

To:
From: KBL
Date: May 18, 2016
Re: Senate Commerce TCPA Hearing Summary

Senate Considers Impacts of TCPA Order

On Wednesday, May 18, 2016, the Senate Commerce Committee held a [hearing](#) on ““The Telephone Consumer Protection Act at 25: Effects on Consumers and Business.” The hearing featured testimony from Squire Patton Boggs' Monica Desai, who serves as CBA's outside counsel in an ongoing lawsuit challenging the FCC's TCPA Order. Key takeaways from the hearing include:

1. Industry representatives explained desired and beneficial communications are being eliminated as a result of the TCPA. The National Consumer Law Center (NCLC) counsel and Indiana Attorney General indicated "robocalls" are an escalating problem but did not point the finger at businesses. Instead, the Indiana AG indicated the calls are often spoofing calls or robocalls from overseas.
2. The Indiana AG and NCLC counsel were very concerned about the Bipartisan Budget Agreement (BBA) carve out for servicers of debt owed to the federal government.
3. After the hearing concluded, Chairman Thune indicated he wants to investigate a reassigned number database. "I suspect the carriers would push back against that, but I think it's something we ought to maybe take a look at," the senator said. "Clearly having someplace where people can go to find out numbers that have been reassigned makes sense. Whether or not there's a way to do that remains to be seen."

Witnesses

- Ms. Becca Wahlquist, Snell and Wilmer, testifying on behalf of the U.S. Chamber Institute of Legal Reform
- Ms. Monica Desai, Squire Patton Boggs
- Mr. Rich Lovich, Law Offices of Stephenson, Acquisto & Coleman, testifying on behalf of the American Association of Healthcare Administrative Management
- Ms. Margot Saunders, Of Counsel, National Consumer Law Center
- The Honorable Greg Zoeller, Indiana Attorney General

Committee Members in attendance (*asked a question)

Democrats: Blumenthal,* Booker, Cantwell, Klobuchar,* Manchin, Markey,* McCaskill,* Nelson*

Republicans: Ayotte, Blunt,* Danes,* Fischer, Gardner, Heller, Sullivan, Thune*

Opening Statements

Chairman Thune: Last year, the FCC struggled to adequately implement the TCPA and has not kept up with technology. Over the last couple years, TCPA litigation has boomed and communications have been chilled (citing a filing by Twitter). There is a cost to consumers for not receiving these communications, including notices from schools and utilities to low income consumers. Even the administration realized these benefits when it was carved servicers of its debts out of TCPA liability in last fall's BBA.

Ranking Member Nelson: Consumers hate robocalls and the FCC receives tens of thousands of complaints each month. Consumers are giving up their landline for cellphones because they don't want to be harassed by robocallers. These calls on cell phones would be expensive for low and moderate income consumers and the elderly who pay by the minute. Moreover, these calls distract drivers. He asserted business should get consent from consumers.

Attorney General Greg Zoeller: He is focused on the protection of their own statutes, which is why he opposes the government carve out in the BBA. Further, the federal government exception undercuts their TCPA arguments because the carve out unconstitutionally distinguishing types of speech. Often, the complaints his office receives are about robocalls that are from overseas. He, along with 25 state AGs, support the passage of the HANGUP Act that eliminates the federal government carve out.

Becca Walquist: A cottage industry of TCPA firms has sprung up over the past few years and compliance-minded companies cannot foot the enormous bill, especially smaller ones. She cited a company of six employees that might have to shut its doors due to TCPA litigation. In 2015, TCPA plaintiffs' attorneys recovered \$2.4 million on average, while consumers received an average of \$4.12. She noted one plaintiff has about 30 cell phone numbers and another who fought all the way to the Ohio Supreme Court to keep his number off the Do Not Call List – both to increase their ability to rack up TCPA litigation damages.

Margot Saunders: Robocalls are still a huge problem and the industry is making spurious claims about TCPA litigation abuses. The judicial system has mechanisms to stop meritless claims. It is cheap for businesses to make lots of calls at once so there is no incentive for them to stop. The BBA federal government carve out was unfortunate.

Rich Lovich: Hospitals are being impacted by TCPA litigation and patients are the ones who ultimately suffer. Given that institutions have limited resources, TCPA litigation expense inevitably has to come from somewhere and may be diverted from patient care. Further, the Affordable Care Act and IRS both mandate hospitals send certain types of communications – a practice that might subject hospitals to TCPA liability.

Monica Desai: Over time, the TCPA has been transformed from a consumer protection shield to a sword for abusive class actions. Three results of this abuse include: 1) detrimental impact to

beneficial consumer communications, 2) detrimental impact to businesses, non-profits and government entities engaging in normal, expected or desired communications; and 3) detrimental impact to consumers trying to manage default and keep current on their payments. She addressed the problems with the way the FCC defined an autodialer and “called party” for revocation of consent purposes. She explained the certain industries affected by TCPA litigation including utilities, healthcare, schools, nonprofits, financial institutions, retail, social media, and food safety. Further, she noted politicians may be impacted when sending tele-townhall notifications. She urged Congress to mandate a reassigned number database, resolve the reassigned numbers issue by defining “called party” in a meaningful way, define an autodialer as present capacity, and restore the balance of the TCPA to what the original drafters intended.

Question and Answer

Senator Thune

- Do you agree with the utility petition before the FCC exempting them from TCPA liability for communications that promote consumer safety? **Walquist**: While she agrees with it, she is worried about picking and choosing certain communications because they aren’t solving the whole problem.
- The CFPB suggested institutions should communicate with consumers via text and wireless, but how can institutions with the threat of TCPA litigation? **Desai**: Financial institutions send an array of beneficial communications including low balance alerts, high spending alerts, and money management tools, but many of her clients are decreasing available services due to TCPA litigation threat.
- What is the impact of TCPA on patient care? **Lovich**: Since hospitals have a finite amount of resources, patients will ultimately be affected. He noted there is a direct correlation between the size of nurse staff and patient recovery.

Senator Nelson: Robocalls are currently illegal and he can’t imagine if Congress made them legal.

Senator McCaskill: It’s not that complicated – companies just need to get consent before they place a call. It is the biggest consumer problem in the country and industry is “whining”.

Zoeller: the number of complaints are increasing, but the cause of the complaints is not the industry representatives testifying before the committee. Instead, the problem is from people calling from overseas.

McCaskill: Telephone companies are members of the Chamber of Commerce – those institutions should be creating technologies so consumers can opt out of receiving these communications. She will not back down on this.

Senator Blunt: Since half the robocalls are coming from outside the country, what can we do about that problem? **Zoller**: the FCC and telecom companies can work out a solution.

Blunt: There seems to be two distinct problems – 1. legitimate companies trying to contact their customers and 2. unwanted robocalls. How long does it take to reassign a number? What if

there was a rule carriers had to wait more than six months? **Saunders:** carriers will not wait that long. Instead, they should create a database of reassigned numbers.

Blunt: we need to divide these two issues into distinct categories and find the correct balance.

Senator Klobuchar: voiced support for the HANGUP Act as 61 million consumers will be impacted. **Saunders:** the BBA is very dangerous because state AGs and the FTC tell consumers not to pick up calls and now the federal government might be calling to service debt. They can no longer give that advice and consumers will be forced to answer or miss a call from the government. **Zoeller:** the BBA may have forfeited their ability to defend the constitutionality of the TCPA because the exceptions choose certain types of speech.

Klobuchar: Are there specific limitations to the “Do Not Call” list? **Saunders:** phone companies need to adopt anti-spoofing technology. **Zoeller:** the illegal overseas robocalls need to be stopped.

Senator Danes: Holding up a phone from 1991, he explains how much technology has shifted. Trial lawyers are the only ones benefitting, which is why the TCPA has been referred to as “Total Cash for Plaintiffs Attorneys”. **Walquist:** described some of the litigations abuses, including a restaurant that was texting coupons to people who signed up, but faced litigation after someone submitted a number that did not belong to them.

Danes: what is the impact on small businesses? **Monica:** the FCC order was particularly damaging to small businesses because compliance and manual dialing is very expensive. **Lovich:** rural communities would be especially impacted because hospitals are spread out and patients in these areas rely more on technology.

Senator Blumenthal: there needs to be stronger consumer protection from the government because robocall complaints keep increasing. **Zoeller:** complaints are increasing and people are disconnecting their landlines as a result of robocalls.

Blumenthal: Congress has done nothing this year so it would be disastrous if they chose an anti-consumer issue to finally act on. What is stopping call blocking technology? **Saunders:** Congress would have to ask the phone companies.

Senator Markey: He authored the TCPA and anticipated the expansion of wireless technology. For this reason, he built in anticipatory consumer protections. People feel comfortable answering their wireless phone because there are certain protections. He alleged American companies are paying people in India to make these “offshore” robocalls.

Can you talk about consent? Why don't they send emails? **Saunders:** there is not a constitutional right to make robocalls and companies were previously able to contact people adequately without using them.

Markey: BBA has relaxed standards for people with student debt. Is there a better way?

Zoeller: there should be affirmative defenses. He is worried about the federal government exception because they are picking winners and losers. **Saunders:** calling people multiple times won't help them pay their debts.



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Thune: have other regulators spoken about the benefits of reaching consumers on their cell phones? **Desai:** yes, in fact, the CFPB, FDIC, FTC, CPSC, and states have all stressed the benefits of contacting consumers on their mobile phones.

Thune: we need a balanced solution that allows for business communications, yet eliminates robocalls.

Markey: Under the FAST Act, the IRS can now contact customers about their taxes – a provision he opposed. He submitted two letters for the record – 25 AGs and 16 consumer groups supporting the HANGUP Act.