of taxpayer delinquent accounts subject to collection activities has grown each year.<sup>69</sup> As of September 30, 2015, a total of 13.3 million taxpayer accounts were subject to IRS delinquent collection activities.<sup>70</sup> These accounts are now subject to robocalling by private debt collectors.<sup>71</sup>

**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

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

<sup>66</sup> "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>.

<sup>67</sup> "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](https://www.sba.gov/sites/default/files/WDS_Table3_ApprovalCount_Report.pdf).

<sup>68</sup> "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>.

<sup>69</sup> 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>.

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

<sup>71</sup> *See* 26 U.S.C. § 6306 (amended by Pub. L. No. 114-94, 129 Stat. 1312 (Dec. 4, 2015)).

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).<sup>72</sup> On the same day, the FDIC announced a separate \$96.6 million settlement 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.<sup>73</sup>

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.<sup>74</sup>

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*,

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<sup>72</sup> See Press Release, Justice Department Reaches \$60 Million Settlement with Sallie Mae to Resolve Allegations of Charging Military Servicemembers Excessive Rates on Student Loans (May 13, 2014), available at <http://www.justice.gov/opa/pr/justice-department-reaches-60-million-settlement-sallie-mae-resolve-allegations-charging>.

<sup>73</sup> 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 carve-out, the behavior of student loan servicers is relevant to the discussion.

<sup>74</sup> 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).



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 US Department of Education. We do not have a current address, phone number, or email 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](http://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:

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 miniscule. 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.<sup>75</sup>

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.<sup>76</sup>

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.<sup>77</sup> Excessive medical debt is also widely seen as cause for the non-payment of other bills.<sup>78</sup>

**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<sup>79</sup> and ITT.<sup>80</sup> 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.

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<sup>75</sup> S. Rep. No. 95-382, 95th Cong., 1st Sess., *reprinted in* 1977 U.S. Code Cong. & Admin. News. (Aug. 2, 1977) (emphasis added).

<sup>76</sup> 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).

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

<sup>78</sup> *See e.g.* Theresa Tamkins, *Medical Bills Prompt More than 60% of Bankruptcies*, CNN Original Series, June 5, 2009.

<sup>79</sup> *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 emails 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/>.

<sup>80</sup> 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/>.

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.<sup>81</sup> 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 all student loan defaults, while enrolling only about 13 percent of all students.<sup>82</sup> 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% 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% of funds that are intended to come from private sources.<sup>83</sup>

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

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<sup>81</sup> 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](http://www.help.senate.gov/imo/media/for_profit_report/Contents.pdf).

<sup>82</sup> 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>.

<sup>83</sup> *Id.*

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.<sup>84</sup> 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.<sup>85</sup> 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.<sup>86</sup>

**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

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<sup>84</sup> 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/>.

<sup>85</sup> See, e.g., *CashCall, Inc. v. Morrissey*, 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).

<sup>86</sup> 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 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).

the debt does not belong to the person called.<sup>87</sup> Almost one fifth of all the complaints related to debt collector communication tactics.<sup>88</sup>

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.<sup>89</sup> 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.<sup>90</sup>

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.<sup>91</sup> Many of these scam robocalls originate from overseas, outside of the reach of the

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<sup>87</sup> 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](http://files.consumerfinance.gov/f/201604_cfpb_consumer-response-annual-report-2015.pdf).

<sup>88</sup> *Id.*

<sup>89</sup> 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>.

<sup>90</sup> 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>.

<sup>91</sup> 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->

law.<sup>92</sup> 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.<sup>93</sup>

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,<sup>94</sup> it will be especially difficult for consumers to determine the difference between real collectors for the IRS and scammers.<sup>95</sup> This likely confusion is made worse by a new statutory 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.”<sup>96</sup>

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

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[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.

<sup>92</sup> 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](http://www.aging.senate.gov/imo/media/doc/FTC_Greisman_6_10_15.pdf).

<sup>93</sup> Federal Trade Commission, *FTC DNC and Robocall Enforcement*, (Apr 19, 2016) (on file with the author).

<sup>94</sup> 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).

<sup>95</sup> 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://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>.

<sup>96</sup> 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.”).



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<sup>97</sup> by improving call-blocking technologies and robocall enforcement.<sup>98</sup> 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,<sup>99</sup> and last summer, 45 state attorneys general called on five major phone companies to provide them to their customers.<sup>100</sup> 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](http://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.<sup>101</sup> A

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<sup>97</sup> Federal Communications Commission, “Spoofing and Caller ID,” *available at* <https://www.fcc.gov/consumers/guides/spoofing-and-caller-id>.

<sup>98</sup> H.R. 4932 (ROBOCOP Act), 114<sup>th</sup> Cong., 2d Sess. (2016).

<sup>99</sup> 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>.

<sup>100</sup> 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](http://www.oag.state.md.us/Press/NAAG_Call_Blocking.pdf).

<sup>101</sup> My understanding is that Twitter has already arranged for a private database providing this information.

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.
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,<sup>102</sup> 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.<sup>103</sup>

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<sup>102</sup> For more information, see Early Warning’s website at <http://www.earlywarning.com/about-us.html>.

<sup>103</sup> 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.



This company claims a high degree of accuracy: “In a recent test, Mobile Number Verification Service correctly identified over 99 percent of mobile changes.”<sup>104</sup> 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 consumers. 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

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<sup>104</sup> *Id.*

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.<sup>105</sup> 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.<sup>106</sup> 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,<sup>107</sup> 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.

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<sup>105</sup> *In re* DISH Network, L.L.C., CG Docket No. 11-50, Declaratory Ruling, FCC 13-54, at 11 (May 9, 2013).

<sup>106</sup> *United States v. DISH Network, L.L.C.*, 75 F. Supp. 3d 942, 1042 (C.D. IL 2014), *vacated in part on reconsideration*, (Fe. 17, 2015).

<sup>107</sup> *In re* DISH Network, L.L.C., CG Docket No. 11-50, Declaratory Ruling, FCC 13-54, at 4 (May 9, 2013).

## 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](http://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 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](http://www.uspirg.org).