



September 20, 2016

TO: Members, Subcommittee on Communications and Technology

FROM: Committee Majority Staff

RE: Hearing on “Modernizing the Telephone Consumer Protection Act”

I. INTRODUCTION

The Subcommittee on Communications and Technology will hold a hearing Thursday, September 22, 2016, at 11:00 a.m. in 2322 Rayburn House Office Building entitled “Modernizing the Telephone Consumer Protection Act.” The Subcommittee will consider the challenges faced by consumers and companies in a world where technology and consumer behavior may have outpaced the language of the Telephone Consumer Protection Act of 1991.

II. WITNESSES

- Shaun W. Mock, CPA, Chief Financial Officer, Snapping Shoals Electric Membership Corporation;
- Richard D. Shockey, Principal, Shockey Consulting;
- Michelle Turano, Vice President, Government Affairs and Public Policy, WellCare;
- Spencer W. Waller, Professor; Director, Institute for Consumer Antitrust Studies, Loyola University Chicago.

III. BACKGROUND

In 1991, the population of the United States was a little over 259 million.¹ Approximately 7.5 million subscribed to wireless telephone service, reflecting a penetration rate of 2.9 percent.² In 2015, the population of the United States was approximately 327 million.³ There were 377.9 million subscribers to wireless service – more subscribers to wireless phones than people, reflecting a penetration rate of 115.7 percent.⁴ This measure continues to grow. At the same time,

¹ See CTIA Annual Wireless Survey, *available at* <https://energycommerce.house.gov/hearings-and-votes/hearings/oversight-federal-communications-commission-3>.

²*Id.*

³ See Comments of CTIA, Wireless Telecommunications Bureau Seeks Comment on the State of Mobile Wireless Competition, WT Docket No. 16-37, May 31, 2016, *available at* <http://www.ctia.org/docs/default-source/fcc-filings/160531-filed-ctia-mobile-wireless-competition-report-comments.pdf>.

⁴*Id.*

the penetration rate for wireline telephone service has steadily decreased over the same period.⁵ The nation no longer relies solely on traditional telephone service to communicate. Instead, whether for personal, commercial, or emergency purposes, consumers are increasingly relying on mobile wireless service. In 2015, 48.3 percent of adults reported living in a household that had only wireless service.⁶ With this shift to wireless service has come a concomitant shift in consumer expectations. Text messaging rather than voice communication is the most effective method to contact consumers between the ages of 18 and 24 and the second most effective method after email for ages 25 and 34.⁷

Put simply, the way consumers communicate for personal, commercial, and public safety purposes has been redefined, and the laws governing our use of technology have not kept pace.

A. History and Purpose of the Telephone Consumer Protection Act of 1991

As the nation approached the threshold of the “wireless” revolution in 1991, Congress took action to address widespread and growing consumer frustration with intrusive unsolicited telemarketing calls. Congress passed the Telephone Consumer Protection Act (“TCPA” or “Act”),⁸ a consumer protection measure intended to protect consumers’ privacy by restricting telephone solicitations and the use of automated dialing equipment. In the Act, Congress sought to strike a balance between “individuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade” and do so “in a way that protects the privacy of individuals and permits legitimate telemarketing practices.”⁹

The Act directed the Federal Communication Commission (“FCC” or “Commission”) to promulgate rules on telephone solicitation and telemarketing practices.¹⁰ Pursuant to that mandate, the FCC first adopted rules implementing the TCPA in September of 1992.¹¹ Among other things, the Act and the FCC’s rules prohibit any call to a residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is for emergency purposes or is made to collect a debt owed to or guaranteed by the United States or otherwise exempted by the FCC.¹² The FCC has determined

⁵ See e.g., Voice Telephone Services: Status as of December 31, 2014, Federal Communications Commission, March 2016, Figure 1 noting retail switched access lines have declined 12% from 2011-2014 available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-338629A1.pdf.

⁶ See National Health Interview Survey Early Release Program, Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July – December 2015, available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201605.pdf>. According to the survey “[m]ore than two-thirds of all adults aged 25-34 and of adults renting homes were living in wireless households.

⁷ See The Imperative to Modernize the TCPA: Why Outdated Law Hurts Consumers and Encourages Abusive Lawsuits, June 2016, at p.2, available at http://www.acainternational.org/files.aspx?p=/images/39929/aca-wp-modernizetcpa_final.pdf.

⁸ Pub. L. No.102-243 (1991), codified at 47 U.S.C. § 227.

⁹ 47 U.S.C. § 227, Congressional Statement of Findings §2(9).

¹⁰ 47 U.S.C. §227 (b)(2).

¹¹ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Report and Order, September 17, 1992, 7 FCC Rcd 8752.

¹² 47 U.S.C. §227(b)(1)(B).

that text messaging is a form of communication used primarily between telephones and is therefore consistent with the definition of a “call” for purposes of the TCPA.¹³

Significantly, the Act and the FCC’s rules prohibit any call using any automatic telephone dialing system or an artificial or prerecorded voice to a cellphone if the called party is *charged* for the call unless caller has express consent for the calls or under other specific exceptions.¹⁴ This prohibition is an acknowledgement that when it was enacted, users of mobile phone service typically paid by the minute for calls made or received on their phones. As noted earlier, the cellular service market, usage, and technology all have changed significantly since the TCPA was enacted.

Additionally, the TCPA provides consumers with a private right of action for violations of the Act and sets damages of \$500 per violation, which can be trebled for willfulness.¹⁵ It also authorizes state attorneys general to file civil suits in federal court against a telemarketer who engages in a pattern or practice of violation of the Act.¹⁶ Finally, consumers may also file complaints alleging violations of the TCPA with the FCC under the agency’s informal complaint procedures, which can result in additional enforcement actions.¹⁷

B. FCC Actions since its First Implementation of the TCPA

Since it first promulgated rules to implement the TCPA, the FCC has revised or clarified the rules multiple times in response to parties seeking guidance as to how the Act and the FCC’s rules apply to these new technologies. For example, in early 2014, the FCC granted a request from the Cargo Airline Associations to clarify the applicability of the TCPA to alerts to wireless consumers about package delivery notifications.¹⁸ In June 2015, the FCC issued an “Omnibus” order responding to twenty-one similar requests – some of which had been pending for more than five years – clarifying the applicability of the TCPA to calls made for healthcare purposes and calls made to prevent fraudulent transactions or identity theft.¹⁹ More recently, in August 2016, the FCC issued an order addressing the applicability of the TCPA to calls made by utilities

¹³ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14115, para. 165 (2003).

¹⁴ 47 U.S.C. § 227 (b)(1)(A). Other types of service lines include an emergency service line, a guest room or patient room of a hospital, elderly home or similar establishment, or a telephone number assigned to a paging service, specialized mobile radio service.

¹⁵ 47 U.S.C. § 227 (b)(3).

¹⁶ 47 U.S.C. § 227(e)(6).

¹⁷ See FCC consumer complaint procedures *available at* <https://consumercomplaints.fcc.gov/hc/en-us/articles/202873880-Rules-and-Resources-for-Dealing-with-Unwanted-Calls-and-Texts>

¹⁸ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Cargo Airline Association Petition for Declaratory Ruling, CG Docket No. 02-278, *Order*, (rel. Mar. 27, 2014).

¹⁹ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, WC Docket No. 07-135, *Declaratory Ruling and Order*, (Adopted June 18, 2015) (*June Order*).

to their customers and by schools to parents and guardians.²⁰ Yet twenty-three petitions remain pending at the FCC.²¹

Moreover, although the FCC's "clarifications" have provided needed certainty in some instances, the outcomes have been deleterious in others. Some have argued that the FCC's actions have expanded the law's scope beyond its purpose, added to the complexity of compliance, injected even greater uncertainty for stakeholders, and chilled the flow of information to consumers.²² Exacerbating this uncertainty is the private right of action, which has seen an explosion in class action lawsuits, often leading to multi-million dollar awards and settlements against businesses and organizations, both large and small, that are well outside the telemarketing industry.²³

And as the number of class action suits has grown, enforcement by the FCC has all but ended, despite the fact that "robocalls and telemarketing calls are the number one source of consumer complaints received by the agency."²⁴ In 2015, the FCC took only eleven enforcement actions for violations of the TCPA compared to 266 in 2009. This despite the fact that the agency has repeatedly told Congress that the FCC's TCPA enforcement activities "are focused on persistent or egregious violators."²⁵

²⁰ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Blackboard, Inc. Petition for Expedited Declaratory Ruling, Edison Electric Institute and American Gas Association Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, *Declaratory Order*, (rel. Aug. 4, 2016). In a separate order the FCC implemented the provisions of the Bipartisan Budget Act of 2015 which amended the TCPA at the request of the Obama administration to permit an autodialed call to a wireless or residential phone without consent if the call is made for the purpose of collecting a debt that is owed or guaranteed by the United States. See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, *Report and Order*, (rel. Aug. 11, 2016). In seeking this amendment, the Administration asserted "in this time of fiscal constraint, the Administration believes that the Federal Government should ensure that all debt owed to the United States is collected as quickly and efficiently as possible... While protections against abuse and harassment are appropriate, changing technology should not absolve these citizens from paying back the debt they owe their fellow citizens." Fiscal year 2016 Budget of the U.S. Government, Office of Management and Budget, p.128

²¹ See <http://www.jdsupra.com/legalnews/tcpa-fcc-petitions-tracker-62436>.

²² See e.g., *New TCPA Order Holds Few Bright Spots For Business*, available at <http://www.law360.com/articles/678867/new-tcpa-order-holds-few-bright-spots-for-businesses>; *FCC's extensive declaratory ruling on TCPA heightens risks and obligations for businesses*, available at <http://www.nixonpeabody.com/FCCs-extensive-declaratory-ruling-on-TCPA>; *FCC's extensive declaratory ruling on TCPA heightens risks and obligations for businesses (Part 2)*, available at http://www.nixonpeabody.com/FCCs_extensive_declaratory_ruling_on_TCPA_part2.

²³ See *The Imperative to Modernize the TCPA: Why Outdated Law Hurts Consumers and Encourages Abusive Lawsuits*, June 2016, available at http://www.acainternational.org/files.aspx?p=/images/39929/aca-wp-modernizetcpa_final.pdf. See also Adonis Hoffman, *Sorry Wrong Number, Now Pay Up*, The Wall Street Journal, June 15, 2015, available at <http://www.wsj.com/articles/sorry-wrong-number-now-pay-up-1434409610>.

²⁴ See Public Notice *FCC To Host First Meeting Of Industry-Led Robocall Strike Force*, August 12, 2016 available at https://apps.fcc.gov/edocs_public/attachmatch/DA-16-917A1.pdf.

²⁵ See Letter to the Honorable Greg Walden, Chairman, Subcommittee on Communications and Technology, Committee on Energy and Commerce, United States House of Representatives, the Honorable Tim Murphy, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, United States House of Representatives from the Honorable Tom Wheeler, Chairman of the Federal Communications Commission, June 30, 2014, responding to request for the FCC's current workload and related operations at p. 8.

The FCC’s consumer complaint data demonstrates that unwanted telemarketing calls continue to be source of consumer frustration – especially robocalls, *i.e.*, “unsolicited prerecorded telemarketing calls to landline home telephones, and all autodialed or prerecorded calls or text messages to wireless numbers, emergency numbers, and patient rooms at health care facilities.”²⁶ Chairman Wheeler recently provided critical insight into the problem when he explained “[t]he problem lies with the “bad guys”²⁷ – those with unlawful intentions who purposely ignore or circumvent the rules in pursuit of nefarious ends.²⁸ As Chairman Wheeler explained further “the bad guys are beating the good guys with technology.”²⁹

Ironically, the grounding of the TCPA’s proscriptions on the technologies of 1991 are not only enabling the “bad guys,” but are hindering the delivery of essential safety and security information to consumers. It is in recognition of this perverse outcome that a bipartisan consensus has emerged among some members of Congress and members of the FCC the TCPA should be updated for the 21st century to better protect consumers from the “bad guys” while restoring a balance with the way businesses and organizations communicate with consumers using today’s technology.³⁰

²⁶ See <https://www.fcc.gov/stop-unwanted-calls>.

²⁷ See Remarks of FCC Chairman Tom Wheeler As Prepared For Delivery Robocall Strike Force Launch Event Washington D.C. August 19, 2016 available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0819/DOC-340882A1.pdf.

²⁸ See *e.g.*, *How To Stop Robocalls Once And For All*, noting “...most robocalls are scams run by con artists who are only trying to trick you out of your money, and they simply ignore the law.” available at http://www.huffingtonpost.com/jim-t-miller/how-seniors-can-stop-robo_b_8064850.html; Pindrop Gathers Insight Into the Robocall Scourge available at <http://www.eweek.com/security/pindrop-gathers-insight-into-the-robocall-scourge.html>.

²⁹ See Remarks of FCC Chairman Tom Wheeler As Prepared For Delivery Robocall Strike Force Launch Event Washington D.C., August 19, 2016 available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0819/DOC-340882A1.pdf.

³⁰ See *e.g.*, Press Release Communications and Technology Subcommittee announcing Hearing: *Modernizing the Telephone Consumer Protection Act*, September 15, 2016 available at <https://energycommerce.house.gov/news-center/press-releases/hearing-subcommtech-review-telephone-consumer-protection-act-next-week>; Letter to the Honorable Fred Upton, Chairman, Committee on Energy and Commerce, United States House of Representatives from the Honorable Frank Pallone, Jr., Ranking Member Committee on Energy and Commerce, the Honorable Anna G. Eshoo, Ranking Member Subcommittee on Communications and Technology, and the Honorable Schakowsky, Ranking Member, Subcommittee on Commerce, Manufacturing and Trade, September 1, 2016 available at <https://democrats-energycommerce.house.gov/newsroom/press-releases/ec-democratic-leaders-request-hearing-to-protect-consumers-from-unwanted>; Response to Questions for the Record from the Honorable Jessica Rosenworcel, Commissioner, Federal Communications Commission, in response to a question from the Honorable Billy Long, September 8, 2016, available at <https://energycommerce.house.gov/hearings-and-votes/hearings/oversight-federal-communications-commission-3>; Response to Questions for the Record from the Honorable Michael O’Rielly, Commissioner, Federal Communications Commission, in response to a question from the Honorable Billy Long, September 8, 2016, available at <https://energycommerce.house.gov/hearings-and-votes/hearings/oversight-federal-communications-commission-3>; Response to Questions for the Record from the Honorable Ajit Pai, Commissioner, Federal Communications Commission, in response to a question from the Honorable Billy Long, September 7, 2016, available at <https://energycommerce.house.gov/hearings-and-votes/hearings/oversight-federal-communications-commission-3>.

IV. ISSUES

The TCPA currently fails American consumers on two fronts: it fails to stop the flow of unwanted calls, and it discourages American companies from providing information to their customers through calls and texts. As a result, because the law has failed to keep pace with technology and society, companies are faced with having to choose between providing the services and notices consumers want with the threat of litigation.

Unwanted calls, particularly calls made under fraudulent circumstances, are among the most common complaints made to the FCC and to members of Congress. Many of these calls are in the form of calls purporting to be regarding personal finances. Those calling impersonate credit card companies or even the United States government in attempts to steal Americans identities.

A. Empowering Consumers

One proposal to stem the tide of unwanted calls is through advanced call blocking technologies. In the *June Order*, the FCC affirmed that carriers and VoIP providers are not prohibited under the Communications Act or its rules from implementing call blocking technology for customers upon request.³¹ The FCC determined that if this service is provided, the carrier is required to inform its customers that the technology could block wanted calls. Building on on-going industry efforts and prior FCC workshops, the FCC recently announced the formation of the “Robocall Strike Force” whose members include carriers, broadband providers, equipment manufacturers, and a telecommunications industry standards organization.³² The mission of the Strike Force is to “develop comprehensive solutions to prevent, detect, and filter unwanted robocalls” and advise the FCC on the role government can play to facilitate these efforts under existing law.

B. Modernizing Definitions for 20th Century Communications

As noted above, many of the definitions and technologies for callers have changed in the 24 years since the passage of the TCPA.

Once such definition is that of an “autodialer.” The TCPA prohibits any call using automatic telephone dialing systems to wireless phones except in certain circumstances. The statute defines an automatic telephone dialing system as “equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”³³ Despite the legislative limitations, the FCC has taken steps to change the way the TCPA is implemented. In its *June Order*, the FCC clarified that the definition of autodialer is to be broadly interpreted.³⁴ The FCC determined that “the *capacity* of

³¹ *June Order* at para. 152.

³² See Public Notice, *FCC To Host First Meeting Of Industry-Led Robocall Strike Force*, available at https://apps.fcc.gov/edocs_public/attachmatch/DA-16-917A1.pdf.

³³ 47 U.S.C. §227(a)(1).

³⁴ *June Order* at paras. 10-24.

an autodialer is not limited to its current configuration but also includes its *potential* functionalities.”³⁵ Thus, any equipment that could conceivably be modified in the future is an autodialer. Unfortunately, this determination expands the scope of the Act and creates even greater uncertainty for businesses and organizations.

Moreover, as FCC Commissioner Ajit Pai and others have observed,³⁶ under this determination “every smartphone, tablet, VoIP phone, calling app, texting app – nearly any calling device or software-enabled feature that’s not a ‘rotary-dial phone’ – is an automatic telephone dialing system.”³⁷ Because the TCPA’s provisions addressing the use of autodialers applies to *any* call, any user of such a device or software – even a consumer – is potentially open to suit under the TCPA for a call to a wireless phone in the absence of prior consent. Recognizing this outcome, the FCC promised to monitor the situation and take further action if warranted.³⁸

The increased prevalence of reassigned numbers has also exacerbated challenges with the TCPA. The TCPA permits calls to wireless phones using an autodialer where the calling party has prior consent.³⁹ However, the legislation does not adequately contemplate the changes in the marketplace for telephone numbers that occurred with the shift to mobility. In today’s communications marketplace, more than 37 million telephone numbers are reassigned annually.⁴⁰ These reassignments occur for a number of reasons, including when a consumer requests a new number and when prepaid customers terminate service.

The FCC has found that “the TCPA requires the consent not of the intended recipient of the call, but of the current subscriber.”⁴¹ Therefore, even if the caller has prior express consent from the intended recipient, the caller may be liable for a TCPA violation if the number has been reassigned. The FCC’s rules permit a caller to make a “first call” to obtain knowledge that a number has been reassigned, but is liable for any calls thereafter whether they have knowledge of the reassignment or not.⁴² Given the frequency and level of number reassignment and because there is no authoritative database that exists that tracks disconnected or reassigned telephone numbers,⁴³ callers are at significant risk in making an unlawful call using an autodialer even

³⁵ *Id.* at para. 15

³⁶ See The National Law Review, *FCC Approves New TCPA Rules – Telephone Consumer Protection Act*, June 18, 2015 available at <http://www.natlawreview.com/article/fcc-approves-new-tcpa-rules-telephone-consumer-protection-act> noting “under the new rule, an i-Phone might be considered an [automatic telephone dialing system.]”

³⁷ See Dissenting Statement of Commissioner Ajit Pai,, *June Order* at pp. 112-123.

³⁸ *June Order* at para 21.

³⁹ 47 U.S.C § 227 (b)(1)(A).

⁴⁰ See *Wrong Number? Blame Companies’ Recycling*, *The Wall Street Journal*, November 30, 2011, available at <http://www.wsj.com/articles/SB10001424052970204012004577070122687462582>.

⁴¹ *June Order* at para. 85

⁴² *June Order* at para. 89.

⁴³ See Notice of Ex Parte from Monica S. Desai, Counsel, Consumer Banking Association to Marlene Dortch, Secretary, FCC, Docket No. 02-278, February 17, 2015 explaining that an ex parte from Richard L. Fruchterman, Associate General Counsel of Neustar, to Marlene H. Dortch, Secretary FCC, submitted in CG Docket No. 02-278, dated February 5, 2015 dispels the existence of a database that would prevent companies from calling a wrong or reassigned number – ‘Neustar told the Commission that it is not aware of any authoritative telecommunications industry database that links consumer names with their telephone numbers.’

though they believe they have the requisite consent to make such a call. The practical implication of this provision consumers are missing wanted calls when businesses and organizations forgo making necessary or informational calls for fear of litigation.

C. Clarifying Consent

Because the provisions of the TCPA hinge on whether a consumer has provided consent, the Commission has defined consent and revocation in its rules. Specifically, a called party may revoke consent through “any reasonable means.”⁴⁴ Conversely, a caller may not limit the manner in which revocation may occur.⁴⁵ Businesses and organizations that are already struggling with TCPA compliance face additional uncertainty and potential costs because a revocation can come in any form and the burden is on the calling party.

These and other issues will likely be discussed at the hearing.

V. STAFF CONTACT

If you have any questions regarding this hearing, please contact Kelsey Guyselman or Charlotte Savercool of the Committee staff at (202) 225-2927.

⁴⁴ *June Order* at para. 55.

⁴⁵ *Id.* at para. 63.