Questions for the Record from Chairman John Thune
To
Mr. Rich Lovich

Question 1. *Would a concrete standard for revocation of consent in the TCPA regulations, as there is for the FDCPA, FCRA, and other banking laws, be helpful in reducing the types of contact intended to be prohibited by the TCPA?*

Answer: A clearly articulated standard for when consent is considered to have been revoked is sorely lacking in the current application of the TCPA. This goes hand in hand with a severely lacking definition of "prior express consent" itself. The less ambiguity in the statute, the less likely it will be for well-meaning entities such as health care providers to run afoul of the law. For example, currently if a number whose owner originally granted consent is transferred, the health care provider attempting to fulfill its statutory and regulatory duty to follow up with patients, remind them of appointments and follow-ups, and provide information on prescription readiness, will be completely unaware of that transfer. The FCC's current interpretation allows the caller only one call to the reassigned number. Even if that call is not connected or if the information concerning transfer is not obtained, the next innocent call is actionable.

Also, in order to clearly define when "prior express consent" is revoked, one must determine from whom it was originally obtained. Under the FCC's 2015 TCPA decision, an incapacitated patient whose consent is obtained from a family member may have that consent revoked immediately upon his becoming capable of responding. This may not be the most opportune time for a care giver to obtain consent or inquire whether consent has been withdrawn, as the person is recovering from a serious condition. This is what makes healthcare providers and their related entities unique in this movement to clarify the TCPA. The healthcare context, the TCPA issues, and specifically the issue of consent is directly related to the ability of the patient to communicate. It is thus impacted by the health of the patient and the ability of the provider to provide adequate care.

Concrete standards for both consent and revocation also allow the hospital to develop and articulate protocols to avoid running afoul of the law. Violation in this regard should have an intent component in order not to penalize otherwise innocent callers. As you may recall from my testimony, the Affordable Care Act requires providers to follow up with patients and provide adequate health information to cut down on readmissions. In addition, regulations applicable to charitable hospitals require communication of eligibility for rate discounts. These statutory and regulatory requirements cannot be effectively met without posing an unreasonable risk of liability for violation of the Act.

With clear standards for revocation, the number of unwanted contacts will be significantly decreased as the hospital has absolutely no interest, either medically or economically, in contacting people it has not treated. Hospitals do not recruit people to be sick nor do they attempt to worsen health conditions in order to get more business. This again sets them apart from enterprises who use robocalls for the purposes the Act was originally targeting.

Question 2. *Attorney General Zoeller and a number of other attorneys general sent a letter to this committee urging support for the HANGUP Act, arguing that it was necessary because, "As amended, the TCPA now permits citizens to be bombarded by unwanted and previously illegal robocalls to their cell phones if the calls are made pursuant to the collection of debt owed to or guaranteed by the United*

States." Is that your understanding of what will necessarily be allowed as a result of the Federal Communications Commission's implementation?

Answer: The Bipartisan Budget Agreement of 2015 provision that allows the use of robocalls to collect debts owed to or guaranteed by the federal government illustrates the shortcomings of the TCPA as applied in the modern world. If it makes sense in the area of federally backed debt it makes even more sense in the healthcare sector where compliance with the TCPA as currently articulated is a tremendous financial burden that takes precious resources away from patient care. If Congress felt that it was important enough to protect federal debt calls, is it even arguable that the health of Americans is equally if not more important?

The provision provides for an economical and efficient way to communicate essential information to help citizens concerning their student loans, tax, and other federal debt. Based on available data, the amendment should not create a significant number of additional calls along the lines being forecast by opposition groups.

Information aids those affected. If the provision were expanded to health care providers and their related entities, the rights and needs of patients would be significantly increased and strengthened.

Question 3. *What are some of the benefits and challenges of moving forward with a mandatory reassigned numbers database?*

Answer: The benefits here are clear for callers who are statutorily mandated to make such calls and who face high penalties if they innocently call a number on which they previously obtained consent.

Healthcare entities fulfilling their legal obligation to provide essential health related information to a patient are exposed to great liability when the patient from whom they obtained consent for cell phone communication no longer has the number assigned to them. There is currently no effective way for the health care provider community to know of the transfer.

The regulatory scheme currently grants one free call attempt. If that call is unproductive in obtaining the information that the number has been reassigned, the patient the hospital is seeking to reach will be deprived of the essential information to maintain health.

In addition to this direct negative patient impact, the current language of the statute and its regulatory interpretation is an open invitation to costly litigation. The person to whom a number is transferred has no legal obligation at any time to inform the hospital that the number has been transferred and that no consent has been granted post transfer. Because of the FCC's decision, the recipient of the transferred number can continue to receive calls meant for patient care and information, not inform the hospital of the transfer, and sue for each call after the first one.

The ability to reference a reassigned numbers database will help reduce the potential for caregivers to be exposed to TCPA liability for seeking to help patients.

It is anticipated that privacy issues will be advocated by opponents to this solution. However, either the TCPA has to be amended and overhauled or an effective way for care givers to determine reassignment must be provided. Otherwise, the Act is nothing more than a full employment bill for the plaintiff's bar.

Question 4. *Is there a helpful way to distinguish between random or sequential telemarketing calls and texts versus calls or texts to numbers originally provided by customers that have been subsequently reassigned?*

Answer: A simple approach is to require the caller to give notice that the call is for a legitimate purpose, much like the notice requirement under the FDCPA. The FDCPA provides language indicating that if you are not the debtor please disregard the call and that the purpose of the call is the collection of a debt. Adopting similar language for the TCPA would protect the consumer who receives a reassigned number to know immediately not take the call or delete the text.

Question 5. *Are texts less intrusive than phone calls? If so, would it make sense to have reduced penalties for text message violations of the TCPA in order to encourage contact through text messaging rather than phone calls?*

Answer: Like emails or paper mail, a text message can be completely ignored and easily deleted once the recipient determines it is of no interest or is not directed at them. They are read at the recipient's convenience and are easily deleted. Thus any sanction for an innocently sent text in furtherance of the hospital's duty to communicate with a patient should not be sanctioned.

Question 6. *Are you aware of any negative consequences resulting from the Commission's 2015 Omnibus Declaratory ruling, including the movement of call centers overseas?*

Answer: The negative aspect of the ruling is in its failure to take significant action to protect healthcare providers. The request was to exempt healthcare related entities from the reach of the Act. Instead the ruling failed to do so, only providing a very narrow exemption that is difficult to meet and may exclude certain healthcare related entities. Thus having been requested to make the change and failing to do so, the FCC has handed the plaintiff's bar another weapon. That FCC refusal to exempt the healthcare community endorses frivolous lawsuits against healthcare providers. It establishes that hospitals are to be lumped together with the worst element of telemarketing.

In addition, the overbroad interpretation of "automatic telephone dialing system," failure to address the need for a more concrete definition of "prior express consent," unworkable standard for addressing calls to reassigned numbers, lack of an intent element to acts violating the Act, and the clear lack of investment by the FCC in the needs of the healthcare community are all negative consequences of the ruling.

Healthcare entities continue to run the risk of costly litigation in fulfillment of their statutory and regulatory duties. This imposes a tremendous economic burden on the healthcare industry as time, money and energy has to be expended whether the litigation is valid or not. Instead of being able to take advantage of technology, hospitals must make decisions as to how to allocate resources. Every dollar spent, every minute expended in defending frivolous lawsuits or in not using autodialers, is a dollar and a minute not spent on patient care. Those dollars add up to thousands if not millions and those minutes run into hours, weeks, days and longer.

The ruling also failed to require the recipient of a reassigned number to notify the caller of the reassignment. This results in the recipient being able to simply allow the caller to continue to call, not tell them of the reassignment, and then sue on each violation for each call after the first.

Question 7. *Is there a database on which callers can reasonably rely that identifies numbers that have been reassigned?*

Answer: We are not aware of any such databases.

Question 8. *Why can't callers simply rely on consent?*

Answer: "Prior express consent" has never been defined, and no uniform standard has been developed. As applied to health care providers, consent seems like an easy thing to obtain but as with all areas of human endeavor circumstances arise making it difficult.

One issue is who can provide consent. According to the FCC, if a patient is incapacitated and his family member provides consent, such consent is revoked upon the patient's return to capacity. This recovery may not occur while the patient is still in the hospital.

A second issue involves the multilingual American patient population. Does the consent form have to be printed in all available languages? Does an interpreter need be provided to explain the consent form so as to avoid but not eliminate the possibility of a lawsuit down the line over whether the consenting party understood the import of the consent?

Most importantly, because we rely on the use of language, there will always be opportunistic attorneys who will prey upon innocent companies whose language can be manipulated, and what language cannot be manipulated? If the statute provided consent language that was above reproach, and provided a mechanism whereby consent could be concretely established, then the caller could rely upon the consent given.

Question 9. *Are you aware of any small businesses that have gone out of business as a result of the legal fees or settlements associated with a TCPA litigation? In the recent CFPB Notice of Proposed rulemaking for arbitration, the CFPB appears to recognize the challenges small businesses have when faced with TCPA related class action litigation. In the rule they note, "… the Bureau recognizes the concern expressed by SERs, among others, that particular statutes may create the possibility of disproportionate damages awards." Do you have similar concerns about how the statutory damages associated with TCPA litigation can threaten small businesses?*

Answer: The healthcare industry has its small businesses just like most areas of endeavor. In healthcare, the small community hospital is often the lifeblood for care in rural and small communities not served by a large metropolitan medical center or an academic medical center attached to a large university. The struggles of the small community hospitals, with the lack of bargaining power with large commercial insurance companies, and large governmental payor populations, are very real. The difference between providing necessary healthcare to a rural community and shutting the doors of the hospital is often a very thin line.

Add to these issues an obligation to contact each patient in follow up to decrease readmissions, provide eligibility information for charitable and discount programs (both areas required by statute), while at the same time being prohibited from using technology to efficiently perform these tasks, and you are left with a hospital that has to decide to maintain the nurse/patient ratio or to hire boiler rooms full of phone callers in order to deliver information. Resources are finite, and each telephone staff member

who performs no other task represents an additional level of lost patient care. The economic stress is tragic mostly because it is fully avoidable.

Disproportionate damage awards are also devastating to small hospitals. The hospital has no need or economic incentive to make telemarketing calls. Thus its calls are all patient education and information-driven. The hospital fulfilling its statutory and regulatory duty innocently calls a reassigned number more than once, where the holder of the number (under no obligation to inform the hospital of the reassignment) receives more than one call and sues. This is not justice and is a far cry from the original purposes of the Act.

Not all robocalls are annoying and intrusive telemarketing calls. Health care related calls go to the essence of the patient's well-being. Resources devoted just to defending such lawsuits are devastating to the care giver community.

What we will see, at a time where healthcare is at the forefront of the national agenda, is a consolidation and loss of hospital facilities, causing greater scarcity of our most precious resource- the ability to care for those in need.

Questions for the Record from Senator Roy Blunt
To
Mr. Rich Lovich

Question 1. *Healthcare represents roughly one quarter of our nation's economy but is unique in a number of ways both due to its bifurcated regulation and reimbursement but also in its personal impact on consumers.*

Given those facts, how is the FCC gathering information from the impacted healthcare patients and providers to inform its regulatory processes?

Answer: We are not aware of any efforts by the FCC to gather such information in the TCPA context.

Question 2. *Further, how concerned is the FCC's leadership that rigorous regulation of such specific tools like auto-dialing will inhibit the ability of healthcare providers to reach out to their patients, assist patients in accessing care and improve patient adherence to care plans - and in a less intrusive manner that most patients prefer?*

Answer: FCC leadership seems completely unconcerned about how the regulation of specific tools negatively impacts the patient. Instead, the approach taken by the FCC has been to lump healthcare related entities into the same basket as telemarketers for many aspects of the TCPA. Heart transplant surgeons are apparently no better than scam telemarketers.

The Bipartisan Budget Agreement of 2015 exempted the collection of federal debt from the TCPA and shows a logical and rational approach to this issue. Federal debt collection is immensely important, and so is healthcare. The damage awards, class action suits, defense costs, and untold thousands of hours of productive time stolen from patients and devoted to the nonsensical pursuit of avoiding a frivolous TCPA claim cannot be the right outcome. Instead, the TCPA should be modernized, consistent with HIPAA, to allow consumers to receive necessary and vital non-telemarketing health care communications.